

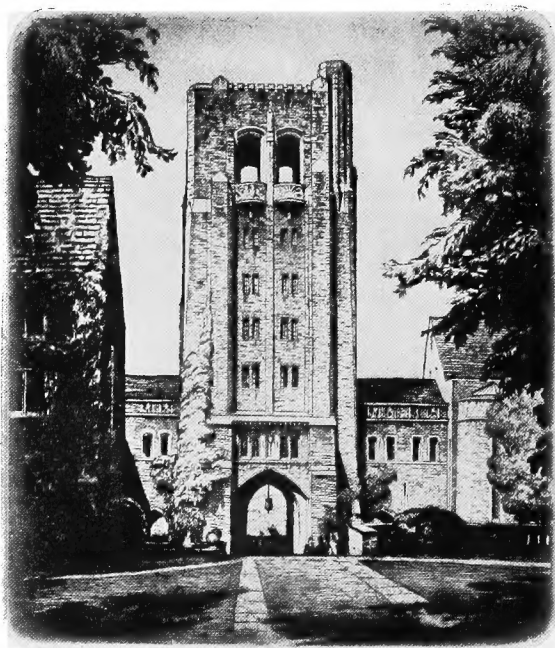
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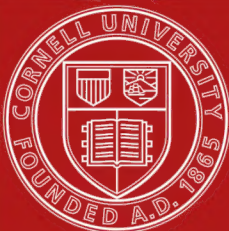
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HANDBOOK
OF THE
LAW OF REAL PROPERTY

BY WM. L. BURDICK

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ARD ENCYCLOPEDIA OF PROCEDURE. ETC.

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To
A. P. B.
(v)*

PREFACE

ALL who have made a special study of real property law realize the difficulties involved in attempting to present with reasonable adequacy the principles of so great a subject within the narrow confines of a single volume. The author's experience of more than twenty years, both as a practitioner and a teacher of this subject, has served to increase his consciousness of these difficulties.

He has long been aware, however, that a one-volume work is more available and practical for the use of the average law student than a more extended treatise. Accordingly, when the writer of this book was invited by its publishers to prepare a one-volume text upon the subject of real property, he came to the conclusion that, if personal theories and discursive digressions were omitted, the fundamental principles of the subject, profound though it is, could be stated in a single volume of reasonable length. At least, this is what he has tried to do.

Montesquieu says that law can be understood only through the light of history. This is peculiarly true in the case of our land law, and some reference to English history is absolutely necessary in order to explain certain doctrines and principles connected with our real property law of the present time. The Roman law may likewise, at times, afford enlightenment in the same way. For occasional reference, therefore, to these sources of information, the author has no apology. His regret is that, in order to keep the size of the volume within the limits as planned, much that could be drawn helpfully from the past had to be omitted.

In working out the subject the author has endeavored to state, not only the early or the common law, but also, as more important, the law as it exists in this country at the present time. He has tried to make the book reliable from the standpoint of scholarship, and also useful to the practitioner from the standpoint of modern application. If it is found that to a fair degree he has succeeded in this effort, he will feel abundantly rewarded.

To the student and also to the reader in general he wishes to say a word, however, with reference to such phrases as "modern law," the "practical side of the law," and other similar expressions too often emphasized with misleading effect. Mr. Cyprian Williams, in his excellent edition of his father's admirable book on Real Property (Williams Real Prop. [17th Ed.] p. 174) says: "The whole modern law of real property is nothing but a tangle of heterogeneous devices for

escaping the effect of the common-law rules regarding land. And it will yield up its reason to no one who lacks the patience to learn its history. I would therefore entreat the student to lay aside the notion that the study of what is obsolete in practice must necessarily be waste of time, and will beg him again to consider with me the law of bygone days." Although this language was addressed to English students, it applies even more importantly to the law students of our own country. The American student, however, should not, as many do, look upon the law of real property as "highly technical," "difficult," "cumbersome," "unreasonable," "arbitrary," or "abstruse." That the subject is a great one, all who enter upon it soon realize. That, however, the student cannot become commendably proficient in the knowledge and understanding of its principles is not true.

To enumerate all the sources of information to which the author is indebted in connection with the preparation of this volume would be an almost impossible task. The material has been accumulated during a number of years. While many writers, both ancient and modern, have been consulted, the text is built mainly upon the decided cases, and where, otherwise, statements are based upon recognized authority, pains have been taken to refer to the original source. Special mention should, however, be made of several means of assistance. The publishers of this book authorized the writer, in its preparation, to make use of such parts of Hopkins on Real Property, another of their publications, as, in the writer's judgment, might be available for his purpose. While the scope of the present work and the method of its treatment are quite different from Hopkins, yet in a number of its paragraphs the writer has drawn freely from Mr. Hopkins' excellent and clear statements, and desires to acknowledge with sincere appreciation the use thus made of that author. He is also grateful to the publishers for a large amount of digested case law placed by them at his service, and he is further under obligations to the American Law Book Company for their highly prized permission to make use of such articles in the Cyclopedia of Law and Procedure as might prove of assistance in the preparation of this volume. This generous aid has been of great value in several instances, and various references have been made to articles in that work.

A separate volume, consisting of selected cases for illustrative purposes, has been prepared by the author to accompany the text. An effort has also been made in this volume to furnish added service to the student and practitioner by citing, together with the older cases, late cases, as far as space would permit, in order that the text and its authorities may present the law of the present day.

WM. L. BURDICK.

UNIVERSITY OF KANSAS, JUNE, 1914.

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THE NATURE OF REAL PROPERTY AND TENURE THEREOF

CHAPTER I

INTRODUCTION

1. The Law of Real Property.
2. Ownership and Property.
3. Things Movable and Immovable.
4. Lands and Goods.
5. Real and Personal Property.
6. Differences in Law of Real and Personal Property.

THE LAW OF REAL PROPERTY

1. The law of real property means, in general, the law pertaining to land.

OWNERSHIP AND PROPERTY

2. In a strict sense, the right of ownership and "property" are synonymous, and property, as a general term, means anything capable of ownership.

THINGS MOVABLE AND IMMOVABLE

3. Things subject to ownership are naturally divided into things movable and things immovable.

LANDS AND GOODS

4. In early English law, property was divided into (1) lands, tenements, and hereditaments; and (2) goods and chattels.

REAL AND PERSONAL PROPERTY

5. In modern English law, property is divided into real property and personal property, the terms being derived from real and personal actions.

Law of Real Property

The law of real property, as applied in modern times to English and American law, means, in general, the land law.¹ The term "real estate" is also, in this country, both by statute and common law, generally used synonymously with real property.² In distinction from real property all other property is called personal.³

Ownership and Property

"Property (from the Lat. *proprius*, meaning belonging to one; one's own) signifies, in a strict sense, one's exclusive right of ownership of a thing."⁴ In their strict meanings, therefore, the right of ownership and property are synonymous, each term signifying a bundle or collection of rights. In a secondary meaning, however, the term "property" is applied to every kind of valuable right and interest that can be made the subject of ownership,⁵ and in this sense, since it is the subject of ownership, land is called property.

¹ The terms "real property" and "land" are here used in a popular sense. The term "real property" is broader than "land" in its legal sense, and is equivalent to lands, tenements, and hereditaments. The statutes may sometimes distinguish between "real property" and "land," as, for example, in California. See *MT. CARMEL FRUIT CO. v. WEBSTER*, 140 Cal. 183, 187, 73 Pac. 826, *Burdick Cas. Real Property*.

² *Murphy v. Superior Court of Los Angeles County*, 138 Cal. 69, 70 Pac. 1070; *Gillett v. Gaffney*, 3 Colo. 351, 364; *Jackson ex dem. Cary v. Parker*, 9 Cow. (N. Y.) 73, 81.

³ See *infra*.

⁴ *McKeon v. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642; *Chicago & N. W. Ry. Co. v. Cicero*, 154 Ill. 656, 662, 39 N. E. 574; *Jackson ex dem. Pearson v. Housel*, 17 Johns. (N. Y.) 281, 283; *Illinois Cent. R. Co. v. Mattoon*, 161 Ill. 247, 251, 43 N. E. 1100; *Waters v. Wolfe*, 162 Pa. 153, 169, 29 Atl. 646, 42 Am. St. Rep. 815.

⁵ *Rigney v. Chicago*, 102 Ill. 64, 77; *City of St. Louis v. Hill*, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226; *Wynehamer v. People*, 13 N. Y. 378, 433.

The term, therefore, includes both real and personal property,⁶ and it is often thus expressly defined in statutes.⁷ The word "property," however, may have different meanings, under different circumstances, according to the manner in which it is used.⁸ Moreover, the word "owner" as applied to land has no fixed legal meaning which can be applied under all circumstances, and to every statutory enactment.⁹

Things Movable and Immovable

A natural or scientific division of things which may become the subject of ownership, or of property, is into things movable and things immovable. This distinction is inherent from the very nature of things. In the Roman law, and its offspring, the modern civil law, we do not find the terms "real property" and "personal property," but the terms "movable things" and "immovable things."¹⁰ Movable things are things which can be moved from place to place, without injury, and which are not attached to the soil. Immovable things include lands, and things adherent thereto, either by nature, as trees, or by the hand of man, as buildings, and also things destined for the land.¹¹ While "movable things" of the civil law correspond, in general, to "personal property" of our law, and "immovable things" to our "real property," yet the terms are not strictly synonymous.¹²

⁶ *Briggs v. Briggs*, 69 Iowa, 617, 618, 29 N. W. 632; *Mason v. Hackett*, 35 Hun (N. Y.) 238, 240; *White v. Keller*, 68 Fed. 796, 800, 15 C. C. A. 683.

⁷ *Fears v. State*, 102 Ga. 274, 279, 29 S. E. 463; *Aurora Nat. Bank of Aurora v. Black*, 129 Ind. 595, 598, 29 N. E. 396; *State v. Topeka Water Co.*, 61 Kan. 547, 561, 60 Pac. 337; *State v. Barr*, 28 Mo. App. 84, 85; *Wing v. Disse*, 15 Hun (N. Y.) 190, 194.

⁸ See, for example, the following cases: *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 395, 3 Am. Rep. 711; *Wilson v. Beckwith*, 140 Mo. 359, 372, 41 S. W. 985; *Brawley v. Collins*, 88 N. C. 605, 607; *Hickman v. Ruff*, 55 Miss. 549, 550.

⁹ *Coombs v. People*, 198 Ill. 586, 64 N. E. 1056.

¹⁰ In the civil law, property is divided into movables and immovables. *Penniman v. French*, 17 Pick. (Mass.) 404, 28 Am. Dec. 309; Code Nap. art. 516; Spanish Civil Code, art. 333.

¹¹ For example, by the French Code (art. 524), and the law is the same in Louisiana, immovables include articles intended "by destination" for the use of the land. There is no such thing as a "chattel mortgage" in the system, and a mortgage of a plantation may include, for example, a mule placed thereon for the use of the cultivation of the land. By "destination" the mule becomes an immovable. See *Moussier v. Zunts*, 14 La. Ann. 15. See, also, *Dacey*, Conf. Laws (Moore's Ed.) 72.

¹² *STRONG v. WHITE*, 19 Conn. 238, *Burdick Cas. Real Property*; *Dickey, J.*, in *Ohio & M. R. Co. v. Weber*, 96 Ill. 448; *Penniman v. French*, 17 Pick. (Mass.) 404, 28 Am. Dec. 309. In Louisiana slaves were classed as "immovables," yet were held not to be "real estate." *Girard v. New Orleans*, 2 La. Ann. 897, 901.

Lands and Goods

The term "real property" is not found in the mediæval common law of England,¹³ and when the early English colonies were planted in this country, at Jamestown and at Plymouth, the phrase was practically unknown.¹⁴ The older writers, when speaking of "things real," or what we, in modern times, designate as "real property," use the words "lands, tenements, and hereditaments."¹⁵ "Things personal" were designated by the phrase "goods and chattels."¹⁶ A tenement is anything of a permanent nature that can be made the subject of feudal tenure;¹⁷ that is, a tenancy.¹⁸ It is a broader term than land, since it includes incorporeal rights, as, for example, rents and commons.¹⁹ There must, however, be an estate of freehold²⁰ in order to constitute a tenement.²¹ Hereditaments are things which can be inherited; that is, which, on the death of the owner intestate, descend to the heir. The term "hereditament," according to Coke,²² is by much the largest and most comprehensive expression, since it includes, not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed.²³ Thus heirlooms, although personal property, descend with the inher-

¹³ Holds. Hist. Eng. Law, III, 22.

¹⁴ The use of the terms "real property" and "personal property" dates back only about three hundred years in English law. For one of the early cases using the term "real property," see *Wind v. Jekyl*, 1 P. Wms. 572, 24 Eng. Reprint, 522 (1719).

¹⁵ 2 Blk. Comm. 15, 16; Co. Litt. 4a to 6b. In re *Althouse's Estate*, 63 App. Div. 252, 255, 71 N. Y. Supp. 445. The term "real property" is coextensive with "lands, tenements, and hereditaments," and includes rights and interests in land, or interests growing out of, or connected with, land, except mere chattel interests. 7 Words & Ph. p. 5939 et seq.; *Jackson ex dem. Cary v. Parker*, 9 Cow. (N. Y.) 73, 81.

¹⁶ Id.

¹⁷ 2 Blk. Comm. 16; *Potter, J.*, in *Canfield v. Ford*, 28 Barb. (N. Y.) 336; *Hosmer, C. J.*, in *Mitchell v. Warner*, 5 Conn. 518.

¹⁸ *Field v. Higgins*, 35 Me. 339, 342.

¹⁹ 2 Blk. Comm. 17; Co. Litt. 6.

²⁰ As to what constitutes a freehold, see post.

²¹ *City of New York v. Mable*, 13 N. Y. 151, 159, 64 Am. Dec. 538; *People v. Westervelt*, 17 Wend. (N. Y.) 674, 676. Contra, *Merry v. Hallet*, 2 Cow. (N. Y.) 497. See, in general, 2 Blk. Comm. 16, 17.

²² 1 Inst. 6.

²³ 2 Blk. Comm. 17; Coke, Litt. 6a (quoted in *City of New York v. Mable*, 13 N. Y. 151, 159, 64 Am. Dec. 538); *Owens v. Lewis*, 46 Ind. 488, 508, 15 Am. Rep. 295; *Nellis v. Munson*, 108 N. Y. 453, 458, 15 N. E. 739; *Canfield v. Ford*, 28 Barb. (N. Y.) 336, 338; *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423, 453.

MIXED PROPERTY.—The older writers often spoke of property as real, personal, or mixed. By mixed property is meant property which is essentially personal, but it partakes of the character of real property, as leaseholds, tomb-

itance.²⁴ Hereditaments are divided into two classes, corporeal and incorporeal.²⁵

Real and Personal Property

In our modern law, property is classified either as real or personal. This classification is explained by the rules which defined the sphere of "real actions" and "personal actions" in the English common-law courts.²⁶ Not only did these actions give their respective names to the property with which they were connected, but the very legal principles which were applied to the ownership or possession of land, as distinguished from the principles applicable to movable property, were shaped by these different forms of action.²⁷ In fact, the mediæval land law of England can be well understood only by a careful study of the ancient "real actions."²⁸ The terms "real actions" and "personal actions," as used in English law, were borrowed by the early writers from the Roman law.²⁹ They did not, however, apply these terms in the sense in which they were used by the Roman jurists, and it would seem as if their real meaning had been entirely misconceived. In the Roman law, actions are either personal (actions in personam) or impersonal (actions in rem). In the former, the *person* against whom the action is brought was named. It was an action arising from an obligatory right, and in this action a breach of duty was alleged against some particular individual. Actions in rem, on the contrary, did not name the person of the defendant, because they were actions which could be enforced against everybody, and the plaintiff merely alleged that the "res" in question was his *own*. They were actions arising from ownership, paternal power, right of succession, or from

stones, monuments in a church, and title deeds (in English law) to an estate. The term is practically obsolete in modern times. See 2 Blk. Comm. 428; Black, L. Dict.; Bouv. L. Dict.; Miller v. Worrall, 62 N. J. Eq. 776, 48 Atl. 586, 90 Am. St. Rep. 480; Minot v. Thompson, 106 Mass. 583, 585.

²⁴ 2 Blk. Comm. 17.

²⁵ As to incorporeal hereditaments, see post.

²⁶ Holds. Hist. Eng. Law, III, 2, 22.

²⁷ Holds. Hist. Eng. Law, II, 67.

²⁸ Holds. Hist. Eng. Law, III, 1. The real actions of English law were abolished more than seventy-five years ago, and had fallen out of use about two centuries before. See 4 L. Q. R. 395, "The Terms Real and Personal in English Law."

²⁹ The Roman jurist Labeo, the friend and adviser of Augustus, was probably the author of the division of actions into "actiones in rem" and "actiones in personam," a division which, to this day, affects all juristic thought in matters of private law. Sohm's Inst. Rom. Law (3d Ed.) 94. Bracton seems to be the first writer on English law to employ these terms. Lib. III, cap. III, par. 1, fol. 101b.

rights of status.³⁰ It should be observed, further, that in the Roman law the term "*res*" (which has, with some inexactness, been translated into English as "things") was applied to anything that could be the object of proprietary rights, and "things" (*res*) thus capable of ownership were divided into "things corporeal" and "things incorporeal." The Roman jurists, however, gave to the word "*res*" a wider meaning than our word "thing" implies. With us, a "thing" is tangible, capable of sensual perception, and, consequently, an "incorporeal thing" is an apparent contradiction. By "incorporeal things," however, the Roman jurists did not mean soul or spirit, in distinction from matter, but they meant "rights," such, for example, as rights of inheritance, usufruct, or rights growing out of obligations. In fact, an investigation of the Roman law will show that the jurists did not mean to discuss "things" even under the term "corporeal things." Under that term they discussed "ownership" (*dominium*), and under the term "incorporeal things" they discussed "rights." In an action for ownership the plaintiff claimed a thing (*res*); in an action for usufruct or servitude he claimed a right (*jus*). Both of these actions were known, however, as actions *in rem*.³¹ The English writers who transferred these terms from the Roman law to English law certainly did not classify them in the same way as the Romans. Actions *in rem* became, in time, "real actions," while actions *in personam* became "personal actions." In English law "real actions" came to mean actions for the specific recovery of land, enforceable against the land (*the res*), while personal actions were actions for damages enforceable against the person. Actions were said to sound in the *realty* or in the *personalty*. It was but a short step to apply the name of the action to the property sought to be recovered, and the result was that it became, in time, common practice to speak of "lands, tenements, and hereditaments" as "real property," while, in contradistinction, "goods and chattels" were designated as "personal." In this way the terms became fixed in our judicial system.³² All things which could

³⁰ Just. Inst. 4, 6, 1; Hunter, Rom. Law, 133; Sohm's Inst. Rom. Law (3d Ed.) 263 et seq.

³¹ See, in general, Just. Inst. II, 2; IV, 6, 1; Gaius, Inst. IV, 3; Sohm's Inst. Rom. Law (3d Ed.) 264, 265.

³² Personal actions included actions for the specific recovery of goods and chattels, which might naturally be considered "real actions," since their object was the recovery of a "thing" (*res*), yet in such actions the defendant was not compelled to return the chattel, but might reimburse the plaintiff in damages; consequently, such actions came to be looked upon as "personal." It accordingly came to pass that the term "real" was applied to the class of property recoverable in real actions, namely, lands, tenements, and hereditaments, while the term "personal" was conveniently used by way of contradistinction to designate goods and chattels. See P. & M., Hist. II, 46 et seq.;

be recovered in real actions were real property, and all other property was personal.³³ In real actions there could be an actual recovery of the land itself, but in personal actions there could be no recovery of the thing, except in the action of replevin. In this action, however, the person detaining the chattel could not be compelled to deliver the identical thing, but might elect to pay damages.³⁴ The action was accordingly in personam to obtain damages, and the property involved was called "personal property." Leasehold interests—that is, terms for years—were not originally specifically recoverable, and for this technical reason they were classed as chattels, or, since they were derived from the realty, as "chattels real."³⁵

DIFFERENCES IN LAW OF REAL AND PERSONAL PROPERTY

6. Most systems of law apply different rules to different classes of property. In our system of law, however, a greater divergence exists between land law and personal property law than is found in any other system.

To the student of comparative jurisprudence, one of the most striking features in English and American law is the great difference between the law relating to land and the law governing personal property. In no other legal system is there such a wide divergence of legal principles in property law. To a certain degree, perhaps, all systems of law must recognize the convenience of different rules for property that is fixed, immovable, or "real," and for property that is movable, transitory, or "personal."³⁶ The Roman and the later civil

Booth on Real Actions, II, ch. IX; Reeves' Hist. Com. Law (Finlason Ed.) p. 336, note. For a valuable article upon "The Terms Real and Personal in English Law," see 4 L. Q. R. p. 394, by Mr. Williams. In the case of *Myers v. League*, 62 Fed. 654, 659, 10 C. C. A. 571, the court, in speaking of land, says: "That species of property, which by its fixed situation and qualities, has engrossed the term 'real' as its peculiar descriptive." This statement is, however, more fanciful than historical.

³³ Co. Litt. 121a, Butler & H. note 1; Bouv. Law Dict. tit. "Real Property." As previously pointed out, the term "mixed property" is used by some to cover those things which partake of the characteristics and qualities of both personal and real property.

³⁴ Dig. Real Prop. (4th Ed.) 71, note 2. See note 32, *supra*.

³⁵ *Bridgewater v. Bolton* (1704) 6 Mod. 106, 107.

³⁶ In the legal system of Turkey, however, "no distinction is made between movable and immovable property. They are governed by the same rules. In the eye of the law the sale, hire, pledge, and devolution of a piece of land are subject to exactly the same incidents as the sale, hire, pledge, and devolution of a piece of cloth." Legal System of Turkey, 25 L. Q. R. 24 (1909).

law recognize this fact, although not to the widely divergent extent that exists in our law. Among the many important differences between our law of real property and personal property may be mentioned the following: The modes of transferring real and personal property are different. The title to millions of dollars worth of personal property³⁷ may be transferred by mere oral agreement, while real property, no matter how trifling in value, can be conveyed, as a rule, only by a written instrument, executed with certain required formalities.³⁸ The transfer, or mortgage, of real property is governed by the law of the place where the land is situated,³⁹ while the sale, or mortgage, of personal property is governed, generally, by the place of contract. So, also, there are different requirements both as to the form and as to the recording of mortgages affecting real and personal property.⁴⁰ On the death of the owner, realty passes at once to the heir or devisee,⁴¹ while personalty goes to the personal representative, and through him to the distributee or legatee.⁴² The personal property of a decedent must be used before the realty in paying his debts.⁴³ There are differences in the form and place of bringing actions for damages to lands and to chattels.⁴⁴ There is also a difference in the law governing the taxation of the two kinds of property,⁴⁵ particularly as to the place of taxation. In some states, a will of personal property may be made at an earlier age than a will of real property can be

³⁷ But few realize, perhaps, that in modern times our assessed valuation of personal property is in excess of real property. One illustration must suffice. The census of 1910 showed the reported value in this country of all farm lands, improvements, implements, and live stock thereon to be something in excess of forty-one billion dollars. The corporation returns in 1912, under the federal Corporation Tax Law, showed the aggregate value of stocks and bonds, represented by the corporations thus reporting, to be over eighty-eight billion dollars. This class of personal property alone was consequently double, it is perceived, the value of all the farm property of the country.

³⁸ See Deeds, post.

³⁹ Post.

⁴⁰ Stim. Am. St. Law, arts. 185-194, 453; 1 Schouler, Pers. Prop. (2d Ed.) c. 6.

⁴¹ 1 Woerner, Adm'n, pp. 15, 408.

⁴² 1 Woerner, Adm'n, p. 409. There is no present-day reason, of course, why the laws of descent and distribution should be different for different classes of property. In some states, as a matter of fact, all the property, both real and personal, of an intestate passes, by force of statute, to the heirs, subject to the control of the court and to the possession of an administrator appointed by the court.

⁴³ 2 Woerner, Adm'n, p. 1093.

⁴⁴ 1 Jag. Torts, p. 102 et seq.

⁴⁵ Cooley, Tax'n, pp. 270, 275; Stim. Am. St. Law, arts. 33, 35. As defined for the purposes of taxation, the term "real property" sometimes includes things which in a strict sense should be regarded as personal property. See *Union Compress Co. v. State*, 64 Ark. 136, 138, 41 S. W. 52.

made, and wills known as nuncupative wills may be made of one's personal estate, although not of his real estate. In the law of marriage, the rights of the husband, at common law, are not the same with reference to the real property of the wife as in the case of her personal property, and the common-law estates of dower and curtesy apply to real property alone. These are not, by any means, all of the differences between the law of these two classes of property, yet they are sufficient to establish the fact of a wide difference.

It has sometimes been said that the explanation of this difference in our land law and our personal property law is due to the fact that the former law is derived from the feudal system, while the laws regulating personal property are derived from the law merchant. While this statement is true in part, it is not entirely true, and, in any case, it does not really explain. Many important principles of our law of real property are in truth derived from feudalism, yet not all of them. For the beginning of our law of real property we must go beyond the days of the feudal system. The Normans changed the old local customs of the Anglo-Saxon land law into "tenures," but this "insured a wholesale reception of Old English land law by the French conquerors."⁴⁶ Had feudalism never been introduced into England, nevertheless, our law of real property would have differed from our law of personal property. This would have been due partly to the inherent differences between immovable and movable property, but more particularly to the fact, as already pointed out, that the different principles of law applicable to the ownership or possession of land, in contradistinction to the principles applicable to movable property, were considerably influenced by the ancient forms of actions. A complete discussion, however, of the questions relative to the explanation of the differences in our law of real property and our law of personal property, would involve a general review of many matters connected with the political, social, and economical history of the English people.

⁴⁶ Vinogradoff, *English Society*, 224.

CHAPTER II

WHAT IS REAL PROPERTY

7. Meaning of Real Property.
8. Land Includes What.
9. Things Growing on Land.
10. Things Severed from the Land.
11. Incorporeal Hereditaments.
12. Equitable Conversion.
13. Personal, or Chattel, Interests in Land.

MEANING OF REAL PROPERTY

7. With reference to the subject-matter of property, real property includes land and things attached to land so as to become a part of it; with reference to rights of property or of ownership, real property means the estate, title, interest, or rights in land which continue for life or are inheritable, either of full ownership, or of some partial enjoyment of the land or its profits.

LAND INCLUDES WHAT

8. Land, in general, includes the soil and minerals of the earth, its natural productions, and permanent structures erected upon it.

Real Property

The term "real property" may be used either with reference to the subject-matter of property, or with reference to the rights, the property rights, of an owner therein. As the subject-matter of property, real property includes land and things becoming a part of it by attachment;¹ with reference, on the other hand, to property rights, real property means the estate, title, or interest in land which an owner may have. It is in the first sense, however, that the term is used at this time.²

¹ "Real Property," Laws of Eng. vol. 24, § 277; Bemis v. First Nat. Bank, 63 Ark. 625, 628, 40 S. W. 127; Mound City Const. Co. v. Macgurn, 97 Mo. App. 403, 408, 71 S. W. 460; Mathes v. Dobschuetz, 72 Ill. 438, 441.

² Property rights, or "real property" involving the possession of lands, are treated under the title of Estates, post.

Land

Land, in its legal sense, is a general term of very broad significance.³ It includes the ground, soil, or surface of the earth, such as fields, meadows, pastures, woods, moors, waters, marshes, and heath.⁴ It also includes all mines, minerals, and fossils beneath the surface, or imbedded in it;⁵ likewise houses and other buildings upon it,⁶ such as fences⁷ and bridges.⁸ It includes the herbage, grass, trees,⁹ rocks, and the natural or perennial products of the soil.¹⁰ It is also said to

³ 2 Blk. Comm. 16; *CANFIELD v. FORD*, 28 Barb. (N. Y.) 336, Burdick Cas. Real Property; *Ex parte Leland*, 1 Nott & McC. (S. C.) 460, 463; *Nessler v. Neher*, 18 Neb. 649, 650, 26 N. W. 471; *Goodhue v. Cameron*, 142 App. Div. 470, 127 N. Y. Supp. 120. In ancient times "land" appears to have meant arable land only. See Co. Litt. 4a; *Shep. Touch.* (Preston's Ed.) 91; P. & M. II, 147. Land has been defined as follows: "In law, 'land' signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or water-covered, and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc." Century Dict. [quoted in *Connecticut Mut. Life Ins. Co. v. Wood*, 115 Mich. 444, 448, 74 N. W. 656].

⁴ Co. Litt. 4a; 2 Blk. Comm. 17.

⁵ 2 Blk. Comm. 17; *Smith, C. J.*, in *Johnson v. Richardson*, 33 Miss. 462, 464; *Ray, C. J.*, in *State v. Pottmeyer*, 33 Ind. 402, 403, 5 Am. Rep. 224; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

⁶ *Staufer v. Cincinnati, etc., R. Co.*, 33 Ind. App. 356, 70 N. E. 543, 544; *People ex rel. International Nav. Co. v. Barker*, 153 N. Y. 98, 100, 47 N. E. 46; *Chicago, I. & R. R. Co. v. Knuffke*, 36 Kan. 367, 369, 13 Pac. 582; *Union Cent. Life Ins. Co. v. Tillery*, 152 Mo. 421, 425, 54 S. W. 220, 75 Am. St. Rep. 480.

⁷ *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626, 627, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325; *Mott v. Palmer*, 1 N. Y. 564, 569; *Murray v. Van Derlyn*, 24 Wis. 67.

⁸ *Monmouth County v. Red Bank, etc., Turnpike Co.*, 18 N. J. Eq. 91, 94. Electric light poles and wires are real property. *Keating Implement Co. v. Marshall Electric Light, etc., Co.*, 74 Tex. 605, 12 S. W. 489.

⁹ *Marion County Lumber Co. v. Lumber Co.*, 84 S. C. 505, 66 S. E. 124, 877; *Morgan v. O'Bannon*, 125 La. 367, 51 South. 293; *Gulf Red Timber Lumber Co. v. O'Neal*, 131 Ala. 117, 135, 30 South. 466, 90 Am. St. Rep. 22; *Fox v. Pearl River Lumber Co.*, 80 Miss. 1, 6, 30 South. 583.

¹⁰ See *infra*. The annual products of industry are treated as personal property. Co. Litt. 4; *Bagley v. Columbus So. R. Co.*, 98 Ga. 626, 627, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325; *Green v. Armstrong*, 1 Denio (N. Y.) 550, 554; *Pattison's Appeal*, 61 Pa. 294, 297, 100 Am. Dec. 637. The owner of land may, to abate the nuisance, cut off the limbs of trees which overhang his boundary line without committing a trespass. *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Smith, J.*, in *Countryman v. Lighthill*, 24 Hun (N. Y.) 406. He does not, however, own such branches, and he has no right to the fruit on trees overhanging his land. *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728. When a tree standing on one man's land sends roots into the soil of an adjoining proprietor, the one on whose land the trunk stands owns all the tree and its fruit. *Masters v. Pollie*, 2 Rolle, 141; *Holder v. Coates*, 1 Moody & M. 112; *Lyman v. Hale*,

include everything under it and everything over it,¹¹ extending upward indefinitely and downward to the center of the earth, giving rise to the maxim "cujus est solum ejus est usque ad cœlum usque ad orcum."¹² With reference to its ownership, however, land may be divided horizontally, so that one person may own the surface and another person may own the underlying strata, having the right to the minerals,¹³ or to construct a tunnel therein.¹⁴ Land may, of course, have, in any particular case, a restricted rather than a general meaning, according to the construction of its special use in a deed, will, contract, or other instrument.¹⁵ The term in some states is defined by statute.¹⁶

Minerals and Fossils

Mines are land, and minerals or fossils in their natural location in the earth are a part of the land.¹⁷ If severed, however, by other than

¹¹ Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. As holding that they are tenants in common when the tree stands on the line, see *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326.

¹² *State v. Pottmeyer*, 33 Ind. 402, 403, 5 Am. Rep. 224; *HIGGINS OIL & FUEL CO. v. SNOW*, 113 Fed. 433, 438, 51 C. C. A. 267, *Burdick Cas. Real Property*.

¹³ *Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211; *Slosson, J.*, in *Sherry v. Frecking*, 4 Duer (N. Y.) 452, 457; *Welles, J.*, in *Aiken v. Benedict*, 39 Barb. (N. Y.) 401; *Isham v. Morgan*, 9 Conn. 374, 377, 23 Am. Dec. 361; *CANFIELD v. FORD*, 28 Barb. (N. Y.) 336, *Burdick Cas. Real Property*. See, however, the article *Real Property*, in *Laws of Eng.* vol. 24, § 305, note, where it is said: "The strict right of property does not extend skyward without limit, so as to entitle the owner to sue in trespass (*Pickering v. Rudd*, 4 Camp. 219), and the advent of airships has shown that this would be impracticable." It is held, however, that the owner of land may rightfully object to the stretching of telegraph or telephone wires over his land. *Boards of Works v. United Telephone Co.*, 13 Q. B. D. 904.

¹⁴ *Lillibridge v. Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 1 Atl. 394, 58 Am. Rep. 743; *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3; *Byers v. Byers*, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. Rep. 765; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436.

¹⁵ *Central London Railway v. City of London*, [1911] 2 Ch. 467, C. A.

¹⁶ *Overton v. Moseley*, 135 Ala. 599, 605, 33 South. 696.

¹⁷ *Missouri, K. & T. R. Co. v. Miami County*, 67 Kan. 434, 439, 73 Pac. 103; *People v. New York Tax Com'rs*, 104 N. Y. 240, 248, 10 N. E. 437; *Edwards & McCulloch Lumber Co. v. Mosher*, 88 Wis. 672, 677, 60 N. W. 264; *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408, 414, 5 Sup. Ct. 573, 28 L. Ed. 1009; *People v. Cassity*, 46 N. Y. 46, 49; *MT. CARMEL FRUIT CO. v. WEBSTER*, 140 Cal. 183, 73 Pac. 826, *Burdick Cas. Real Property*.

¹⁸ *Appeal of Stoughton*, 88 Pa. 198; *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696; *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448; *Lone Acre Oil Co. v. Swayne* (Tex. Civ. App. 1903) 78 S. W. 380.

natural causes, they become personal property.¹⁸ A meteorite is also held to be a part of the realty, whether imbedded in the soil,¹⁹ or merely lying upon the land where it fell.²⁰ By the English common law, the right to gold and silver mines is in the crown.²¹ In this country, however, it is held that this rule does not apply, but that the state or the United States own mines as they own other property, and not by the mere right of sovereignty.²² The practical consideration of this question is with us, however, governed mainly by the laws pertaining to mineral deposits found upon the public lands. The federal statutes²³ provide for the location of mineral claims by discoverers, for the posting of a notice and the recording of the claim, for labor and improvements upon the claim as a condition for the continuance of the claimant's rights,²⁴ and for the final entry, payment of the government price for the land, and the issuance of a patent.

Oil and gas beneath the soil are properly classed as minerals, and while confined within the earth they belong to the owner of the land.²⁵ They are, however, of a fugitive and volatile nature, and a grant of either of them gives only an inchoate right, becoming absolute only upon the reduction to possession.²⁶ The rights of an owner in the

¹⁸ *Bender v. Brooks* (Tex.) 127 S. W. 168; *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740.

¹⁹ *Goddard v. Winchell*, 86 Iowa, 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481.

²⁰ *Oregon Iron Co. v. Hughes*, 47 Or. 313, 81 Pac. 572, 8 Ann. Cas. 556.

²¹ *Atty. Gen. v. Morgan* (1891) 1 Ch. 432; *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123. If the gold or silver was found together with baser metals, they all belonged to the king if the value of the precious metals was greater than the value of the others. But if the baser metals were more valuable than the gold or silver, then the owner of the soil took both. *Case of Mines, Plowd.* 310, 75 Eng. Reprint, 472; 3 Kent, Comm. 378, note; 1 Blk. Comm. 294. The statutes of 1 Wm. & M. c. 30, and 5 Wm. & M. c. 6, provided, however, that royal ownership should not extend to copper, tin, iron, or lead mines by virtue of gold or silver being found therein.

²² *Loney v. Scott*, 57 Or. 378, 112 Pac. 172, 32 L. R. A. (N. S.) 466; *Heil v. Martin* (Tex. Civ. App. 1902) 70 S. W. 430; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 23 L. Ed. 995; *Boogs v. Mining Co.*, 14 Cal. 279; *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123; 1 Cooley, Blk. Comm. 294, note 4. Compare *Gold Hill Quartz Min. Co. v. Ish*, 5 Or. 104.

²³ See Rev. St. U. S. §§ 2318-2352 (U. S. Comp. St. 1901, pp. 1423-1441).

²⁴ Not less than \$100 worth of labor during each year until a patent has been issued. Rev. St. U. S. (1878) § 2324.

²⁵ *Rupel v. Oil Co.*, 176 Ind. 4, 95 N. E. 225, 226, Ann. Cas. 1913E, 836; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545; *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691, 75 Pac. 995, 1 Ann. Cas. 403; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas, etc., Co.*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

²⁶ *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373, 375, affirmed 121 Fed. 674, 57 C. C. A. 428; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732.

oil and gas of his land are similar to his rights in subterranean waters.²⁷

Water

Water is included under the general term land,²⁸ and a pond or other standing body of water cannot be conveyed or possession thereof recovered by the name of water, but only by calling it land covered with water.²⁹ Standing water and percolations beneath the surface belong to the owner of the soil.³⁰ Running waters, however, are not owned by those who own the land over which they flow.³¹ These riparian owners, as they are called, have only an easement in such waters, although these rights in water are treated as real property.³² In any case, a man has the exclusive right to sail and fish in the waters overlying his land.³³ There are no such exclusive rights, however, in connection with navigable waters,³⁴ because the title to the soil under them is in the state.³⁵ This is, however, denied by some

²⁷ See *Easements, Subterranean Waters; Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas Co.*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

²⁸ *Lux v. Haggin* (1884), 69 Cal. 255, 4 Pac. 919, 920, 10 Pac. 674; *State v. Pottmeyer*, 33 Ind. 402, 403, 5 Am. Rep. 224; Co. Litt. 4a; 2 Blk. Comm. 18. Land comprehends tide-waters, lakes, and running streams, as so much land covered with water. Co. Litt. 4; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236, 259.

²⁹ 2 Blk. Comm. 18. See *Mitchell v. Warner*, 5 Conn. 497, 518.

³⁰ *Ocean Grove Camp Meeting Ass'n v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Village of Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90; *Alexander v. U. S.*, 25 Ct. Cl. 87; *Hills v. Bishop*, 63 Hun, 624, 17 N. Y. Supp. 297; *Walker v. Board*, 16 Ohio, 540; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

³¹ "Running water in natural streams is not property and never was." *City of Syracuse v. Stacey*, 169 N. Y. 231, 245, 62 N. E. 354; *Mitchell v. Warner*, 5 Conn. 497, 518.

³² See *Easements*, post.

³³ *Shrunk v. Navigation Co.*, 14 Serg. & R. (Pa.) 70; *Reece v. Miller*, 8 Q. B. Div. 626; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304; *Com. v. Chapin*, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; *Cobb v. Davenport*, 32 N. J. Law, 369; *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

³⁴ *Carson v. Blazer*, 2 Bin. 475, Fed. Cas. No. 2,461a; *Arnold v. Mundy*, 6 N. J. Law, 1, 10 Am. Dec. 356; *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Weston v. Sampson*, 8 Cush. (Mass.) 347, 54 Am. Dec. 764; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Attorney General v. Chambers*, 4 De Gex, M. & G. 206; *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 20 L. R. A. 94, 39 Am. St. Rep. 404. And see *Bagott v. Orr*, 2 Bos. & P. 472; *Packard v. Ryder*, 144 Mass. 440, 11 N. E. 578, 59 Am. Rep. 101. But cf. *Anon.*, 1 Camp. 517, note; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42.

³⁵ *Pacific Gas Imp Co. v. Ellert*, 64 Fed. 421; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Poor v. McClure*, 77 Pa. 214; *Flannagan v. Philadelphia*, 42 Pa. 219:

cases, which hold that the title to the bed of a navigable river is in the riparian proprietor.³⁶ Navigable rivers are those which are navigable in fact.³⁷ The English rule, that only those waters in which

McManus v. Carmichael, 3 Iowa, 1; *Tomlin v. Railway Co.*, 32 Iowa, 106, 7 Am. Rep. 176; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Smith v. Levinus*, 8 N. Y. 472; *People v. Appraisers*, 33 N. Y. 461; *Rumsey v. Railway Co.*, 130 N. Y. 88, 28 N. E. 763; *Saunders v. Railway Co.*, 144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729; *State v. Pacific Guano Co.*, 22 S. C. 50; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Goodwin v. Thompson*, 83 Tenn. 209, 54 Am. Rep. 410; *Concord Manuf'g Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Wainwright v. McCullough*, 63 Pa. 66. But cf. *Wilson v. Welch*, 12 Or. 353, 7 Pac. 341; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400. That the title to the bed of such streams is not in the United States, see *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565. A riparian proprietor on a nonnavigable river owns the bed of the stream to the center. *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Wiggenhorn v. Kountz*, 23 Neb. 690, 37 N. W. 603, 8 Am. St. Rep. 150. In England, the fee to all land covered by navigable waters is, at common law, in the king. *Brookhaven v. Smith*, 98 App. Div. 212, 90 N. Y. Supp. 646.

³⁶ *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606, 56 Am. Rep. 642; *Olson v. Merrill*, 42 Wis. 203; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Houck v. Yates*, 82 Ill. 179; *Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; *Gavit's Adm'rs v. Chambers*, 3 Ohio, 496; *Blanchard's Lessee v. Porter*, 11 Ohio, 139; *Commissioners of Canal Fund v. Kempshall*, 26 Wend. (N. Y.) 404; *Berry v. Snyder*, 3 Bush (Ky.) 266, 96 Am. Dec. 219; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Keyport & M. P. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Morgan v. Reading*, 3 Smedes & M. (Miss.) 366; *The Magnolia v. Marshall*, 39 Miss. 109; *Cates' Ex'rs v. Wadlington*, 1 McCord (S. C.) 580, 10 Am. Dec. 699; *Mathis v. Board of Assessors*, 46 La. Ann. 1570, 16 South. 454; *Gibson v. Kelly*, 15 Mont. 417, 39 Pac. 517. Cf. *Buttenuth v. Bridge Co.*, 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; *Wool v. Town of Edenton*, 115 N. C. 10, 20 S. E. 165. See *Water Boundaries, Deeds*.

³⁷ *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S. W. 892; *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 Atl. 648; *State of Maryland v. Miller*, 180 Fed. 796; *U. S. v. Turnpike Road*, 183 Fed. 598; *Asher v. McNight*, 129 Ky. 623, 112 S. W. 647; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *McManus v. Carmichael*, 3 Iowa, 1; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Spring v. Russell*, 7 Greenl. (Me.) 273; *American River Water Co. v. Amsden*, 6 Cal. 443; *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650; *Homochitto River Com'rs v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Bayzer v. Mill Co.*, 105 Ala. 395, 16 South. 923, 53 Am. St. Rep. 133; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *The Montello*, 20 Wall. 430, 22 L. Ed. 391; *Chisholm v. Caines*, 67 Fed. 285; *Stover v. Jack*, 60 Pa. St. 339, 100 Am. Dec. 566; *Heyward v. Mining Co.*, 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702; *Falls Mfg. Co. v. Scouts River Imp. Co.*, 87 Wis. 134, 58 N. W. 257. And see *Volk v. Eldred*, 23 Wis. 410; *Lewis v. Coffee Co.*, 77 Ala. 190, 54 Am. Rep. 55; *Rowe v. Bridge Corp.*, 21 Pick. (Mass.) 344; *State v. Gilmanton*,

the tide ebbs and flows are navigable,³⁸ does not apply in this country,³⁹ and although statutes, in some states, have declared certain streams navigable, yet it is held that such statutes are inoperative if the stream is not navigable in fact.⁴⁰

Ice

Ice formed over the waters of ponds or streams belongs to the owner of the land beneath the water.⁴¹ The riparian owner has the right to cut and appropriate it.⁴² Under the New England rule pertaining to ice on "great ponds," a riparian owner has, however, no exclusive right to the ice, but the right to take the same belongs to the public.⁴³

14 N. H. 467; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; *State v. Eason*, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811. That the stream must be navigable in its natural state, see *Jeremy v. Elwell*, 5 Ohio Cir. Ct. R. 379; *Ten Eyck v. Town of Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536.

³⁸ *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095, 21 Ky. Law Rep. 72, 90 Am. St. Rep. 232; *People ex rel. Ricks Water Co. v. Elk River Mill, etc., Co.*, 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; *Jones v. Pettibone*, 2 Wis. 308.

³⁹ *Fulton Light, Heat & Power Co. v. State*, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Black*, Const. Law, 124; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Wilson v. Forbes*, 13 N. C. 30; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999. Cf. *Veazie v. Durnel*, 50 Me. 479; *City of Chicago v. McGinn*, 51 Ill. 226, 2 Am. Rep. 295; *People v. Tibbetts*, 19 N. Y. 523; *Glover v. Powell*, 10 N. J. Eq. 211. The great inland rivers and lakes in this country make the English common-law rule as to tide waters inapplicable.

⁴⁰ *Runyard v. Ice Co.*, 142 Wis. 471, 125 N. W. 931; *People ex rel. Ricks Water Co. v. Elk River Mill Co.*, 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; *U. S. v. Union Bridge Co.*, 143 Fed. 377; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Duluth Lumber Co. v. St. Louis Boom, etc., Co.*, 17 Fed. 419, 5 McCrary, 382.

⁴¹ *Hoag v. Place*, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39; *Hinckel v. Stevens*, 165 N. Y. 171, 58 N. E. 879; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Brookville & Metamora Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; *Village of Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90. And see *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 6 N. W. 636, 38 Am. Rep. 246; *Howe v. Andrews*, 62 Conn. 398, 26 Atl. 394. A railroad company has no right to the ice formed along its right of way, when the fee to the land is owned by some other person. *Julien v. Woodsmall*, 82 Ind. 568.

⁴² *Myer v. Whitaker*, 5 Abb. N. C. (N. Y.) 172; *Id.*, 55 How. Prac. (N. Y.) 376; *Lawton v. Herrick*, 83 Conn. 417, 76 Atl. 986; *Oliver v. Olmstead*, 112 Mich. 483, 70 N. W. 1036; *Wright v. Woodcock*, 86 Me. 113, 29 Atl. 953, 25 L. R. A. 499.

⁴³ *Carville v. Com.*, 192 Mass. 570, 78 N. E. 735, 6 L. R. A. (N. S.) 310, 116 Am. St. Rep. 220; *Inhabitants of Town of Rockport v. Webster*, 174 Mass. 385, 54 N. E. 852; *Paine v. Woods*, 108 Mass. 160; *Inhabitants of West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Brastow v. Ice Co.*, 77 Me. 100; *Wood-*

Ice formed, however, on the lands of the state, and entirely surrounded by other state land, belongs exclusively to the state.⁴⁴

THINGS GROWING ON LAND

9. Things growing on land are either:

(a) Natural products (*fructus naturales*); or

(b) Annual crops (*fructus industriales*).

Natural products are real property. Annual crops are generally regarded as personalty.

Annual Crops—Emblements

Everything growing upon the land, except annual crops, is realty.⁴⁵ The annual crops, however, are, as a rule, personal property.⁴⁶ The spontaneous or natural products of the land (known as "*fructus naturales*"), such as trees, perennial grass, and perennial bushes, are regarded as a part of the soil, and pass with a conveyance of the land.⁴⁷ Annual crops are the vegetable products of the earth, such as garden products, corn, grain, straw, hemp, hops, and nursery stock. Being produced annually⁴⁸ by labor and industry, they are called "*fructus*

man v. Pitman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342; Barrett v. Ice Co., 84 Me. 155, 24 Atl. 802, 16 L. R. A. 774. See, also, Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330.

⁴⁴ Green Island Ice Co. v. Norton, 189 N. Y. 529, 82 N. E. 1126.

⁴⁵ Flynt v. Conrad, 61 N. C. 190, 192, 45 Am. Dec. 588; Maples v. Millon, 31 Conn. 598; Batterman v. Albright, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510; Adams v. Beadle, 47 Iowa, 439, 29 Am. Rep. 487; Wescott v. Delano, 20 Wis. 514; Cockrill v. Downey, 4 Kan. 426; Brackett v. Goddard, 54 Me. 309.

⁴⁶ Robinson v. Ezzell, 72 N. C. 231; Crine v. Tifts, 65 Ga. 644; Bloom v. Welsh, 27 N. J. Law, 177; Pickens v. Webster, 31 La. Ann. 870; Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; Polley v. Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Mabry v. Harp, 53 Kan. 398, 36 Pac. 743. See, also, Wintermute v. Light, 46 Barb. (N. Y.) 278; Miller v. Baker, 1 Metc. (Mass.) 27; Batterman v. Albright, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510. They pass, however, with a conveyance of the land. Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Coman v. Thompson, 47 Mich. 22, 10 N. W. 62, 41 Am. Rep. 706; Powell v. Rich, 41 Ill. 466; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Terhune v. Elberston, 3 N. J. Law, 726; Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388. As to matured crops, see 2 Jones, Real Prop. § 1621. And go to a devisee. Dennett v. Hopkinson, 63 Me. 350, 18 Am. Rep. 227; Bradner v. Faulkner, 34 N. Y. 347; Mr. Spencer's Case, Winch. 51; Cooper v. Woolfitt, 2 Hurl. & N. 122.

⁴⁷ Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Rep. 571; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; McKenzie v. Shows, 70 Miss. 388, 12 South. 336, 35 Am. St. Rep. 654.

⁴⁸ As to teasels, see Graves v. Weld, 5 Barn. & Adol. 105; Kingsbury v. Collins, 4 Bing. 202.

"industriales" in distinction from "fructus naturales."⁴⁹ Although regarded generally as personalty,⁵⁰ yet some cases distinguish between growing and immature crops, and those that are mature and ready for the harvest. In connection with the conveyance of land, some states hold unripe crops to be real property, since they are still connected with the soil, drawing their sustenance therefrom.⁵¹ If ripe, they are personal property, and do not pass with a grant of the land, unless so expressly declared.⁵²

Emblements,⁵³ in connection with the law of landlord and tenant, is a term used to describe such annual products, or fructus industriales, as have resulted from a tenant's care and labor. They are sometimes called the "away-going crops," or the crops that a tenant has the right to take away after his tenancy has ended.⁵⁴ Whenever such crops are planted⁵⁵ by one having an interest of uncertain duration in the land,⁵⁶

⁴⁹ They include grain. *Peacock v. Purvis*, 2 Brod. & B. 362; *Cooper v. Woolfitt*, 2 Hurl. & N. 122; *Forsythe v. Price*, 8 Watts (Pa.) 282, 34 Am. Dec. 465. And the straw. *Craig v. Dale*, 1 Watts & S. (Pa.) 509, 37 Am. Dec. 477. Hemp. *Co. Litt.* 55a. Hops. *Latham v. Atwood*, Cro. Car. 515. Clover and artificial grasses. *Graves v. Weld*, 5 Barn. & Adol. 105. Contra, *Reiff v. Reiff*, 64 Pa. 134; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171. But not growing grasses. *Reiff v. Reiff*, 64 Pa. 134. Nor young trees. *Co. Litt.* 55a. But turpentine "scrape" may be. *Lewis v. McNatt*, 65 N. C. 63. And nursery stock. *Brooks v. Galster*, 51 Barb. (N. Y.) 196; *King v. Wilcomb*, 7 Barb. (N. Y.) 263. See, also, *Brackett v. Goddard*, 54 Me. 309.

⁵⁰ *Supra*.

⁵¹ *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592; *Goodwin v. Smith*, 49 Kan. 351, 31 Pac. 153, 17 L. R. A. 284, 33 Am. St. Rep. 373.

⁵² *Ellithorpe v. Reidesil*, 71 Iowa, 315, 32 N. W. 238; *Burleigh v. Piper*, 51 Iowa, 650, 2 N. W. 520. A growing crop is said to be "a sort of legal species of chameleon," and there is no fixed rule by which to determine in every case when it is to be considered personal and when real estate. See *Bagley v. Columbus Southern R. Co.*, 98 Ga. 626, 631, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325; *Reed v. Johnson*, 14 Ill. 257, 258; *McCall v. State*, 69 Ala. 227, 228.

⁵³ From Old French *embleer*, to sow with corn.

⁵⁴ *Black, Law Dict.* Emblements. See *Life Estates and Estates for Years*, post.

⁵⁵ The seed must be sown. Mere preparation of the ground is not sufficient. *Price v. Pickett*, 21 Ala. 741.

⁵⁶ *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318. A tenant from year to year is entitled to emblements. *Clark v. Harvey*, 54 Pa. 142; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567. A tenant at will. *Davis v. Brocklebank*, 9 N. H. 73; *Davis v. Thompson*, 13 Me. 209; *Towne v. Bowers*, 81 Mo. 491; *Pfanner v. Sturmer*, 40 How. Prac. (N. Y.) 401; *Sherburne v. Jones*, 20 Me. 70. A tenant for life. *Poindexter v. Blackburn*, 36 N. C. 286; *Perry v. Terrel*, 21 N. C. 441; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Thornton v. Burch*, 20 Ga. 791; *Bradley v. Bailey*, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316. And his lessees. *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139. When the interest is of definite duration, there is no right to

and that interest terminates without his fault before the crops are harvested, he has a right to enter to cultivate, harvest, and remove them.⁵⁷ This right is given on the principle that the crops are not planted with any intention to benefit the one next entitled to the land, but with the expectation of reaping them. No one, however, is entitled to emblements who has terminated his estate by his own act.⁵⁸ The right to remove crops may be given in any case by express contract,⁵⁹ and in some states the subject is regulated by statute.⁶⁰

THINGS SEVERED FROM THE LAND

10. By severance from the land, things which were formerly a part of the realty may, if such be the intention, become personal property.

Things which are a part of the realty may, nevertheless, by their severance from the land by the owner, with an intention on his part to change their character, become personal property.⁶¹ Water; ice;

emblements; for instance, under a tenancy for years. *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Sanders v. Ellington*, 77 N. C. 255; *Dircks v. Brant*, 56 Md. 500; *Hendrixson v. Cardwell*, 68 Tenn. 389, 40 Am. Rep. 93; *Gossett v. Drydale*, 48 Mo. App. 430. A custom, however, to the contrary will give the right. *Stultz v. Dickey*, 5 Bin. (Pa.) 285, 6 Am. Dec. 411; *Biggs v. Brown*, 2 Serg. & R. (Pa.) 14; *Templeman v. Biddle*, 1 Har. (Del.) 522; *Van Doren v. Everitt*, 5 N. J. Law, 460, 8 Am. Dec. 615; *Foster v. Robinson*, 6 Ohio St. 90; *Clark v. Banks*, 6 Houst. (Del.) 584. Contra, *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510.

⁵⁷ *Den ex dem. Humphries v. Humphries*, 25 N. C. 362.

⁵⁸ *Debow v. Colfax*, 10 N. J. Law, 128; *Samson v. Rose*, 65 N. Y. 411; *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31; *Gregg v. Boyd*, 69 Hun, 588, 23 N. Y. Supp. 918; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935; *Orland's Case*, 5 Coke, 116a; *Davis v. Eyton*, 7 Bing. 154. Cf. *Carpenter v. Jones*, 63 Ill. 517. So the right is lost by the assertion of a title paramount. *Howell v. Schenck*, 24 N. J. Law, 89; *King v. Fowler*, 14 Pick. (Mass.) 238. As by foreclosure of a mortgage executed before the lease. *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Downard v. Groff*, 40 Iowa, 597; *Gilman v. Wills*, 66 Me. 273. But see *Cassilly v. Rhodes*, 12 Ohio, 88. Cf. *Lewis v. Klotz*, 39 La. Ann. 259, 1 South. 539.

⁵⁹ *Van Doren v. Everitt*, 5 N. J. Law, 460, 8 Am. Dec. 615.

⁶⁰ 1 Stim. Am. St. Law, §§ 1334, 2064, 3233.

⁶¹ *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Leidy v. Procter*, 97 Pa. 486; *Lykens Valley Coal Co. v. Dock*, 62 Pa. 232; *Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160; *In re Clever's Estate*, 23 Pittsb. Leg. J. N. S. (Pa.) 358; *Kier v. Peterson*, 41 Pa. 357; *Lewis v. Rosler*, 16 W. Va. 333; *State v. Moore*, 33 N. C. 70. Cf. *State v. Stephenson*, 2 Bailey (S. C.) 334. But see *In re Mulholland's Estate*, 154 Pa. 491, 26 Atl. 612.

metals; oil; gas; coal; natural or perennial products, including trees,⁶² rock, stone,⁶³ and all other minerals; buildings⁶⁴ and all other structures—in fact, all things, even the soil itself,⁶⁵ which in their natural positions are parts of the land, may become personalty by severance. Manure generally is a part of the soil,⁶⁶ but it may be made personal property by severance.⁶⁷ In case parts of the land are severed by accident, the rule is that the character of the property is not changed. Thus, trees blown down by the wind,⁶⁸ or the fallen materials of a building destroyed by tempest or fire,⁶⁹ remain realty. In the case of trees, however, it is held that the severance of them by one in possession, although having no right to sever them, or severance by even a trespasser, will change them into personal property.⁷⁰ In order to change by severance real property into personal, the severance need not be an actual physical act, but may be constructive.⁷¹ For instance, trees and the like can be made personal property by conveying the land and reserving the trees, or by the owner selling the trees as they stand on the land.⁷² Likewise, a house may be sold with the understanding that it is to be removed. This is sufficient to make it personalty.⁷³

⁶² *Kimball v. Lohmas*, 31 Cal. 154; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Macomber v. Detroit, etc., R. Co.*, 108 Mich. 491, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713; *Pierrepont v. Barnard*, 6 N. Y. 279; *Brewer v. Fleming*, 51 Pa. 102.

⁶³ *Fulton v. Norton*, 64 Me. 410.

⁶⁴ *Hood v. Whitwell*, 66 Misc. Rep. 49, 120 N. Y. Supp. 372; *Stackpole v. Eastern R. Co.*, 62 N. H. 493.

⁶⁵ See *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476; *Riley v. Water Power Co.*, 11 Cush. (Mass.) 11.

⁶⁶ *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *French v. Freeman*, 43 Vt. 93. But when dropped in the street it is personalty. *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 350.

⁶⁷ *French v. Freeman*, 43 Vt. 93.

⁶⁸ *Leidy v. Proctor*, 97 Pa. 486.

⁶⁹ *Guernsey v. Phinizy*, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270; *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 694.

⁷⁰ *Kimball v. Lohmas*, 31 Cal. 154; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Brewer v. Fleming*, 51 Pa. 102. Exception: *Porch v. Fries*, 18 N. J. Eq. 204.

⁷¹ *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173. As when owned by one who does not own the land. *Jencks v. Smith*, 1 N. Y. 90; *Dayton v. Vandoozer*, 39 Mich. 749; *Warren v. Leland*, 2 Barb. (N. Y.) 613.

⁷² *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Yale v. Seely*, 15 Vt. 221; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173. But compare *Brackett v. Goddard*, 54 Me. 309.

⁷³ *Hood v. Whitwell*, 66 Misc. Rep. 49, 120 N. Y. Supp. 372; *Stackpole v. Eastern R. Co.*, 62 N. H. 493.

INCORPOREAL HEREDITAMENTS

11. Real property also includes incorporeal hereditaments. An incorporeal hereditament is anything that can be the subject of property which is inheritable but not tangible or visible. It is a right issuing out of or annexed to a thing corporeal.

It has already been pointed out that real property consists of lands, tenements, and hereditaments.⁷⁴ Hereditaments are things capable of being inherited.⁷⁵ Incorporeal hereditaments comprise certain inheritable rights which are not, strictly speaking, of a corporeal nature or land, although they are, by their own nature or use, annexed to corporeal inheritances, and are rights issuing out of them or concerning them.⁷⁶ They are not the object of sensation, nor can they be seen or handled. Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently objects of our bodily senses.⁷⁷ We have already seen that in the Roman law "things" (res) capable of ownership were divided into "things corporeal" and "things incorporeal."⁷⁸ It was also pointed out, in connection therewith, that by "things incorporeal" the Roman jurists meant "rights." The term was introduced from Roman sources into English law at an early date,⁷⁹ and Prof. Maitland tells us that the realm of mediæval law was rich in incorporeal things.⁸⁰ According to Blackstone,⁸¹ there were, in his time, ten kinds of incorporeal hereditaments, namely, advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, or pensions, annuities, and rents. In addition to these, there are, says Washburn,⁸² other incorporeal hereditaments, such as remainders and reversions dependent upon an intermediate freehold estate, and rights of way, or passage of water through an-

⁷⁴ Supra.

⁷⁵ Ante.

⁷⁶ 3 Kent, Comm. 402.

⁷⁷ Co. Litt. 9a; 2 Blk. Comm. 19-21; Whitlock v. Greacen, 48 N. J. Eq. 359, 21 Atl. 944; Stone v. Stone, 1 R. I. 425, 428.

⁷⁸ Ante.

⁷⁹ See Bracton (Twiss Ed.) vol. I, 57, 83. At page 57, he says: "Incorporeal things are such as rights which cannot be seen nor touched, as the right of going, or of driving, or of leading water, and such like."

⁸⁰ P. & M. II, 123. Littleton says but little about incorporeal things. He mentions commons, advowsons, and rights that can be only appendant or appurtenant to land. §§ 183, 617. "In a feudal state where property and office are confused under a primitive legal system which has a highly developed land law, but no theory of contract, the list of incorporeal things tends to expand." Hold. Hist. of Eng. Law, II, 300.

⁸¹ 2 Blk. Comm. 20.

⁸² Washburn, Real Property (6th Ed.) § 50.

other's land, or of light and the like. In this country, however, there are no advowsons, tithes, dignities, nor corodies; commons are rare; offices are rare or unknown; and annuities have no necessary connection with land.⁸³ In the development of the land law of England incorporeal things came to differ from corporeal in the fact that they were said "to lie in grant and not in livery."⁸⁴ Rights to the possession of land were transferable only by delivery of such possession, while rights not involving possession of land were transferable by deed of grant. Corporeal hereditaments were therefore said to "lie in livery,"⁸⁵ while incorporeal hereditaments were said to "lie in grant."⁸⁶ This distinction, however, is not now of practical importance, because, in modern law, corporeal as well as incorporeal hereditaments are transferable without actual delivery of possession.⁸⁷

Incorporeal hereditaments are usually classified, in this country, as consisting of easements, profits à prendre, rents, and franchises. These rights will be discussed in a subsequent special chapter.⁸⁸

EQUITABLE CONVERSION

12. Equitable conversion is an implied change in the character of property, by means of which

- (a) Personal property is considered as real; and
- (b) Real property is considered as personal.

By virtue of the maxim that equity regards that as done which ought to be done, courts of equity, in order to carry out the intention of parties, will, for certain purposes, treat personal property as real property, and real property as personal property.⁸⁹ As was said by Sewell, Master of the Rolls, in the leading case of *Fletcher v. Ashburner*:⁹⁰ "Nothing is better established than this principle that money

⁸³ 3 Kent, 402, 454.

⁸⁴ "Bracton states this rule in Roman form, but it was long before it came to be the rule of English law." Hold. Hist. Eng. Law, II, 301. And see L. Q. R. V. 36.

⁸⁵ *Drake v. Wells*, 11 Allen (Mass.) 141; *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203.

⁸⁶ Litt. §§ 183, 628; Co. Litt. 9a; 1 Washb. Real Prop. (5th Ed.) 37.

⁸⁷ This is also in some jurisdictions expressly so provided by statute. For example, the Real Property Act of England of 1845 (8 & 9 Vict. c. 106) made all property which formerly lay in livery lie also in grant.

⁸⁸ See chapter XVII.

⁸⁹ See *Fetter*, Eq. p. 67; *Bisp. Eq.* (4th Ed.) 370; 3 Pom. Eq. (2d Ed.) p. 1765.

⁹⁰ 1 Brown, Ch. 499.

directed to be employed in the purchase of land,⁹¹ and land directed to be sold and turned into money,⁹² are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will,⁹³ by way of contract, marriage article, settlement, or otherwise;⁹⁴ and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed." While there need be no express direction in the instrument, in order that land shall be treated as money and money as land, yet it is requisite in all cases that an intention shall be clearly and positively expressed that the land shall be sold, and turned into money, or that money shall be expended in the purchase of land.⁹⁵ The doctrine of equitable conversion applies, for the most part, to trusts created by wills and to contracts for the sale of lands. Equity will not, however, assume a conversion either for or against a person not a party to the contract.⁹⁶

⁹¹ *Kettleby v. Atwood*, 1 Vern. 298; on rehearing, Id. 471; *Chichester v. Bicherstaff*, 2 Vern. 295; *Sweetapple v. Bindon*, Id. 526; *Scudmore v. Scudmore*, Prec. Ch. 544; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *In re Becker's Estate*, 150 Pa. 524, 24 Atl. 687.

⁹² *Fletcher v. Ashburner*, 1 Brown, Ch. 497; *Steed v. Preece*, L. R. 18 Eq. 192; *Evans v. Kingsberry*, 2 Rand. (Va.) 120, 14 Am. Dec. 779; *Turner v. Davis*, 41 Ark. 270; *Fluke v. Fluke*, 16 N. J. Eq. 478; *Roy v. Monroe*, 47 N. J. Eq. 356, 20 Atl. 481; *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. 237; *In re Blauvelt*, 60 Hun. 394, 15 N. Y. Supp. 586; *Fraser v. Trustees*, 124 N. Y. 479, 26 N. E. 1034; *Bolton v. Myers*, 146 N. Y. 257, 40 N. E. 737. But see *In re Machemer's Estate*, 140 Pa. 544, 21 Atl. 441.

⁹³ *Fletcher v. Ashburner*, 1 Brown, Ch. 497; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Jones' Ex'rs v. Jones*, 13 N. J. Eq. 236; *Hyman v. Devereux*, 63 N. C. 624; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Massey v. Modawell*, 73 Ala. 421; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Gould v. Orphan Asylum*, 46 Wis. 106, 50 N. W. 422; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585; *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304. The direction must be positive. *Darlington v. Darlington*, 160 Pa. 65, 28 Atl. 503; *In re Ingersoll's Estate*, 167 Pa. 536, 31 Atl. 858, 859, 860.

⁹⁴ *In re Hirst's Estate*, 147 Pa. 319, 23 Atl. 455; *Dobson's Estate*, 11 Phila. (Pa.) 81; *Evans v. Kingsberry*, 2 Rand. (Va.) 120, 14 Am. Dec. 779; *Masterson v. Pullen*, 62 Ala. 145; *Turner v. Davis*, 41 Ark. 270; *Hunter v. Anderson*, 152 Pa. 386, 25 Atl. 538; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825.

⁹⁵ *Eaton, Equity*, p. 224.

⁹⁶ *Eaton, Equity*, p. 225.

13. PERSONAL, OR CHATTEL, INTERESTS IN LAND

There are certain interests in land which are treated as personal property, as, for example, chattels real,⁹⁷ which are estates less than freehold; that is, estates for years, or leaseholds.⁹⁸ Chattel interests are, however, in some states made real property by statutory definition.⁹⁹ These and other personal interests in land, such as the interest of a mortgagor or mortgagee, will be treated of in other connections. Corporate shares, moreover, are not real property, even though the property which constitutes the capital of the corporation is realty.¹ The ownership of this realty is in the corporation, and not in the individual stockholders. Therefore their interests are personalty only.² A land certificate,³ or a contract right to acquire land, is personal property, since there is a wide difference between the mere right to acquire land and the land afterwards acquired by virtue of such right.⁴

⁹⁷ Chattels real are such as concern or savor of the realty. They are called "real" because they issue out of or are annexed to real estate; and "chattels" because they lack the quality of a sufficient legal indeterminate duration. *Putnam v. Westcott*, 19 Johns. (N. Y.) 73, 76.

⁹⁸ *Mark v. North*, 155 Ind. 575, 577, 57 N. E. 902; *In re Gay*, 5 Mass. 419; *Buhl v. Kenyon*, 11 Mich. 249, 251, 83 Am. Dec. 738; *In re Althause's Estate*, 63 App. Div. 252, 255, 71 N. Y. Supp. 445 [affirmed in 168 N. Y. 670, 61 N. E. 1127]; *Lycoming F. Ins. Co. v. Haven*, 95 U. S. 242, 250, 24 L. Ed. 473; *Keating v. Condon*, 68 Pa. 75; *Hellwig v. Bachman*, 26 Ill. App. 165.

⁹⁹ *Comer v. Light*, 175 Ind. 367, 93 N. E. 660, 94 N. E. 325; *Knapp v. Jones*, 143 Ill. 375, 379, 32 N. E. 382; *First Nat. Bank v. Adam* (Ill. 1890) 25 N. E. 576, 577; 1 Stim. Am. St. Law, § 1300.

¹ See, in general, *State v. Kidd*, 125 Ala. 413, 420, 28 South. 480; *Greenleaf v. Morgan County*, 184 Ill. 226, 228, 56 N. E. 295, 75 Am. St. Rep. 168; *In re Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476.

² *Bligh v. Brent*, 2 Younge & C. Exch. 268; *South Western Ry. v. Thomson*, 40 Ga. 408; *Arnold v. Ruggles*, 1 R. I. 165; *Mohawk & H. R. Co. v. Clute*, 4 Paige Ch. (N. Y.) 384; *Toll Bridge Co. v. Osborn*, 35 Conn. 7. But shares in a turnpike company were held realty in *Welles v. Cowles*, 2 Conn. 567; and in a water company, in *Drybutter v. Bartholomew*, 2 P. Wms. 127. And see *Price v. Price's Heirs*, 6 Dana (Ky.) 107; *Codman v. Winslow*, 10 Mass. 146.

³ *McLain v. Pate* (Tex. Civ. App.) 124 S. W. 718; *Grosbeck v. Bodman*, 73 Tex. 287, 11 S. W. 322.

⁴ *Collins v. Durward*, 4 Tex. Civ. App. 339, 342, 23 S. W. 561.

CHAPTER III

FIXTURES

14. Defined.
15. Immovable and Movable Fixtures.
16. Rules for Determining Fixtures.
17. Time of Removal.
18. Severance of Fixtures.

FIXTURES DEFINED

14. A fixture is a chattel that has been annexed to a building or to land, under such circumstances as to cause it to lose its original character of personal property, and to become a part of the realty.

IMMOVABLE AND MOVABLE FIXTURES

15. By a confusion of terms, fixtures are sometimes said to be immovable or movable. Immovable fixtures are fixtures proper, as defined above. Movable fixtures are personal chattels annexed to lands or buildings, but which do not become a part of the realty. Such so-called fixtures include trade, agricultural, and domestic fixtures.

Speaking literally, a fixture is anything that is fixed or attached to some other thing. In the law of real property, buildings erected upon land and chattels annexed to land or to buildings on the land are called "fixtures."¹ When the annexation is made by the owner in fee of the land, such fixtures become real property.² They may, however, again become personalty by being actually severed from the land with such intent.³ Where, however, the annexation is made by the tenant of an estate less than a fee, it is not always easy to determine whether such articles become realty or remain personalty. Things annexed by a tenant some-

¹ *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Capen v. Peckham*, 35 Conn. 88; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Peirce v. Goddard*, 22 Pick. (Mass.) 559, 33 Am. Dec. 764. And see *Ferard*, *Fixt.* (2d Am. Ed.) 2; *Grady*, *Fixt.* 1.

² *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173; *Dooley v. Crist*, 25 Ill. 551; *Sampson v. Cotton Mills*, 64 Fed. 939. But see *Jenkins v. McCurdy*, 48 Wis. 630, 4 N. W. 807, 33 Am. Rep. 841. And cf. *Green, J.*, in *Stevens v. Railway Co.*, 31 Barb. (N. Y.) 597.

³ *Bostwick v. Leach*, 3 Day (Conn.) 476; *Lee v. Gaskell*, 1 Q. B. Div. 700.

times become realty, and sometimes do not. The question is of importance, because, if the chattels become realty, they cannot be lawfully severed or removed by the tenant, while if they remain personalty, notwithstanding their annexation, they may be removed by the tenant before the expiration of his term. There is great conflict in the cases over the question of what constitutes fixtures. This conflict is due largely to a loose use of the word "fixtures." The term is used in three senses: First, as meaning simply chattels which are annexed to realty, irrespective of whether they may be removed or not; second, as meaning irremovable fixtures; and, third, as meaning removable fixtures.⁴ The resulting confusion of the cases is natural. Some writers have tried to avoid this confusion by calling those fixtures, which cannot be lawfully removed "real fixtures," because they have become realty, and calling fixtures which can be lawfully removed "chattel fixtures," because they remain personal property.⁵

RULES FOR DETERMINING FIXTURES

16. The rules for determining fixtures are not in harmony. Speaking generally, however, whether or not articles affixed to the land are fixtures may be determined in the following ways:
 1. By express contract of the parties concerned.
 2. In some states by statutory provisions.
 3. By the implied intention of the parties, as gathered from the following facts:
 - (a) The mode or manner of the annexation.
 - (b) The purpose of the annexation.
 - (c) The adaptation of the article to the realty.
 - (d) The possibility of removing the article without serious injury.
 4. By the character or relation of the party making the annexation, whether, for example, the owner in fee, tenant for life, or tenant for a term less than life.
 5. By the nature of the chattels annexed, whether, for example, in the case of landlord and tenant, the articles are used for trade, agricultural, or domestic purposes.

⁴ Ewell, *Fixt.* 1; Tyler, *Fixt.* 35; Hopkins, *Real Prop.* p. 11.

⁵ See *Voorhees v. McGinnis*, 48 N. Y. 278; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. For a discussion of the general nature of fixtures, see *CANNING v. OWEN*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858, *Burdick Cas. Real Property*.

Express Contract

Although there is great conflict as to the rules governing the tests to be applied for the purpose of determining the question of the intention of the parties, where the intention is merely one of implication,⁶ nevertheless, the parties between whom the question is likely to arise may settle all doubts in advance by an express contract.⁷ This is, of course, an instance of expressed intention. For example, an agreement may be made between a landlord and his tenant that any or all articles annexed to the land or building may be removed by the tenant as his personal property. Such an agreement made before annexation may be made by parol,⁸ but after the chattel is annexed and made a part of the realty, some cases hold that such a parol agreement is invalid,⁹ although there is other authority to the contrary.¹⁰

Statutory Regulation

In some states the question of fixtures has been made a matter of legislative enactment, and certain classes of annexations are

⁶ See *infra*.

⁷ *Hines v. Ament*, 43 Mo. 298; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Mott v. Palmer*, 1 N. Y. 564. See *Ex parte Ames*, 1 Low. 561, Fed. Cas. No. 323; *Aldrich v. Husband*, 131 Mass. 480; *Taft v. Stetson*, 117 Mass. 471; *Hunt v. Iron Co.*, 97 Mass. 279; *Lake Superior Ship Canal, Ry. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061, 30 Am. St. Rep. 488; *Holly Mfg. Co. v. Water Co.*, 48 Fed. 879; *New Chester Water Co. v. Manufacturing Co.*, 3 C. C. A. 399, 53 Fed. 19; *Advance Coal Co. v. Miller*, 4 Pa. Dist. R. 352; *White's Appeal*, 10 Pa. 252; *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. 848.

⁸ See *Woods v. Bank*, 10 Cal. App. 93, 106 Pac. 730; *Barnes v. Hosmer*, 196 Mass. 323, 82 N. E. 27; *Laclede Gaslight Co. v. Consumers' Ass'n*, 127 Mo. App. 442, 106 S. W. 91; *People ex rel. Interborough Rapid Transit Co. v. O'Donnel*, 202 N. Y. 313, 95 N. E. 762; *Condit v. Goodwin*, 44 Misc. Rep. 312, 89 N. Y. Supp. 827; *Bank v. Lewis*, 12 Brit. Col. 398; *Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn*, 132 App. Div. 442, 117 N. Y. Supp. 10; *Badger v. Manufacturing Co.*, 70 Ill. 302; *Marshall v. Bachelder*, 47 Kan. 442, 28 Pac. 168; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Hartwell v. Kelly*, 117 Mass. 235; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Western Union Tel. Co. v. Railroad Co.*, 11 Fed. 1, 3 McCrary, 130; *Stephens v. Ely*, 14 App. Div. 202, 43 N. Y. Supp. 762.

⁹ *Equitable Guarantee & Trust Co. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961; *Johnston v. Trust Co.*, 129 Ala. 515, 30 South. 15, 87 Am. St. Rep. 75; *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Lacustrine Fertilizer Co. v. Fertilizer Co.*, 82 N. Y. 476.

¹⁰ *Parker v. Blount County*, 148 Ala. 275, 41 South. 923; *Cronkhite v. Bank*, 14 Ont. L. R. 270, 8 Ont. W. R. 18, 9 Ont. W. R. 326; *Hines v. Ament*, 43 Mo. 298; *Harlan v. Harlan*, 20 Pa. 303.

by statute declared to be fixtures,¹¹ and others to be removable chattels.¹² This arises particularly in the case of landlord and tenant, and a statute may provide that a tenant may remove, at any time during his term, anything affixed by him to the premises for the purpose of trade, manufacturing, ornament, or domestic use, unless such removal would result in serious injury to the realty.¹³

Presumed Intention

The most important rule of determining whether or not certain property is a fixture is the presumed intention of the parties. The character of a fixture is largely a question of fact, and few general rules can be laid down for determining what personal property in the nature of fixtures is removable.¹⁴ The tendency, however, of modern cases is to make the intention with which a fixture is annexed the test of its character,¹⁵ and to regard the circumstances of the annexation as evidence of that intention.¹⁶ It is not, in other words, a secret intention which controls, but the intention which the law presumes from the acts and situation of the party at the time of making the annexation.¹⁷ The facts that are of especial value as evidence are (1) the actual annexation of the article to the realty; (2) the immediate object or purpose of the annexation; (3) the adaptability of the article for permanent or mere temporary use; (4) and whether or not the article can be removed without material injury to the property

¹¹ See, in general, the statutes of California, Idaho, Louisiana, Montana, North Dakota, Oklahoma, and South Dakota. In these states there are statutory definitions of fixtures. See *Morton Trust Co. v. Salt Co.*, 149 Fed. 540, construing Louisiana statute.

¹² See, for example, *Shafter Estate Co. v. Alvord*, 2 Cal. App. 602, 84 Pac. 279, construing Civ. Code Cal. § 1019.

¹³ See, for example, *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669; Rev. Laws Mass. 1902, c. 134, § 10; Code N. D. 1899, § 3492; *Willson's Rev. & Ann. St. Okl.* 1903, § 4183.

¹⁴ *Ewell*, Fixt. 9.

¹⁵ *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527; *Reynolds v. New York Security & Trust Co.*, 88 Hun, 569, 34 N. Y. Supp. 890; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Meig's Appeal*, 62 Pa. 28, 1 Am. Rep. 372; *Hill v. Wentworth*, 28 Vt. 428; *Jones v. Ramsey*, 3 Ill. App. 303; *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243; *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511; *Copp v. Swift* (Tex. Civ. App.) 26 S. W. 438; *McDavid v. Wood*, 5 Heisk. (Tenn.) 95; *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894; *Strickland v. Parker*, 54 Me. 263; *Capen v. Peckham*, 35 Conn. 88; *Linahan v. Barr*, 41 Conn. 471; *Equitable Trust Co. v. Christ*, 47 Fed. 756.

¹⁶ *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

¹⁷ *Rogers v. Brokaw*, 25 N. J. Eq. 496. Cf. *Linahan v. Barr*, 41 Conn. 471.

to which it is annexed. It is not by the consideration of any one of these facts alone that the nature of the annexation is to be determined, but rather by a united consideration of all of them.

Mode or Manner of Annexation

In earlier times much importance was apparently attached to the mode or manner in which the article was annexed to the realty. As a matter of fact, this is of but little value. The exact length of the screws or nails used is immaterial.¹⁸ "Whether the Pyramids of Egypt or Cleopatra's Needle is real or personal property does not depend upon the results of an inquiry by the antiquarians whether they were originally made to adhere to their foundations by wafers, or sealing wax, or handfuls of cement."¹⁹ The manner, however, in which a fixture is attached or annexed to the realty may be indicative of the intention with which it was placed there. It tends to show whether it was intended to be permanent or to be subsequently removed,²⁰ and some cases even make the manner of fastening a thing the test of its character as a fixture.²¹ There may be, however, an attachment of a thing to the land by its weight alone;²² as, for instance, a heavy statue on a pedestal,²³ a dry stone wall,²⁴ or other things made a part of the architectural scheme of a building.

Purpose of Annexation

Of more importance, however, than the manner or mode of annexation, is the object or purpose for which the annexation was made. This test is often applied in the case of "trade fixtures."²⁵ A trade or a business is personal in its nature, and articles affixed

¹⁸ Ward v. Taylor, [1901] 1 Ch. 523, 531, O. A.

¹⁹ SNEDEKER v. WARRING, 12 N. Y. 170, Burdick Cas. Real Property.

²⁰ Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Rogers v. Brokaw, 25 N. J. Eq. 496; Redlon v. Barker, 4 Kan. 445, 96 Am. Dec. 180; O'Donnell v. Hitchcock, 118 Mass. 401; Pennybecker v. McDougal, 48 Cal. 160; Cook v. Whiting, 16 Ill. 480; Sayles v. Purifying Co., 62 Hun, 618, 16 N. Y. Supp. 555; Jones v. Bull, 85 Tex. 136, 19 S. W. 1031; Kendall v. Hathaway, 67 Vt. 122, 30 Atl. 859; Chase v. Box Co., 11 Wash. 377, 39 Pac. 639; Roseville Alta Min. Co. v. Mining Co., 15 Colo. 29, 29 Pac. 920, 22 Am. St. Rep. 373; Strickland v. Parker, 54 Me. 263.

²¹ Rex v. Otley, 1 Barn. & Adol. 161; Wansbrough v. Maton, 4 Adol. & E. 884; Ex parte Astbury, 4 Ch. App. 630; Wadleigh v. Janvrin, 41 N. H. 503; 77 Am. Dec. 780; Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160. But see Landon v. Platt, 34 Conn. 517.

²² Smith v. Blake, 96 Mich. 542, 55 N. W. 978; Miller v. Waddingham, 3 Cal. Unrep. Cas. 375, 25 Pac. 688, 4 L. R. A. 510.

²³ SNEDEKER v. WARRING, 12 N. Y. 170, Burdick Cas. Real Property; Oakland Cemetery Co. v. Bancroft, 161 Pa. 197, 28 Atl. 1021.

²⁴ Ewell, Fixt. 31. Cf. Noble v. Sylvester, 42 Vt. 146.

²⁵ Infra.

to the premises for the purposes of trade retain, as a rule, their personal character and do not become a part of the realty.²⁶ For example, where nursery stock is planted in the ground by a lessee, the object and purpose of the annexation make manifest the intention of the tenant.

Adaptation for Use with the Realty

Another circumstance showing the intention with which a chattel is annexed is its adaptation for use with the realty.²⁷ Some cases even regard this a decisive test.²⁸ The principal application of this rule is to heavy machinery, engines, and boilers in mills and factories. Such articles are generally held to be fixtures, since they are adapted for the permanent use of the realty, and without them the business could not be carried on.²⁹ There are many exceptions, however, in the case of trade fixtures, and the rule is not usually extended to loose and movable machinery.³⁰ Such things, however, as duplicate rolls in an iron rolling mill have been held fixtures, because of their adaptation for use with the mill.³¹ The same has been held of pans in salt works,³² and shelves, drawers, and counters in a retail store.³³ The latter articles, how-

²⁶ Fortman v. Geopper, 14 Ohio St. 566.

²⁷ Burnside v. Twitchell, 43 N. H. 394; Murdock v. Gifford, 18 N. Y. 28; Smith Paper Co. v. Servin, 130 Mass. 511; Ferris v. Quimby, 41 Mich. 202, 2 N. W. 9; Curran v. Smith, 37 Ill. App. 69; Wade v. Brewing Co., 10 Wash. 284, 38 Pac. 1009; Parsons v. Copeland, 38 Me. 537; MUELLER v. RAILROAD CO., 111 Wis. 300, 87 N. W. 239, Burdick Cas. Real Property.

²⁸ Green v. Phillips, 26 Grat. (Va.) 752, 21 Am. Rep. 323; Morris' Appeal, 88 Pa. 368; Huston v. Clark, 162 Pa. 435, 29 Atl. 866, 868; Shelton v. Ficklin, 32 Grat. (Va.) 727; Brennan v. Whitaker, 15 Ohio St. 446; Parsons v. Copeland, 38 Me. 537.

²⁹ Walker v. Sherman, 20 Wend. (N. Y.) 636; Winslow v. Insurance Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Voorhees v. McGinnis, 48 N. Y. 278; Christian v. Dripps, 28 Pa. 271; Hill v. Hill, 43 Pa. 521; Lafin v. Griffiths, 35 Barb. (N. Y.) 58; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Winslow v. Insurance Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Curran v. Smith, 37 Ill. App. 69; Keeler v. Keeler, 31 N. J. Eq. 181; Rice v. Adams, 4 Harr. (Del.) 332; Trull v. Fuller, 28 Me. 545; Davenport v. Shants, 43 Vt. 546; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Citizens' Bank v. Knapp, 22 La. Ann. 117.

³⁰ McKim v. Mason, 3 Md. Ch. 186; Cherry v. Arthur, 5 Wash. 787, 32 Pac. 744. See Burnside v. Twitchell, 43 N. H. 390.

³¹ Pyle v. Pennock, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; Voorhis v. Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490. And see Keating Implement Co. v. Power Co., 74 Tex. 605, 12 S. W. 489; McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894.

³² Lawton v. Salmon, 1 H. Bl. 259, note.

³³ Tabor v. Robinson, 36 Barb. (N. Y.) 483. But see, as to an ice chest, Park v. Baker, 7 Allen (Mass.) 78, 83 Am. Dec. 668.

ever, may constitute mere trade fixtures.³⁴ Doors and windows are an essential part of a building, intended for permanent use, and are, consequently, fixtures. Likewise, keys to a house and storm windows, though not at the time fastened to the house, will pass with a conveyance of the realty.³⁵ The same has been held as to saws and belts in a factory.³⁶ As to whether railway cars are real or personal property the cases are conflicting, but the tendency of the later cases is to consider them personalty,³⁷ and there are constitutional provisions to this effect in some states.³⁸ Some cases, however, apply the test of adaptability to the rolling stock of railroads, holding such property realty.³⁹

Injury to the Realty

When an article has been annexed to a building or land in such a way that it cannot be removed without causing serious damage to the premises, it tends to show that the party annexing it intended that it should be a permanent addition.⁴⁰ Trifling damage is not considered, but an actual injury to the building or land.

Party Making the Annexation

In the consideration of the law of fixtures, the character or the relation of the party making the annexation is the most important fact of all for the purpose of determining the probable intention

³⁴ *Infra*.

³⁵ *Ewell, Fixt.* 33. See, also, *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

³⁶ *Burnside v. Twitchell*, 43 N. H. 390; *Farrar v. Stackpole*, 6 Greenl. (Me.) 154, 19 Am. Dec. 201.

³⁷ See *Williamson v. Railway Co.*, 25 N. J. Eq. 13; *Stevens v. Railway Co.*, 31 Barb. (N. Y.) 590; *Beardsley v. Bank*, 31 Barb. (N. Y.) 619; *Hoyle v. Railway Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Chicago & N. W. Ry. v. Ft. Howard*, 21 Wis. 45, 91 Am. Dec. 458; *Coe v. Railway Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Midland Ry. Co. v. State*, 11 Ind. App. 433, 38 N. E. 57; *Hoyle v. Railway Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

³⁸ 1 Stim. Am. St. Law, § 468. There are provisions, however, to the contrary in other states. *Id.* § 2100.

³⁹ For cases holding them realty, see *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Palmer v. Forbes*, 23 Ill. 301; *Titus v. Mabee*, 25 Ill. 257; *Farmers' Loan & Trust Co. v. Railroad Co.*, 3 Dill. 412, Fed. Cas. No. 4,669; *Baker v. Atherton*, 15 Pa. Co. Ct. R. 471.

⁴⁰ *Bewick v. Fletcher*, 41 Mich. 625, 3 N. W. 162, 32 Am. Rep. 170; *Murdock v. Gifford*, 18 N. Y. 28; *Ford v. Cobb*, 20 N. Y. 344; *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Swift v. Thompson*, 9 Conn. 63, 21 Am. Dec. 718; *Hunt v. Mullanphy*, 1 Mo. 508, 14 Am. Dec. 300; *Lanphere v. Lowe*, 3 Neb. 131; *Fullam v. Stearns*, 30 Vt. 443; *Bartlett v. Wood*, 32 Vt. 372. But see *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Morrison v. Berry*, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446; *Quinby v. Paper Co.*, 24 N. J. Eq. 260; *Degraffenreid v. Scruggs*, 4 Humph. (Tenn.) 451, 40 Am. Dec. 658; *Thresher v. Water Works*, 2 Barn. & C. 608.

with which the chattel was attached. Questions concerning fixtures usually arise between such persons as landlord and tenant, grantor and grantee, an heir or devisee and the personal representatives of the deceased, a remainderman and the life tenant, and between a mortgagor and mortgagee. Any other persons between whom the question arises may be shown to stand in a like relation to each other as those in one of these classes.⁴¹ The rules governing fixtures, especially with reference to the right of removal, are not, however, the same in all these relations. Particularly, in the case of tenants, the rules have been considerably relaxed. It is obvious that one having only a short term of years in certain land will be less likely to make annexations with the intention of having them become permanent than if his interest was that of an owner in fee simple. Therefore a tenant is accorded considerable freedom in removing annexed chattels, and the tendency of modern cases seems to be towards a greater liberality in his favor, because the presumption is very strong that he made the annexation in order to secure a more complete enjoyment during his term, and not with the intention of benefiting his landlord.⁴² Persons having life estates are, in many cases, tenants in dower or by curtesy, and, therefore, often closely related to one entitled to the next estate. It is accordingly not unnatural, in such cases, to presume an intention to make permanent annexations for the benefit of the estate.⁴³ The same reasons hold good in the case

⁴¹ For other relations, see *Raymond v. White*, 7 Cow. (N. Y.) 319; *Heffner v. Lewis*, 73 Pa. 302; *Havens v. Electric Light Co.* (Sup.) 17 N. Y. Supp. 580; *Parsons v. Copeland*, 38 Me. 537; *Bigler v. Bank*, 26 Hun (N. Y.) 520; *Cresson v. Stout*, 17 Johns. (N. Y.) 116; *Gale v. Ward*, 14 Mass. 352; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527, 8 Am. Dec. 373; *Goddard v. Chase*, 7 Mass. 432; *Tudor Iron Works v. Hitt*, 49 Mo. App. 472.

⁴² *Youngblood v. Eubank*, 68 Ga. 630; *Thomas v. Crout*, 5 Bush (Ky.) 37; *Ambs v. Hill*, 10 Mo. App. 108; *Osgood v. Howard*, 6 Greenl. (Me.) 452, 20 Am. Dec. 322. Cf. *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292. For cases of trade fixtures, see *Raymond v. White*, 7 Cow. (N. Y.) 319; *Andrews v. Button Co.*, 132 N. Y. 348, 30 N. E. 831; *Conrad v. Mining Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Hayes v. Mining Co.*, 2 Colo. 273; *Powell v. Bergner*, 47 Ill. App. 33; *Berger v. Hoerner*, 36 Ill. App. 360; *Lang v. Cox*, 40 Ind. 142; *Western N. C. Ry. Co. v. Deal*, 90 N. C. 110; *Cubbins v. Ayres*, 4 Lea (Tenn.) 329; *Brown v. Power Co.*, 55 Fed. 229. Domestic fixtures. *Jenkins v. Gething*, 2 Johns. & H. 520; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290.

⁴³ *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Cannon v. Hare*, 1 Tenn. Ch. 22; *Cave v. Cave*, 2 Vern. 508; *Lawton v. Salmon*, 1 H. Bl. 260, note; *McCullough v. Irvine's Ex'rs*, 13 Pa. 438; *Glidden v. Bennett*, 43 N. H. 306; *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87; *Lord Ellenborough, C. J.*, in *Elwes v. Maw*, 3 East, 51. Some erections are, however, held removable. *Lawton v. Lawton*, 3 Atk. 12; *Dudley v. Warde*, Amb. 113;

of a tenant in tail. The assignees of life tenants and of tenants in tail are in the same situation, and are therefore accorded no greater freedom in removing fixtures.⁴⁴ On the same principle, when a question of fixtures arises between the heir and the personal representatives of an owner in fee, the presumptions are all in favor of the former,⁴⁵ and the same is true between vendee and vendor,⁴⁶ or mortgagee and mortgagor,⁴⁷ because a tenant in fee is not likely to make annexations with any intention of removing them, but rather for the benefit of his property. It is not true, however, that all chattels pass with the realty, although annexed

Overman v. Sasser, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. So far as a tenant for life is individually concerned, "his estate lasts forever. It is only terminated by his death. He can have no personal interest in the removal of fixtures at the end of his term. The only interest he can possibly take in the matter is the welfare of his heirs. Whatever addition he makes to the permanent betterment of the estate, he will be permitted to enjoy all his life, and therefore there is the same reason for finding that he intended such betterment to last and continue through his term as there is in case of the owner in fee." *Thomp. Fixt. & Easem.* 31.

⁴⁴ *White v. Arndt*, 1 Whart. (Pa.) 91; *Haffick v. Stober*, 11 Ohio St. 482; *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87; *Elam v. Parkhill*, 60 Tex. 581.

⁴⁵ *Henry's Case*, Y. B. 20 Hen. VII, p. 13, pl. 24; *Anon.*, Y. B. 21 Hen. VII, p. 26, pl. 4; *Lawton v. Salmon*, 1 H. Bl. 259, note; *Fisher v. Dixon*, 12 Clark & F. 312; *Bain v. Brand*, 1 App. Cas. 762; *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *Kinsell v. Billings*, 35 Iowa, 154; *McDavid v. Wood*, 5 Heisk. (Tenn.) 95. So of an annexation by a tenant in common. *Baldwin v. Breed*, 16 Conn. 60. *Contra*, *Squier v. Mayer*, *Freem. Ch.* 249.

⁴⁶ *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Tabor v. Robinson*, 36 Barb. (N. Y.) 483; *Voorhees v. McGinnis*, 48 N. Y. 278; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305; *Cohen v. Kyler*, 27 Mo. 122; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286; *Pea v. Pea*, 35 Ind. 387. But see *Leonard v. Clough*, 59 Hun, 627, 14 N. Y. Supp. 339. So one making erections on land which he holds under contract to purchase cannot remove them if he fails to carry out the contract. *McLaughlin v. Nash*, 14 Allen (Mass.) 136, 92 Am. Dec. 741; *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Miller v. Waddingham*, 3 Cal. Unrep. Cas. 375, 25 Pac. 688, 11 L. R. A. 510; *Hemenway v. Cutler*, 51 Me. 407.

⁴⁷ *Winslow v. Insurance Co.*, 4 Metc. (Mass.) 306, 38 Am. Dec. 368; *Ex parte Astbury*, 4 Ch. App. 630; *Climie v. Wood*, L. R. 4 Exch. 328; *Clary v. Owen*, 15 Gray (Mass.) 522; *Brennan v. Whitaker*, 15 Ohio St. 446; *Davenport v. Shants*, 43 Vt. 546; *Burnside v. Twitchell*, 43 N. H. 390; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Woodham v. Bank*, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622. As to machinery annexed for trade purposes, see

by one owning the fee. For instance, carpets, pictures, and gas fixtures retain their character as personal property.⁴⁸ When chattels are annexed to the realty by a stranger without authority, they become the property of the owner of the soil.⁴⁹ If put there, however, in good faith, the enhanced value of the land may be set off by the person making the annexation in an action against him for rent.⁵⁰ The same rules apply to trees set out and crops planted by one not the owner.⁵¹

Nature of the Chattels Annexed—Trade Fixtures

Chattels placed by a tenant upon leased premises for the purpose of carrying on his business or trade are generally, as a rule, regarded as personal property. Annexations of this kind are called "trade fixtures," and their removal is permitted with considerable freedom. Showcases,⁵² counters and shelves,⁵³ engines,⁵⁴

Helm v. Gilroy, 20 Or. 517, 26 Pac. 851; Hathaway v. Insurance Co., 58 Hun, 602, 11 N. Y. Supp. 413; Calumet Iron & Steel Co. v. Lathrop, 36 Ill. App. 249; Phelan v. Boyd (Tex. Sup.) 14 S. W. 290. But for trade fixtures held removable, see Rogers v. Brokaw, 25 N. J. Eq. 496; Johnson v. Mosher, 82 Iowa, 29, 47 N. W. 996. Cf. Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069. The mortgagee is entitled to fixtures erected after the execution of the mortgage as against an assignee of the mortgagor. Walmsley v. Milne, 7 C. B. (N. S.) 115; Holland v. Hodgson, L. R. 7 C. P. 328; Winslow v. Insurance Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Cooper v. Harvey, 62 Hun, 618, 16 N. Y. Supp. 660; Snedeker v. Warring, 12 N. Y. 170; Kloess v. Katt, 40 Ill. App. 99; Seedhouse v. Broward, 34 Fla. 509, 16 South. 425; Sands v. Pfeiffer, 10 Cal. 258.

⁴⁸ Jarechi v. Society, 79 Pa. 403, 21 Am. Rep. 78; McKeage v. Insurance Co., 81 N. Y. 38, 37 Am. Rep. 471; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353. Cf., however, Central Trust & Safe Deposit Co. v. Hotel Co., 26 Wkly. Law Bul. (Ohio) 149.

⁴⁹ Madigan v. McCarthy, 108 Mass. 376, 11 Am. Rep. 371; Inhabitants of First Parish in Sudbury v. Jones, 8 Cush. (Mass.) 184; Huebschmann v. McHenry, 29 Wis. 655. Otherwise, when the owner consents. Fuller v. Tabor, 39 Me. 519; Gregg v. Railway Co., 48 Mo. App. 494; Merchants' Nat. Bank of Crookston v. Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491. But see Histe v. Buckley, 8 Ohio Cir. Ct. R. 470.

⁵⁰ Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983; Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347. And see Oregon Railway & Nav. Co. v. Mosier, 14 Or. 519, 13 Pac. 300, 58 Am. Rep. 321.

⁵¹ Simpkins v. Rogers, 15 Ill. 397; Mitchell v. Billingsley, 17 Ala. 391; Boyer v. Williams, 5 Mo. 335, 32 Am. Dec. 324.

⁵² McCall v. Walter, 71 Ga. 287.

⁵³ Guthrie v. Jones, 108 Mass. 191. But see O'Brien v. Kusterer, 27 Mich. 289.

⁵⁴ Cook v. Transportation Co., 1 Denio (N. Y.) 91; Lemar v. Miles, 4 Watts (Pa.) 330; Robertson v. Corsett, 39 Mich. 777; Crane v. Brigham, 11 N. J. Eq. 29.

boilers,⁵⁵ machinery,⁵⁶ tanks in a distillery,⁵⁷ a bowling alley,⁵⁸ bar fixtures, and even buildings erected upon leased land,⁵⁹ have been held removable as trade fixtures. Various reasons have been laid down by the courts for these exceptions to the general rule. The reason usually assigned is that from the temporary nature of the tenure it is not to be presumed that one engaged in trade or manufacture will attach valuable chattels to the realty with the intention of making them permanent additions thereto.⁶⁰ It is also said that the right to remove such property does not arise from any regard of intention, but that it is an indulgence shown by the law, by way of exception to the general rule, for the purpose of promoting trade.⁶¹ Within the principle governing trade fixtures fall likewise certain mixed cases, where the annexation is made for purposes of trade and partly to secure the enjoyment of the demised estate, as in the case of engines erected in a colliery⁶² or brickyard, or trees set out in a nursery;⁶³ or it may be that the fixtures are partly for domestic use and convenience and partly for purposes of trade.⁶⁴

Agricultural Fixtures

Closely allied to, and sometimes included within, the term of trade fixtures, are agricultural fixtures. These are annexations

⁵⁵ *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33; *Conrad v. Mining Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Merritt v. Judd*, 14 Cal. 60; *Kelsey v. Durkee*, 33 Barb. (N. Y.) 410; *Hayes v. Mining Co.*, 2 Colo. 273.

⁵⁶ *Holbrook v. Chamberlain*, 116 Mass. 155, 17 Am. Rep. 146; *Moore v. Smith*, 24 Ill. 512.

⁵⁷ *Chidley v. Churchwardens of West Ham*, 32 Law T. (N. S.) 486. So vats of a soap boiler, but not partitions, etc., which were put up to complete the house, may be taken on execution. *Poole's Case*, 1 Salk. 368.

⁵⁸ *Hanrahan v. O'Reilly*, 102 Mass. 201.

⁵⁹ *Beers v. St. John*, 16 Conn. 322; *Walton v. Wray*, 54 Iowa, 531, 6 N. W. 742; *Kissam v. Barclay*, 17 Abb. Prac. (N. Y.) 360; *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510; *West North Carolina R. Co. v. Deal*, 90 N. C. 110; *Security Loan & Trust Co. v. Manufacturing Co.*, 99 Cal. 636, 34 Pac. 321. But buildings, though erected solely for purposes of trade, may be of so substantial a character that they are irremovable. *Whitehead v. Bennett*, 27 Law J. Ch. 474. And cf. *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791.

⁶⁰ *Field v. Morris*, 95 Ark. 268, 275, 129 S. W. 543, 545; *Mining Co. v. Bishop*, 35 Can. S. Ct. 539; *McDavid v. Wood*, 5 Heisk. (Tenn.) 95; *Boyd v. Douglass*, 72 Vt. 449, 48 Atl. 638.

⁶¹ *Treadway v. Sharon*, 7 Nev. 37.

⁶² *Lawton v. Lawton*, 3 Atk. 12.

⁶³ *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Miller v. Baker*, 1 Metc. (Mass.) 27.

⁶⁴ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, 7 L. Ed. 374, holding that a dwelling house erected by a dairyman and used as accessory to that business was removable. See, also, *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

which are used in farming, and consist principally of barns, sheds,⁶⁵ and farm machinery, such as cotton gins.⁶⁶ In England agricultural fixtures are for the most part irremovable,⁶⁷ but the rule is generally otherwise in the United States,⁶⁸ although it is not as liberal as in the case of trade fixtures proper.⁶⁹ Manure made on a farm becomes a part of the realty, and cannot be lawfully treated as personalty by one not the owner of the fee,⁷⁰ except when it is made from material not obtained on the premises, as in the case of a livery stable.⁷¹ Manure usually passes with the freehold to a vendee of the land.⁷² It cannot, moreover, be taken on execution against the personalty of the owner of the fee, unless he has made it personal property by severance.⁷³

Domestic Fixtures

Where the owner of real property adds articles to the premises for his greater convenience or enjoyment of the same, they will not, as a rule, pass to a grantee by deed, unless the evidence shows

⁶⁵ *Elwes v. Maw*, 3 East, 38.

⁶⁶ *McJunkin v. Dupree*, 44 Tex. 500. But see *Bond v. Coke*, 71 N. C. 97.

⁶⁷ See *Elwes v. Maw*, 3 East, 38, where an agricultural tenant, having erected several outbuildings of brick and mortar built into the ground was not permitted to remove them. Trees and plants, however, forming the stock in trade of nurserymen and gardeners, are removable as trade fixtures. *Oakley v. Monck*, L. R. 1 Exch. 159, 4 H. & C. 251.

⁶⁸ *Wing v. Gray*, 36 Vt. 261; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238.

⁶⁹ *Tyler*, Fixt. 271; *Perkins v. Swank*, 43 Miss. 349; *Leland v. Gassett*, 17 Vt. 403.

⁷⁰ *Perry v. Carr*, 44 N. H. 118; *Hill v. De Rochemont*, 48 N. H. 87; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169. Manure in a heap is personalty, but when scattered upon the ground it becomes part of the realty. *Yearworth v. Pierce*, Aleyn, 31; *Ruckman v. Outwater*, 28 N. J. Law, 581; *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619; *Collier v. Jenks*, 19 R. I. 137, 32 Atl. 208, 61 Am. St. Rep. 741. And see *Lassell v. Reed*, 6 Greenl. (Me.) 222. It has been held, however, that manure may be taken on execution against a tenant at will without incurring liability to the landlord. *Staples v. Emery*, 7 Greenl. (Me.) 201.

⁷¹ *Carroll v. Newton*, 17 How. Prac. (N. Y.) 189; *Plumer v. Plumer*, 30 N. H. 558; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611. So manure made after the sale of a farm, where the vendor retains possession during the winter, but carries on no farming operations, may be sold by him. *Needham v. Allison*, 24 N. H. 355. But see *Lassell v. Reed*, 6 Greenl. (Me.) 222. Cf. *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550.

⁷² *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393. Contra, *Ruckman v. Outwater*, 28 N. J. Law, 581. It may be reserved by a separate agreement. *Strong v. Doyle*, 110 Mass. 92.

⁷³ *Sawyer v. Twiss*, 26 N. H. 345.

that such additions were intended to be permanent.⁷⁴ Such annexations are generally classed as domestic fixtures, and where the relation of landlord and tenant exists, such articles added to the premises by the tenant are generally removable by the tenant as in case of trade fixtures.⁷⁵ Domestic fixtures include such things as mirrors, although attached with screws and spikes,⁷⁶ gas ranges,⁷⁷ stoves,⁷⁸ washtubs fastened to the house,⁷⁹ gas fixtures,⁸⁰ chimney-pieces,⁸¹ marble shelves,⁸² and sheds.⁸³ In the annexation, however, of domestic fixtures, it is held that there is a stronger presumption of an intention to make them permanent additions to the realty than in the case of either trade or agricultural fixtures, and consequently less freedom of removal.⁸⁴

⁷⁴ *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669; *Hunt v. Bullock*, 23 Ill. 320; *Leonard v. Stickney*, 131 Mass. 541; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353.

⁷⁵ *Wolff v. Sampson*, 123 Ga. 400, 51 S. E. 335; *Raymond v. Strickland*, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69; *McLain Inv. Co. v. Cunningham*, 113 Mo. App. 519, 87 S. W. 605; *Webber v. Brewing Co.*, 123 App. Div. 465, 108 N. Y. Supp. 251; *Excelsior Brewing Co. v. Smith*, 125 App. Div. 668, 110 N. Y. Supp. 8.

⁷⁶ *Cranston v. Beck*, 70 N. J. Law, 145, 56 Atl. 121, 1 Ann. Cas. 686.

⁷⁷ See *Cosgrove v. Troescher*, 62 App. Div. 123, 70 N. Y. Supp. 764, holding that gas ranges connected to the realty by a gas pipe and flue do not pass by a mortgage.

⁷⁸ *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. *Grates. Aldine Manuf'g Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290. And steam valves and radiators. *National Bank of Catsauqua v. North*, 160 Pa. 303, 28 Atl. 694.

⁷⁹ *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64. See, also, *Kirchman v. Lapp* (Super. Buff.) 19 N. Y. Supp. 831.

⁸⁰ *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am. Dec. 622; *Kirchman v. Lapp* (Super. Buff.) 19 N. Y. Supp. 831; *Manning v. Ogden*, 70 Hun, 399, 24 N. Y. Supp. 70. Contra, *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 357, 83 Am. Dec. 475.

⁸¹ *Winn v. Ingilby*, 5 Barn. & Ald. 625. But see *Spinney v. Barbe*, 43 Ill. App. 585. So pictures and glasses put up instead of wainscot were given to the heir. *Cave v. Cave*, 2 Vern. 508. And see *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Cahn v. Hewsey*, 8 Misc. Rep. 384, 29 N. Y. Supp. 1107.

⁸² *Weston v. Weston*, 102 Mass. 514. And see *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187.

⁸³ *Krouse v. Ross*, 1 Cranch, C. C. 368, Fed. Cas. No. 7,939.

⁸⁴ See *Buckland v. Butterfield*, 2 Brod. & B. 54 (where a conservatory and pinery, erected for ornament and attached to the dwelling house, were held part of the realty); *Jenkins v. Gething*, 2 Johns. & H. 520; *State v. Elliot*, 11 N. H. 540. But in *Grymes v. Boweren*, 6 Bing. 437, a tenant was permitted to remove a pump erected for domestic use, though quite firmly annexed to the freehold.

TIME OF REMOVAL

17. In the case of a tenant's removable fixtures, the weight of authority is that, where the tenant's interest is of definite duration, the removal must be before its termination. Where the interest is of indefinite duration, the removal may be within a reasonable time after its termination.

Where a person's title to so-called fixtures is absolute, either by agreement or otherwise, some cases hold that the owner of the fixtures, as distinguished from the owner of the land, may recover them until barred by the statute of limitations.⁸⁵ Generally, however, in the case of landlord and tenant, where the interest of the one making the annexation is of definite duration, the right to remove fixtures must be exercised before the termination of that interest or an abandonment of the right will be presumed;⁸⁶ although in cases of an interest of uncertain duration, or in case of a tenancy at will, the removal may be within a reasonable time after the interest comes to an end.⁸⁷ These rules do not apply, however, when the removal of the fixtures is wrongfully prevented by injunction or otherwise.⁸⁸ Moreover, a tenant holding over with the consent of the landlord does not

⁸⁵ See *Welsh v. McDonald*, 64 Wash. 108, 116 Pac. 589; *Broadbuss v. Smith*, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95. Compare *Gasaway v. Thomas*, 56 Wash. 77, 105 Pac. 168, 20 Ann. Cas. 1337; *Sagar v. Eckert*, 3 Ill. App. 412; *Lowenberg v. Bernd*, 47 Mo. 297; *Ingalls v. Railway Co.*, 39 Minn. 479, 40 N. W. 524, 12 Am. St. Rep. 676.

⁸⁶ *Sampson v. Cotton Mills*, 64 Fed. 939; *White v. Arndt*, 1 Whart. (Pa.) 91; *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Gibson v. Railway Co.*, 32 Law J. Ch. 337; *Saint v. Pilley*, L. R. 10 Exch. 137; *Haffick v. Stober*, 11 Ohio St. 482; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Davis v. Buffum*, 51 Me. 160; *Josslyn v. McCabe*, 46 Wis. 591, 1 N. W. 174; *Thomas v. Crout*, 5 Bush (Ky.) 37. Cf. *Dubois v. Kelly*, 10 Barb. (N. Y.) 496. If a lessee mortgages tenant's fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them. *London & Westminster Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 798. See, also, *McKenzie v. City of Lexington*, 4 Dana (Ky.) 130.

⁸⁷ Where a landlord enters on his tenant for breach of condition, and thereby puts an end to the tenancy, the right to remove fixtures is gone. *Pugh v. Arton*, L. R. 8 Eq. 626; *Weeton v. Woodcock*, 7 Mees. & W. 14; *Ex parte Brook*, 10 Ch. Div. 100; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. Cf. *Dunman v. Railway Co.* (Tex. Civ. App.) 26 S. W. 304; *Antoni v. Belknap*, 102 Mass. 193; *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33; *Berger v. Hoerner*, 36 Ill. App. 360; *Sullivan v. Carberry*, 67 Me. 531; *Turner v. Kennedy*, 57 Minn. 104, 58 N. W. 823; *Martin v. Roe*, 7 El. & Bl. 237.

⁸⁸ *Bircher v. Parker*, 40 Mo. 118.

lose his right of removal.⁸⁹ Fixtures wrongfully removed may be recovered by the person entitled to them, if in the hands of any one⁹⁰ not a bona fide purchaser.⁹¹ If a tenant fails to take away the removable annexations made by him, they become technical fixtures, and as such become the property of the owner of the premises. If a tenant, however, accepts a new lease, he generally loses his right to remove his fixtures annexed during the continuation of the former lease, unless the right of removal has been reserved by him.⁹² A tenant in removing his fixtures must do so without material injury to the realty, because if this cannot be done they will generally be presumed to be permanent annexations.⁹³ Questions of what is a reasonable time and whether an annexation can be removed without material injury to the premises are matters of fact for the jury.

SEVERANCE OF FIXTURES

18. Fixtures may be severed from the realty with an intent to restore them to the character of personal property.

Chattels which have become realty by a permanent annexation may, nevertheless, be reconverted into personalty by being severed from the realty by the owner with an intent to produce that effect.⁹⁴ A mere intention to sever is not, however, sufficient.⁹⁵ The

⁸⁹ *Lewis v. Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Torrey v. Burnett*, 38 N. J. Law, 457, 20 Am. Rep. 421; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Brown v. Power Co.*, 55 Fed. 229. Cf. *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991; *Thorn v. Sutherland*, 123 N. Y. 236, 25 N. E. 362.

⁹⁰ *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175; *Huebschmann v. McHenry*, 29 Wis. 655; *Sands v. Pfeiffer*, 10 Cal. 259. Cf. *Salter v. Sample*, 71 Ill. 430; *Hartwell v. Kelly*, 117 Mass. 235. But see 2 Jones, Real Prop. § 1760.

⁹¹ *Peirce v. Goddard*, 22 Pick. (Mass.) 559, 33 Am. Dec. 764.

⁹² *Wadman v. Burke*, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330; *Davis v. Manufacturing Co.*, 112 Ill. App. 112. See *Precht v. Howard*, 187 N. Y. 136, 79 N. E. 847, 9 L. R. A. (N. S.) 483; *Marks v. Ryan*, 63 Cal. 107; *Sanitary Dist. of Chicago v. Cook*, 169 Ill. 184, 48 N. E. 461, 39 L. R. A. 369, 61 Am. St. Rep. 161; *Watriss v. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499. Contra, *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780; *Thomas v. J. W. Gayle Co.*, 134 Ky. 330, 120 S. W. 290, 28 L. R. A. (N. S.) 767.

⁹³ *Supra*.

⁹⁴ *Morgan v. Varick*, 8 Wend. (N. Y.) 587; *Bliss v. Misner*, 4 Thomp. & C. (N. Y.) 633; *Gardner v. Finley*, 19 Barb. (N. Y.) 317; *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553. See, also, *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107.

⁹⁵ *Bratton v. Clawson*, 2 Strob. (S. C.) 478.

severance need not be actual, but may be constructive, as by the execution of a bill of sale or a chattel mortgage.⁹⁶ A mere temporary severance, however, although actual, will not change the character of a fixture.⁹⁷ For example, when machinery is taken from a mill for repairs, it does not thereby become personal property,⁹⁸ and the removal of soil from one part of the owner's land to another will not make it personalty, unless such was the intention.⁹⁹ In general, moreover, the intention to convert a fixture into personal property must relate to the time the actual or constructive severance is made.¹⁰⁰

⁹⁶ *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553; *Shaw v. Carbrej*, 13 Allen (Mass.) 462. See, however, *Richardson v. Copeland*, 6 Gray (Mass.) 536, 66 Am. Dec. 424; *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489.

⁹⁷ *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 694; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553. So fence boards, though temporarily removed, remain part of the realty, so as to pass to a vendee. *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *McLaughlin v. Johnson*, 46 Ill. 163. But see *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173.

⁹⁸ *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

⁹⁹ See *Lacustine Fertilizer Co. v. Fertilizer Co.*, 82 N. Y. 476; *Goodrich v. Jones*, 2 Hill (N. Y.) 142. And compare *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 694.

¹⁰⁰ *People v. Jones*, 120 Mich. 283, 284, 79 N. W. 177.

CHAPTER IV

ANGLO-SAXON AND FEUDAL LAND LAW

19. Anglo-Saxon Land Law.
20. Feudalism.
21. Tenure.
22. Seisin.

ANGLO-SAXON LAND LAW

19. For the origin of many of our laws it is necessary to go beyond the Norman Conquest.

In Anglo-Saxon times, in England, there was a common field system of agriculture. Ownership in land was of three kinds: (1) Folkland; (2) bookland; and (3) *laenland*.

In the study of the principles of the English common law of real property, many persons begin with the reign of William the Conqueror, and particularly with the feudal system developed by him in England. For the origin, however, of many of our laws, it is necessary to go beyond the Norman Conquest,¹ and it would be profitable, did space permit, to consider at some length the land law of the Anglo-Saxon days. A very brief reference, however, to a few important things, is all that can be attempted in this connection.

Danegeld—Domesday Book

The Saxon period of English history extended from the landing of the Jutes² in 449 to the battle of Hastings in 1066. During the latter part of this Saxon period, particularly in the ninth century, England was almost overwhelmed by the invasions of the Danes, and the later Saxon kings paid tribute to them. In fact, from 1016 to 1042 the kings were Danes. The tribute paid to buy off the Danish invasions was known as *Danegeld*. It was instituted about the year 991, in the time of Ethelred, and after the necessity of tribute had passed it was continued as a tax to maintain the defense of the kingdom.³ This tax was levied upon the land, but, in the course of time, the levies became unequal and unjust, based as they were upon the old and inaccurate assessments.⁴ Twenty years after William the Conqueror came to the throne, he caused "a grand survey" of the lands of England to be made, for the purpose of a more orderly system of

¹ Holds. Hist. Eng. Law, II, 2.

² Domesday Studies, I, 10.

³ One of the German tribes of Jutland.

⁴ Holds. Hist. Eng. Law, II, 119.

taxation. The result was the compilation of a great rate book,⁵ called Domesday Book, a work of the highest value in connection with the study of early English land law.⁶

The Anglo-Saxon Common Field System

We can trace, says Holdsworth,⁷ the presence of the Anglo-Saxon common field system of agriculture at all periods of our history, almost up to the present day. It was so common in the seventeenth century, says another writer of authority,⁸ that it was transplanted by the early colonists to New England. The system occupies a sort of middle ground between ideas which recognized no private property and those of later times which recognized individual ownership.⁹ Under the common or open field system, the land of each township was divided into two or three open and unclosed fields which were cultivated in rotation. There was a subdivision of each field into strips or sections of about an acre each in size. Each cultivator possessed a number of these scattered strips. There were also certain common rights that attached to these holdings. For example, the cattle of the people who lived in a village community were permitted to pasture over the fallow fields. There were also waste lands bordering upon the township where the cattle could graze at any time. In these rights we find the origin of common appendant.¹⁰

Anglo-Saxon Land Ownership

Anglo-Saxon land ownership is said to have been of three kinds, namely, folkland, bookland, and laenland.¹¹ Folkland is the primitive form of land ownership, the land held by private persons who form part of the village community, and who cultivate it according to the folk or customary law.¹² The owners of such land were freemen,

⁵ Ballard, *Domesday Boroughs*, 3.

⁶ The "grand survey" of William the Conqueror, ordered by him in 1086, did not mean a survey in the modern sense of that word, but it meant a description of the lands as a basis for taxation. The names of the holders of the land were collected, also information as to the extent and value of the land.

DOMESDAY BOOK.—Consists of two volumes, a quarto, often referred to as the "Little Domesday," and a large folio, known as the "Great Domesday." The smaller book contains the records of but three counties; the larger book the record of the rest of England. From Domesday Book it may be seen how manors were held before the Conquest, also the area of such manors. It can also be seen what estate the tenants of manors had. *Domesday Studies*, I, 4.

⁷ Holds. Hist. Eng. Law, II, 48.

⁸ Cunningham, *Growth of English Industry*, II, 366.

⁹ Holds. Hist. Eng. Law, II, 64.

¹⁰ See Holds. Hist. Eng. Law, II, 46, 47, 48.

¹¹ See Holds. Hist. Eng. Law, II, 57; P. & M. I, 38, 39; Vinogradoff, *English Society*, 229-232.

¹² P. & M. Hist. Eng. Law, I, 37; Vinogradoff, *Manor*, 142, 143; Holds.

they held the soil subject to no landlord, and it descended to their heirs.¹³ Bookland was of ecclesiastical origin. The term "book," or "boc," signifies the written land charter, or grant, made by the king to bishops, religious houses, or to lay nobles. Vast tracts of land were sometimes granted, together with privileges connected therewith. Grants to the church were in the nature of pious gifts by the king. In these grants we see the origin of the strife which in later times culminated in the statutes of mortmain and the statute of uses.¹⁴ Laenland, or loanland, were leases or loans of land, made, usually, by the church out of the possessions that had been granted to it by the king. These loans or leases were made for limited periods, usually for one or more lives, three being a common term.¹⁵ These loans were oral, and were made only to the great and powerful; that is, to those who could render some service in return, or who were able to pay rent.¹⁶ These loans were sometimes made by the church even to the king.¹⁷

The actual tiller of the soil did not, therefore, hold his land by either bookland or laenland law. These kinds of land required cultivators, however, and, in time, the village community gradually became dependant upon a lord, and converted into a manor; that is, an estate grouped around a hall, or manor house, with its vast appendant farm.¹⁸ The great landholders, who hold by the book or laen, are to become the future landlords, and in the conditions that resulted we see the germs of tenure, and signs of many of the later doctrines relating to tenure.¹⁹

Hist. Eng. Law, II, 58. See, also, in general, Vinogradoff, *Inquiries into the Social Hist. of Medieval England*. For a review of this work, see 4 L. Q. R. 260.

¹³ Holds. Hist. Eng. Law, II, 62.

¹⁴ See Holds. Hist. Eng. Law, II, 59.

¹⁵ Holds. Hist. Eng. Law, II, 60.

¹⁶ Holds. Hist. Eng. Law, II, 60.

¹⁷ Domesday Book & Beyond, 302.

¹⁸ Vinogradoff, *Manor*, 225.

¹⁹ Holds. Hist. Eng. Law, II, 64, 65.

FEUDALISM

20. After the Norman Conquest, William the Conqueror developed in England a feudal system of land tenure. The tenure of all land was based on the theory that the land was granted as a feud by the king himself to his tenant. It was a system of military government.

Feudalism

The terms "feudal" and "feudalism" are derived from the word "feud";²⁰ the terms "fee," "fief," and "feod" (Latinized into "feudum" and "feodum") being, doubtless, all forms of the same word. The term "feud" (or fee) meant a grant of land by a monarchical chieftain to his follower, the grant implying certain mutual rights and duties. In general feudal law, or such as obtained in continental Europe, the term "feud" seems to have been equivalent to the Roman "beneficium."²¹ In England, however, feud came to mean a heritable, but dependent, right. Feudalism is a landholding relationship based upon the grant of a feud. The dominant idea in the relationship is that of lord and vassal. Many students of real property conceive the notion that feudalism was peculiar to England. The system or form of feudalism developed by William the Conqueror was indeed so, but feudalism, in general, belongs to no particular age and to no particular people. It is found as an incident to social conditions in the times of continued political demoralization. During the decadent years of

²⁰ "The word 'feodum' is not found earlier than the close of the ninth century. But neither the etymology of the word nor the development of its several meanings can be regarded as certain." Stubbs, *Const. Hist.* I, 251. According to the *Encyclopedia Britannica* (9th Ed.): "Feodum, feudum, fief, or fee is derived from the German 'vieh,' cattle; in a secondary sense the word came to denote goods, money, property in general. The second syllable has been connected with another root, 'od,' also meaning property; the whole word denoting property held as a reward, or in consideration of special service." See 25 L. Q. R. 178, "The Effect of Tenure on Real Property Law." The author of the article says: "Sir Henry Spelman (who died in 1641) was the first English writer who conceived the idea of treating the English law of tenures as a branch of the continental feudal law. * * * Coke never mentions the feudal system, and apparently never uses the word 'feudal.'" And see Maitland's *Const. Hist. of Eng.* 142, where he speaks of the "new learning," introduced by Sir Henry Spelman, and popularized and made orthodox by Blackstone in his easy, attractive manner."

²¹ Sometimes called a precarious benefice; that is, a beneficial grant of land continuing merely at the owner's will. A precarious in the Roman law was anything granted or lent to be returned at the will of the grantor. From the precarious was developed in the continental feudal law the beneficium, an estate upon a conditional tenure.

the Roman Empire, the conditions were practically feudal.²² A powerful system of feudalism existed among the Mohammedan chiefs,²³ and it was not until 1839 that feudalism was abolished in Turkey.²⁴ It flourished for centuries in Japan, and until very recent times.²⁵ "Feudalism is the natural result of the absence of efficient central government."²⁶ Upon the death of Charlemagne, in the early part of the ninth century,²⁷ there was a collapse of all efficient government, and feudalism arose on every hand. It flourished in Germany, France, and Italy.²⁸ In feudalism, no one authority is sufficiently powerful to exercise dominion over all the state. Groups of the more powerful assume control,²⁹ and the less powerful are content to submit to their authority in order to obtain protection.³⁰

The Feudal System in England

Under the feudal system in France the result was "feudal government, a graduated system of jurisdiction based on land tenure, in which every lord judged, taxed, and commanded the class next below him; in which abject slavery formed the lowest, and irresponsible tyranny the highest, grade."³¹ When William the Conqueror and his barons came to England from Normandy, in France, they probably knew no other kind of land tenure. William, however, believed in a strong, central government. The feudalism he developed in England³² was not a feudal system of government, but a feudal system

²² De Coulanges, *Les Origines du Système Féodale*, 206 et seq. "After all it may be doubted," says Colquhoun, "if the system of feodation be not derived from the Roman custom of patron and client. At any rate the similarity is striking. If we consider the respective state of civilization of both, we shall probably admit the resemblance to be closer than it would at first appear; and if we refer it to the earlier period of Roman history, we shall find the plebeian was in a state little, if at all, better than the most favored class of German peasants." *Civ. Law*, § 124.

²³ Esmein, *Histoire du Droit Français*, 175.

²⁴ Until 1839, when the system was abolished by Abdul Mejid, the tenure of the domain land in Turkey was purely feudal. Each feudatory was under an obligation to furnish to the Sultan a certain number of men at arms in time of war. This system was the basis of the Turkish army. 25 L. Q. R. 24, 37.

²⁵ Esmein, *Hist. du Droit Français*, 175.

²⁶ Holds. *Hist. Eng. Law*, II, 6.

²⁷ A. D. 814.

²⁸ Menzel (*Ges. der Deut. c. 77*) says that the system of fiefs is originally German, and that the old pagan Germans were wont to lend (*leihen*) parts of the alods to slaves, freedmen, or poor freemen, upon condition of certain services or other returns. Colquhoun, *Civ. Law*, § 120.

²⁹ Holds. *Hist. Eng. Law*, II, 6.

³⁰ Holds. *Hist. Eng. Law*, II, 7.

³¹ Stubbs, *Const. Hist.* 256.

³² "Probably the principle of tenure by military service was recognized in

of land tenure, differing, however, from the continental plan. On the continent, the military service of undertenants was due to the mesne lords, that is, to the actual feudal lord of each tenant; in William's system, this service was due directly to the king.³³ The tenure of all land was based on the presumption that it was granted as a feud by the king himself to his tenant. William's system was a system of military government, founded on the personal allegiance of the members of the organization to the king. Under his feudal system, the king was surrounded by a body of men pledged to his support in war. The followers of the king likewise had their own followers, bound to them in the same way, but all were bound to the king. The English lands were granted to the followers of William as a reward for past services and for services to be rendered in the future. That is, the lands were held on the condition that the tenants should perform the military and other obligations owed by them on account of their positions as members of the feudal organization, and such other additional obligations as might be imposed in connection with the grant. Each tenant of the king subdivided his portion, distributing the greater part of it among subtenants on conditions of tenure similar to those which he himself was under obligation to perform to the sovereign. In this way a vast social structure was erected, with the king at the apex, his immediate tenants directly beneath him, and so on down, through the various classes of subtenants, until we reach the class which actually cultivated the soil. Under the feudal system there was, therefore, no absolute ownership of land. Land was not the subject of ownership, but of tenure.³⁴ The land could not be held by a subject in absolute independent ownership as personal property is owned, for that was the exclusive prerogative of the king; but all land was held under obligation of duties and services, imposed either by force of law or by express terms of the grant of the feud, whereby a relation, known as "tenure," was constituted and permanently maintained, between the tenant and the crown, characterized by the quality of the duties and services upon which the land was held. In like manner, the tenants of the crown might grant out parts of their land to subtenants upon similar terms of services, thereby creating a subtenure or relation of tenure between themselves, as mesne or intermediate lords, and their grantees, as tenants, but without affecting the ultimate tenure under the crown as lord paramount. The infeudation or grant was effected by the ceremony of feoffment, or

England before the Conquest, but according to the current view its definite establishment took place in the reign of William I." *Laws of Eng.* vol. 24, p. 140, c.

³³ *Laws of Eng.* vol. 24, p. 140, c.

³⁴ *Laws of Eng.* vol. 24, § 279.

delivery of the land by the lord to the tenant, to be held by him upon the terms then expressed or implied; and the tenant was thereby invested with the seisin or actual possession of the land.³⁵ Every acre of England was brought within the feudal principle, although the king did not grant all of the land, but retained a part for his own use. This retained part became known as the "ancient demesne of the crown."³⁶

TENURE

21. Tenure signifies the holding of lands or tenements in subordination to some superior, and also the terms of the holding.³⁷

Forms of Tenure—Free Tenure

"Almost all the real property of England," says Blackstone,³⁸ "is by the policy of our laws supposed to be granted by, dependent upon, and *holden of*, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing *holden* is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*." Under the feudal system, lands held by free tenure were held either by tenure by knight-service, or tenure in socage, or tenure in frankalmoin.³⁹ "The most universal, and esteemed the most honorable, species of tenure, was that by knight-service,"⁴⁰ otherwise known as tenure in chivalry. One who held by this tenure was bound to serve as a knight for forty days a year in the king's army, and to provide himself with the equipment necessary for such service.⁴¹ Grand serjeanty⁴² was another form of tenure in chivalry. The services in this case consisted in certain personal services rendered to the king or lord. "Tenure by grand serjeanty" designated the holdings of those who, in return for their lands, performed duties at the king's palace or in attendance on his person, as a marshal, a chamberlain, or a but-

³⁵ Leake, Land Law, 17.

³⁶ P. & M. Hist. Eng. Law, I, 210, 366; Dig. Hist. Real Prop. (4th Ed.) 34; 2 Blk. Comm. 59; Co. Litt. 1a. And see Hopkins, Real Property, ch. II.

³⁷ 2 Blk. Comm. 59; Co. Litt. 1a.

³⁸ 2 Comm. 59.

³⁹ See, in general, Laws of Eng. vol. 24, § 280; Littleton, Tenures, bk. II; 2 Blk. Comm. 60 et seq.

⁴⁰ 2 Blk. Comm. 62.

⁴¹ P. & M. Hist. Eng. Law, I, 230; Dig. Hist. Real Prop. (4th Ed.) 39, §1n, 135; 2 Blk. Comm. 62; Co. Litt. 103. As a system of military organization, this tenure had but a short existence. P. & M. I, 231.

⁴² From Latin *serviens*. See P. & M. I, 262.

ler.⁴³ Tenancy by petty serjeanty was a form of socage tenure, and those who held by this tenure were bound to do acts of the same nature as in the case of grand serjeanties, although the duties were not connected with the king's person or his palace. Instances of these services were to carry his letters in a certain district, or to provide a given number of arrows or other military supplies each year.⁴⁴ Most of the lands owned by the church were held in "frankalmoigne," or free alms. The only services connected with this tenure were of a spiritual kind, such as prayers for the soul of the donor.⁴⁵ Every freehold tenure which was not in chivalry or in frankalmoin came to be classed as tenure in socage.⁴⁶ From tenants in socage no military service was due,⁴⁷ but the service seems to have been either a rent service,⁴⁸ or the tenant performed some definite agricultural service for his lord.⁴⁹ It was essential, however, that the services to be rendered should be definite and certain.⁵⁰ Service either in rent money or in labor does not, however, seem to have been a necessary incident of tenure in socage, since Littleton says that one who held by fealty alone,⁵¹ although no rent was paid, was a tenant in socage.⁵²

Unfree Tenure

The preceding forms of tenure were known as "free tenure"; that is, they were tenures of freemen, and tenancies of "freehold."⁵³ The greater part of the land was, however, actually cultivated by men who held by unfree tenure.⁵⁴ The technical distinction between free and unfree tenure was that the common-law courts protected free tenure,

⁴³ Litt. Tenures, §§ 153-158; Co. Litt. 105b; 2 Blk. Comm. 73; P. & M. Hist. Eng. Law, I, 262; Dig. Hist. Real Prop. (4th Ed.) 39.

⁴⁴ Litt. Tenures, §§ 159-161; Co. Litt. 108a; 2 Blk. Comm. 74, 81, 82; P. & M. Hist. Eng. Law, I, 262; Dig. Hist. Real Prop. (4th Ed.) 49.

⁴⁵ Litt. Tenures, §§ 133-142; Co. Litt. 93b; 2 Blk. Comm. 101; P. & M. Hist. Eng. Law, I, 218, 240; Dig. Hist. Real Prop. (4th Ed.) 38.

⁴⁶ Litt. § 117.

⁴⁷ Litt. §§ 120, 121.

⁴⁸ Litt. § 117.

⁴⁹ Litt. § 119; Co. Litt. 85a; 2 Blk. Comm. 78; P. & M. Hist. Eng. Law, I, 271; Dig. Hist. Real Prop. (4th Ed.) 46.

⁵⁰ Litt. §§ 117-120.

⁵¹ As to fealty, see *infra*, Incidents of Tenure, note 66.

⁵² Litt. §§ 118, 131; 2 Blk. Comm. 80. "The term 'soc' is connected originally with the word 'seek'; that is, the socman must seek his lord's 'soke' or jurisdiction." In other words, he must seek his lord's court for certain remedies. "He is, therefore, dependent upon his lord." Socmen appear in Domesday in the Danish districts. Often they were bound to perform agricultural service and this no doubt led both Bracton and Littleton to the erroneous belief that the word 'socage' was connected with the French soc, a ploughshare." Holds. Hist. Eng. Law, III, 45; Vinogradoff, Villeinage, 196.

⁵³ Laws of England, vol. 24, § 289.

⁵⁴ Holds. Hist. Eng. Law, III, 165.

but did not protect unfree tenure, or, in other words, the ancient actions, both proprietary and possessory, were available only for "freeholders."⁵⁵ The social distinction, speaking broadly, was that, as a rule, unfree tenants comprised the humblest classes, and were known as villeins.⁵⁶ The service distinction was that a free tenant paid rent, or rent and some labor; the service or duties of each tenant being individual, and different from another free tenant. Unfree tenants, on the other hand, consisted of groups of laborers, every man holding, working, and paying exactly as his fellows.⁵⁷ While the particular form of tenure was often connected with civil or social status, yet it was not necessarily so. A man might be, for example, a free-man, yet hold by a villein tenure,⁵⁸ or he might be a villein and yet hold by a free tenure.⁵⁹ The great mass of unfree tenants were, however, villeins. In later times, however, tenure in villeinage became so thoroughly established by the custom of the manor that it was protected as a freehold, and became the copyhold tenure so well known in England at the present time.⁶⁰ In further illustration of the fact that the form of tenure did not necessarily denote status or rank, it

⁵⁵ Holds. Hist. Eng. Law, III, 167; Laws of England, vol. 24, § 289. The tenant in villeinage had originally only such protection as he could obtain in his lord's court, the manorial court. This, however, gave him no protection against the lord. Ultimately the custom of the manor confirmed him in his holding, and the king's courts allowed an action of trespass against the lord. P. & M. I. 342, 576; Digby, Hist. Law of Real Prop. (5th Ed.) 291; Laws of Eng. vol. 24, § 289.

⁵⁶ From the Latin villani (villa, a farm house). They were unfree peasants, or serfs, with reference to their lords, but free with reference to all other men. At a later period, it was a general term applied to unfree tenants as a class. The villeins of the Norman period were not slaves, however. It is true that, as a class, they were irremovable cultivators of the soil; but they could renounce their holdings and take refuge in a town, and there, if unclaimed for a year, could obtain the full rights of freemen. They could also obtain manumission by the intervention of the church. Stubbs, Const. Hist. of Eng., passim. In the Saxon days, however, slavery was common in England; but Saxon slaves were more like agricultural serfs than the type of slaves known to the Romans. Kemble, writing in 1848, and speaking of the condition of the slave in Saxon times, says: "It seems doubtful whether the labor of the serf was practically more severe, or the remuneration much less, than that of an agricultural laborer in this country, at this day." Kemble, Hist. of the Saxons, I, 214. Although the status of the Norman villein was not as debased as that of the Saxon slave, yet to all practical purposes he was the successor of the earlier serf. Serfdom and villeinage both died out gradually.

⁵⁷ Vinogradoff, Villeinage, 334, 335.

⁵⁸ P. & M. Hist. Eng. Law, I, 337; Dig. Hist. Real Prop. (4th Ed.) 51; 2 Blk. Comm. 90; Co. Litt. 116a.

⁵⁹ Holds. Hist. Eng. Law, II, 209.

⁶⁰ P. & M. Hist. Eng. Law, I, 351; Dig. Hist. Real Prop. (4th Ed.) 151; 2 Blk. Comm. 90; Co. Litt. 57b.

was often the case that a man held land by a number of different tenures; for instance, one parcel by knight-service and another parcel by socage.⁶¹ As time went on, the various kinds of services arising from tenure came to be regarded as due from the land, and not from the person holding the land. Thus, so many acres were bound to furnish one knight, or owed certain work to the lord. In other words, tenure took on a real, rather than a personal, character.⁶² A further development occurred when the various services were commuted for money payments, called "scutage."⁶³ These finally took the form of a rent.⁶⁴ In later times socage tenures gained the ascendancy, and military tenures were abolished.⁶⁵

Incidents of Tenure

The personal relation between a lord and his tenant who held by knight's service was created by fealty and homage. By fealty was meant the obligation taken by a tenant, by special oath, to be faithful to his lord.⁶⁶ Homage was a solemn public ceremony by which a man acknowledged that he was the man, or vassal, of his lord, whereby he became entitled to his lord's protection and warranty.⁶⁷ Homage, it is said, "makes the tenant," while fealty is an acknowledgment of the service due.⁶⁸ Homage was not required in socage tenure, although the tenant was under the obligation of fealty.⁶⁹ There were, moreover, certain incidents, connected with military and with socage tenure, which constituted their chief importance, and continued to exist at a time when the services due on account of the tenure had fallen into disuse or had become unimportant. These incidents were aid, relief, escheat, wardship, and marriage. Aids were ransoms, or sums of money, which the tenant was bound to pay to secure the lord's release from prison, to help him knight his eldest son, and to provide

⁶¹ P. & M. Hist. Eng. Law, I, 276.

⁶² P. & M. Hist. Eng. Law, I, 235.

⁶³ Or the old French *escuage*. From the Latin *scutum*, a shield. Originally the fine levied upon a tenant of a knight's fee in lieu of the military service due.

⁶⁴ P. & M. Hist. Eng. Law, I, 245; Dig. Hist. Real Prop. (4th Ed.) 129; 2 Blk. Comm. 74.

⁶⁵ See *infra*.

⁶⁶ P. & M. Hist. Eng. Law, I, 227; Co. Litt. 67b.

⁶⁷ Co. Litt. 64a; Bracton, f. 80; Litt. § 85.

⁶⁸ Holds. Hist. Eng. Law, III, 48; Year Books, 21 and 22 Edw. I (R. S.) 240. A tenant who held land of different lords could perform unconditional homage and swear fealty only to one lord. Such lord was known as the tenant's liege lord, and was usually the lord from whom the most ancient feoffment came. P. & M. Hist. Eng. Law, I, 279; Holds. Hist. Eng. Law, III, 48.

⁶⁹ P. & M. Hist. Eng. Law, I, 286.

a marriage portion for his eldest daughter.⁷⁰ A relief was a sum which an heir must pay the lord on succeeding to the inheritance.⁷¹ In the case of socage tenements, this sum was fixed at one year's rent.⁷² When an heir holding by knight's service was under age, the lord possessed the right of wardship, and under this right he had the custody of the infant's person and of his lands. The latter was a source of no small profit in the case of rich wards, because the lord was not required to account for the rents and profits of the estate.⁷³ To wardship was added the power to dispose of the ward in marriage, or at least, to propose a marriage for the ward. If the ward refused the marriage, the guardian could claim a fine, as he could, also, if the ward married without his consent.⁷⁴

In socage tenure, the lord was not entitled to the incidents of wardship and marriage.⁷⁵ The wardship of an infant heir who held in socage went to his nearest relative to whom the inheritance could not descend, and the guardian was accountable to the ward for the profits.⁷⁶ This guardianship in socage continued until the ward was fourteen years old.⁷⁷ Tenure in petty serjeanty, which was in effect a socage tenure, likewise did not carry with it the rights of wardship and marriage.⁷⁸ In case a tenant had no heirs, or if the tenant became a felon, the land escheated to the lord. It was also liable to forfeiture to the king for treason.⁷⁹

Manors

It has already been stated that the village community of Anglo-Saxon days developed into the manor.⁸⁰ One of the incidents of feudalism was the right of jurisdiction in civil matters that the lord had over his tenants.⁸¹ In some instances, by special grant from the king,

⁷⁰ P. & M. Hist. Eng. Law, I, 330; Dig. Hist. Real Prop. (4th Ed.) 41, 48, 129; 2 Blk. Comm. 63, 87.

⁷¹ Litt. §§ 112, 113. The relief for a knight's fee was 100 shillings. P. & M. Hist. Eng. Law, I, 289.

⁷² P. & M. Hist. Eng. Law, I, 288; Dig. Hist. Real Prop. (4th Ed.) 40, 48, 80, 120; 2 Blk. Comm. 65, 87; Co. Litt. 76a, 83a.

⁷³ P. & M. Hist. Eng. Law, I, 299; Dig. Hist. Real Prop. (4th Ed.) 41, 86, 136; 2 Blk. Comm. 67.

⁷⁴ P. & M. Hist. Eng. Law, I, 299; Dig. Hist. Real Prop. 41, 90, 123; 2 Blk. Comm. 70.

⁷⁵ P. & M. Hist. Eng. Law, I, 275; 2 Blk. Comm. 80, 88; Dig. Hist. Real Prop. (4th Ed.) 48.

⁷⁶ P. & M. Hist. Eng. Law, I, 303; Dig. Hist. Real Prop. (4th Ed.) 48; 2 Blk. Comm. 87.

⁷⁷ See Litt. § 123.

⁷⁸ Laws of Eng. vol. 24, § 283.

⁷⁹ P. & M. Hist. Eng. Law, I, 332; P. & M. Hist. Eng. Law, II, 22, 464, 498; Dig. Hist. Real Prop. (4th Ed.) 43, 61, 91, 422; 2 Blk. Comm. 72, 89.

⁸⁰ *Supra*.

⁸¹ P. & M. Hist. Eng. Law, I, 20, 21, 558.

or by custom, the lord had criminal jurisdiction also. A great estate might have connected with it a number of free tenants, also unfree tenants, or villeins, likewise lands held by the lord himself, known as demesne lands.⁸² Over these lands and tenants the lord exercised jurisdiction. Such an estate was called a manor, and the lord's court was known as the manorial court.⁸³

Subinfeudation—Statute of Quia Emptores

At a very early date in English law, a tenant who held lands in fee simple⁸⁴ could alienate all his lands, and his grantee would thus become tenant to the original lord, in place of the grantor.⁸⁵ By alienating, however, a part (not the whole) of his lands, he could make the alienee his own tenant; that is, the grantor, since he could not require his lord to accept a division of the service due him, still remained the tenant of the original (or superior) lord, although the grantor became the lord (mesne, or intermediate lord) of the person to whom he had granted a part of his lands.⁸⁶ The tenant thus created could do the same thing, as likewise, in turn, each successive tenant.⁸⁷ This gave rise to a series of sub-feuds; the process being known as subinfeudation. The result was that the feudal rights of the superior lord were diminished. He lost his rights of escheat, marriage, and wardship in the land thus aliened.⁸⁸ Due to the growing practice of subinfeudation, much opposition was created against the custom,⁸⁹ finally culminating in the famous statute of quia emptores.⁹⁰ This

⁸² A tenant who held directly from the crown was known as a tenant in capite. Co. Litt. 108a.

⁸³ P. & M. Hist. Eng. Law, I, 584; Laws of Eng. vol. 24, § 285. When villein tenure became in time copyhold tenure, there were two courts, one for the freeholders, known as the court baron, another for the copyholders, known as the customary court. Dig. Hist. Real Prop. (5th Ed.) 55.

⁸⁴ See Estates, *infra*.

⁸⁵ Co. Litt. 43a; Digby, Hist. Real Prop. (5th Ed.) 157; P. & M. Hist. Eng. Law, I, 310.

⁸⁶ Co. Litt. 43a; Hallam, Mid. Ages, ch. II, pt. 2; Dig. Hist. Real Prop., *supra*.

⁸⁷ P. & M. Hist. Eng. Law, I, 295, giving instance of eight successive subinfeudations.

⁸⁸ P. & M. Hist. Eng. Law, I, 311.

⁸⁹ This is seen even in Magna Charta (1217) c. 39, where a freeman was forbidden to sell more of his land than would leave a residue sufficient for the service due the lord of the fee.

⁹⁰ Stat. (1290) 18 Edw. I, c. 1. The statute, framed in the law Latin of the times, takes its name from its introductory words: "Quia emptores terrarum * * * de fœdis magnatum et aliorum * * * quibus libere tenentes eorundem magnatum et aliorum terras vendiderunt, tenenda in feodo sibi et heredibus suis de feoffatoribus suis et nonde capitalibus dominis fœdorum, per quod iidem capitales domini escetas, maritagia, et custodia terrarum * * * sæpius amiserunt," etc. The translation is as follows:

statute prohibited subinfeudation, and enacted that the grantee should hold immediately of the superior lord and not of the grantor. After this statute a conveyance passed all the grantor's interest to the grantee, and the grantor dropped out of the feudal chain between the tenant in possession of the land and the lord paramount, and had no further connection with the land granted. No new tenure in fee could be created.⁹¹ The statute, however, expressly provided that it should extend "only to lands holden in fee simple";⁹² consequently an estate for life or in tail can be granted, under the statute, to be held of the grantor.⁹³ While the statute put an end to the subinfeudation of estates in fee simple, it established, on the other hand, the right of free tenants to alienate their lands. It thus became one of the period points in the history of English law.⁹⁴ The principles of this statute have, as a rule, to the extent that tenure has here existed,⁹⁵ been the law of this country, "as well during its colonial condition as after it became an independent state."⁹⁶ In a few of our states, however, due either to the form of the original colonial grant, or to the theory that no tenures exist, it is said that the statute of *quia emptores* is not in force.⁹⁷

Whereas purchasers of lands of the feuds of great men and other lords * * * to whom the free tenants of such great men and others have sold their lands, to be holden in fee (to themselves and to their heirs) of their feoffors and not of the chief lords of the fees, whereby the same chief lords have too often lost their escheats, marriages, and wardships of lands, etc.

⁹¹ Gray, *Perp.* 12, 16, 17, 18; *Dig. Hist. Real Prop.* (4th Ed.) 232; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75, 75 Am. Dec. 278; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337. Cf. *Wallace v. Harmstad*, 44 Pa. 492. The charter of North Carolina permitted subinfeudation. *Hopkins, Real Prop.* ch. II, note 25.

⁹² Chapter 3. "In feodo simpliciter tantum" is the language of the statute.

⁹³ *Litt.* § 214; *Laws of Eng.* vol. 24, § 287.

⁹⁴ For a review of the effects of this statute, see *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278 (1859).

⁹⁵ See, *infra*, *Tenure in the United States*.

⁹⁶ *Denio, J.*, in *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. See *Gray, Perp.* 16.

⁹⁷ PENNSYLVANIA.—The charter of King Charles II, in granting the province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage and by fealty only, for all services. The charter also provided that purchasers from William Penn, his heirs or assigns, should hold either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns, should seem expedient, the statute of *quia emptores* in anywise notwithstanding. *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337 (1836). See, *in general*, *Gray, Perp.* §§ 24–28.

NEW YORK.—It is said that the statute of *quia emptores* was not in force within the colony of New York prior to the Revolution. A number of colonial grants was made (the patent to Killian Van Rensselaer being among the number) by which manors were created within the province; and the patentees

Abolition of the Feudal System

We have seen how the payment of a rent, or scutage,⁹⁸ became, in time, substituted for knight-service.⁹⁹ It was not, however, until the middle of the seventeenth century that the special incidents of tenure by knight-service were formally terminated in England. The statute of 1660¹ provided that wardships, marriages, fines for alienation, and homage should be abolished, and that lands held in tenure by knight-service should henceforth be held by free and common socage.² The statute further provided that all future grants of hereditaments should be held in socage tenure.³ The other feudal tenures of frankalmoin and grand serjeanty gradually lost their importance, and at the present time, in England, all lands of inheritance are held either by socage or copyhold tenure.⁴

Tenure in the United States

Our ancestors, in emigrating to this country, brought with them, it is said, such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation.⁵ The law as to holding lands and transmitting the title thereto from one subject to another must have been a matter of the first importance in the colonies.⁶ The early lands were holden under grants from the crown,⁷ and, as the king was not within the statute *quia emptores*, a certain tenure, which, after the act of 12 Car. II abolishing military tenures, must have been that of free and common socage, was created

were authorized to grant lands within those manors, to be holden of them and their heirs as immediate lords, to whom, by the feudal tenures thus created, fealty was due. These manorial tenures could not have been created if the statute of *quia emptores* had extended to the province. Ruggles, C. J., in *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

⁹⁸ *Supra*.

⁹⁹ See P. & M. Hist. Eng. Law, I, 231.

¹ St. 12 Car. II, c. 24; 2 Blk. Comm. 76.

² 12 Car. II, c. 24, §§ 1, 2.

³ *Id.* § 4.

⁴ P. & M. Hist. of Eng. Law, I, 330; Dig. Hist. Real Prop. (4th Ed.) 151, 392; 2 Blk. Comm. 90; Laws of Eng. vol. 24, pp. 147, 148.

⁵ 1 Kent, Comm. 473; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178.

⁶ *Denio, J.*, in *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278.

⁷ The early colonies of this country were either royal or proprietary. In case of a royal colony, the right of soil, together with the power to convey the same, remained in the sovereign. *Montgomery v. Doe*, 13 Smedes & M. (Miss.) 161. See, also, *In re Proprietary Claims*, 10 Haz. Reg. (Pa.) 113. In a proprietary colony, the title was vested in the proprietors, and could be disposed of by them. *Montgomery v. Doe*, 13 Smedes & M. (Miss.) 161; *Conn v. Penn*, Fed. Cas. No. 3,104, Pet. C. C. 496; *Countz v. Geiger*, 1 Call (Va.) 190. Questions connected with these early grants, while interesting historically, have but little, if any, importance, however, at the present time, except in rare instances.

as between the king and his grantee.⁸ In a number of our states, however, all tenures have been abolished, either by statute or by force of judicial decisions.⁹ Lands in such states are said to be allodial,¹⁰ in distinction from a notion of feudal tenure implying some rights, at least, of a superior.¹¹ Allodial lands are, consequently, said to be held in absolute ownership,¹² the same as personal property.¹³ Such forms of tenure as exist between landlord and tenant, or between the tenant for life and the reversioner or remainderman, will be considered in connection with those special topics.¹⁴

SEISIN

22. Seisin is the possession of land by one who claims a freehold interest therein. It may be:

- (a) Seisin in deed (or fact); or
- (b) Seisin in law.

⁸ *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, 1 L. Ed. 440; *Cornell v. Lamb*, 2 Cow. (N. Y.) 652; *Combs v. Jackson*, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; *In re Desilver's Estate*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645. Cf. *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. Ed. 997; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681. The tenure prescribed in all the early colonial charters or patents of this country was free and common socage, being "according to the free tenure of lands in East Greenwich in the county of Kent, in England, and not in capite or by knight's service." See *Bradford's Colony Laws*; *Story, Const. Law*, § 172; 3 *Kent, Comm.* 571, note.

⁹ See *Gray, Perp.* §§ 13, 24; *Matthews v. Ward*, 10 Gill & J. (Md.) 443, 451; 1 *Stim. Am. St. Law*, §§ 400, 401, 1100-1103.

¹⁰ The term "allodial" is derived from the Anglo-Saxon *alod* (*al*, all; *od*, ownership, property), meaning all ownership, all one's own. It corresponds to the *folkland* of the Anglo-Saxon period. See *Vinogradoff, E. H. R.* VIII, 11; *Holds. Hist. Eng. Law*, II, 58.

LOUISIANA.—The feudal law, with its usages, never had a place in the territory while governed by Spain, and the common-law jurisprudence of real property is inapplicable to land titles in this state. In Louisiana all titles to land are allodial. *Xiques v. Bujac*, 7 La. Ann. 498.

¹¹ That the notion of *feudum* in contrast with *allodium* does *not* imply, however, any inferiority of ownership, see *Effect of Tenure on Real Property Law*, 25 L. Q. R. 178.

¹² That, speaking strictly, no private property can be held in absolute ownership, see chapter V, § 23, post.

¹³ *McLean, J.*, in *Mayor, etc., of New Orleans v. United States*, 10 Pet. (U. S.) 716, 9 L. Ed. 573; *Cook v. Hammond*, 4 Mason, 467, 478, Fed. Cas. No. 3,159; *Minneapolis Mill Co. v. Tiffany*, 22 Minn. 463. Cf. *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; *Commonwealth v. Tewksbury*, 11 Metc. (Mass.) 55; *Bancroft v. City of Cambridge*, 126 Mass. 438.

¹⁴ See post, chapters VI and VII.

Seisin¹⁵ meant, originally, any kind of possession; that is, either of lands or of chattels.¹⁶ Later, it came to mean a special kind of possession, namely, a possession of land, or such a status with reference to the possession of land, as resulted from the feudal investiture known as "livery of seisin."¹⁷ In this later sense, it was applied exclusively to freehold interests in land, and was distinguished from mere possession.¹⁸ A freeholder was "seised" of his land, while a lessee for a term of years was not "seised," but had "possession."¹⁹

Under the common-law theory of lands, there must always be some one in whom is the seisin. Seisin may be either seisin in deed (otherwise called seisin in fact), or seisin in law.²⁰ This distinction applies both to corporeal and incorporeal hereditaments.²¹ Seisin in deed is the actual possession of the immediate freehold, "not, as sometimes mistakenly said, the actual possession of the land, since that may be in possession of a tenant for a term of years."²² Seisin in law applies to an heir at law of an ancestor who dies seised, and refers to the time intervening before the heir's entry in case the possession is vacant at the time.²³ When the heir enters, he is seised in fact, or in deed.²⁴ If, however, upon the death of the ancestor, a tenant is in possession, the heir is at once seised in deed, since the possession of the tenant is the possession of the heir.²⁵ Modern applications of the theory of seisin are made in connection with the estates of dower and curtesy, as will later appear.

¹⁵ From seize. For the history of seisin in English law, see, in general, P. & M. Hist. Eng. Law, II, 29 et seq.; *The Mystery of Seisin*, 2 L. Q. R. 481; *Seisin*, 12 L. Q. R. 239.

¹⁶ That it was customary in early times to speak of the seisin of chattels, see Maitland, *Seisin of Chattels*, 1 L. Q. R. 324.

¹⁷ See, in general, P. & M. Hist. Eng. Law, II, 29 et seq.

¹⁸ See Litt. § 324, where he shows the proper use of the terms "seisin" and "possession." The distinction was coming into use about the time Littleton wrote. *Holds. Hist. Eng. Law*, II, 492. See, also, *Van Rensselaer v. Poucher*, 5 Denio (N. Y.) 35; *Sneed, J., in Upchurch v. Anderson*, 3 Baxt. (Tenn.) 411; *Peters, C. J., in Ford v. Garner's Adm'r*, 49 Ala. 603; *Towle v. Ayer*, 8 N. H. 57.

¹⁹ Litt. § 324.

²⁰ Co. Litt. 266b. See *Jenkins v. Fahey*, 73 N. Y. 362; *De Hart v. Dean*, 2 MacArthur (D. C.) 63.

²¹ Challis, *Real Prop.* (3d Ed.) 233.

²² 2 Min. Inst. 122, 123.

²³ *Laws of Eng.* vol. 24, § 406. Likewise, a devisee, if the possession is vacant, has a seisin at law before entry. Co. Litt. 111a.

²⁴ 1 Wash. Real Prop. 36.

²⁵ *Lyell v. Kennedy* (1889) 14 App. Cas. 437, 456; Co. Litt. 15a, 243a.

PART II

RIGHTS IN REAL PROPERTY

(A) OWNERSHIP

CHAPTER V

ESTATES IN FEE SIMPLE

- 23. Ownership Defined.
- 24. Estate Defined.
- 25. Classification of Estates.
- 26. Quantity of Estates.
- 27. Estates in Fee Simple.
- 28. Creation.
- 29. Right of User.
- 30. Alienation.

OWNERSHIP DEFINED

23. Ownership is the right by which a thing belongs to an individual to the exclusion of all other individuals. It is dominion over a thing.

The Roman law term for ownership is "dominium," and was applied by the Roman jurists to "corporeal things" (*res corporales*), and it has been said that it "denotes a right, indefinite in point of user, unrestricted in power of disposition, and unlimited in point of duration, over a determinate thing."¹ Ownership has also been defined as the right by which a thing belongs to an

¹ Austin's Jurisprudence, 817. Strictly speaking, there can be no absolute ownership of private property. Each individual owner holds it subject to the law of the land, including the right of eminent domain. It is also pertinent to add that there is no technical synonym in English law for the Roman law term "dominium."

individual to the exclusion of all other persons,² one of its chief incidents being the right to sell or to dispose of the thing owned.³

It has already been observed in a previous chapter⁴ that ownership and property are synonymous, each term signifying a bundle or collection of rights.

The term "owner," as applied to real property, is often understood to mean one who owns in fee simple.⁵ There is, however, no fixed legal meaning to the word, and it may be used to indicate one having an interest in real property less than a fee⁶—one, in fact, who has any right, in law or in equity, which can be deemed an estate.⁷

In the land law of the Anglo-Saxons there is practically no doctrine of ownership or possession. At that period, the land was for the most part cultivated according to a customary routine.⁸ In fact, it was not until the time of Edward I⁹ that the land law became somewhat distinctly recognized as the law of property.¹⁰ It was not until the feudal system¹¹ began to weaken that the notion of ownership was developed.¹² It came into use gradually, but was finally established. The doctrine, together with its attendant right of alienation was derived by the early English writers from Roman law sources.¹³

² *Converse v. Kellogg*, 7 Barb. (N. Y.) 590, 597.

³ *Sherman v. Elder*, 24 N. Y. 381, 384. For other definitions of ownership, see 6 Words & Ph. p. 5134 et seq.

⁴ Chapter I, subdivision "Ownership and Property."

⁵ *St. Paul & S. C. R. Co. v. Matthews*, 16 Minn. 341 (Gil. 303); *Page v. W. W. Chase Co.*, 145 Cal. 578, 583, 79 Pac. 278; *Bowen v. John*, 201 Ill. 292, 295, 66 N. E. 357; *Coombs v. People*, 198 Ill. 586, 588, 64 N. E. 1056.

⁶ *Higgins v. San Diego*, 131 Cal. 294, 308, 63 Pac. 470; *Larimer County Ditch Co. v. Zimmermann*, 4 Colo. App. 78, 34 Pac. 1111, 1112.

⁷ *Mixon v. Stanley*, 100 Ga. 372, 377, 28 S. E. 440.

⁸ *Holds. Hist. Eng. Law*, II, 66.

⁹ A. D. 1272-1307.

¹⁰ *Holds. Hist. Eng. Law*, II, 292.

¹¹ See the preceding chapter.

¹² The earliest known use of the word "owner" is in the year 1340; and the earliest known use of the word "ownership" dates from the year 1583. *P. & M. Hist. Eng. Law*, II, 151, note 2; *Holds. Hist. Eng. Law*, II, 69.

¹³ See *Bracton*, ff. 45b, 46b.

ESTATE DEFINED

24. The quantity, degree, nature, or extent of interest which a person has in real property is called an "estate."

We have already seen that the word "estate" is used in the sense of property, either real or personal,¹⁴ and that the term "real estate" is frequently used as a synonym for "real property." This, however, is the broad and popular meaning of the word. In its technical meaning, the word "estate," or "state,"¹⁵ expresses a person's position with regard to the degree, quantity, nature, or extent of interest he has in land,¹⁶ and, particularly, with reference to quantity, whether a fee simple, a fee tail, for life, for a term of years or otherwise.¹⁷ In Anglo-Saxon law there is no doctrine of estates,¹⁸ but in Norman times the word came to have its technical meaning.¹⁹ In its technical sense, therefore, the term "estate" is used only in connection with real property. There can properly be no estates in personalty. A person's interest in land may be, however, as absolute as the ownership of personalty, or it may be for a limited time, or qualified by conditions.

CLASSIFICATION OF ESTATES

25. Estates are usually classified:

- (a) As to their quantity;
- (b) As to their quality;
- (c) As to their legal or equitable character;
- (d) As to the time of their enjoyment;
- (e) As to the number of their owners.

¹⁴ The broad use of the word "estate" as meaning the aggregate of one's property as an entity, as, for example, "a decedent's estate," is familiar. And see Appleton, C. J., in *Deering v. Tucker*, 55 Me. 284.

¹⁵ From Latin status.

¹⁶ 2 Blk. Comm. 103; Co. Litt. 345a; *Cliff v. White*, 12 N. Y. 519, 527; *Messmore v. Williamson*, 189 Pa. 73, 78, 41 Atl. 1110, 69 Am. St. Rep. 791; *Bates v. Sparrell*, 10 Mass. 323.

¹⁷ "State or estate signifieth such inheritance, freehold, term for years, tenancy by statute merchant, staple, or the like, as any man hath in lands or tenements." Co. Litt. 345a. See 2 Blk. Comm. 160.

¹⁸ Holds. Hist. Eng. Law, II, 67:

¹⁹ The term is used frequently in the Year Books of Edward I.

QUANTITY OF ESTATES

26. The quantity of an estate is measured by its duration and extent. As to quantity, estates are freeholds or less than freeholds.

- (a) Estates of freehold consist of two classes:
 - (1) Estates of inheritance, which may be either:
 - I. Estates in fee simple, or
 - II. Estates in fee tail.
 - (2) Estates not of inheritance, or life estates.
- (b) Estates less than freehold comprise:
 - 1. Estates for years.
 - 2. Estates at will.
 - 3. Estates from year to year.
 - 4. Estates at sufferance.

As stated in the text above, estates as to their quantity, or duration, are classed either as estates of freehold or estates less than freehold.²⁰ An estate of freehold²¹ is defined by Britton²² to be "the possession of the soil by a freeman."²³ Freeholds, or free tenements, were the only kind of property in land which was fully recognized and protected by the early common law.²⁴ Freehold estates are either estates of inheritance or estates not of inheritance.²⁵ Estates of inheritance are either in fee simple, which are inheritable by heirs generally, or in fee tail, which are inheritable only by particular heirs, exclusive of others, as the heirs of the donee's body.²⁶ Freehold estates not of inheritance exist for some definite period of uncertain duration, as where land is given to one to hold for his life, or the life of another, or until some particular event shall happen.²⁷ Estates less than freehold arise where one gives land to another to hold for a certain period or

²⁰ 2 Blk. Comm. 104; *New Orleans, J. & G. N. R. Co. v. Hemphill*, 35 Miss. 17; *Crawl v. Harrington*, 33 Neb. 107, 49 N. W. 1118.

²¹ Called "liberum tenementum" in the ancient Latin pleadings.

²² Chapter 32.

²³ And see 2 Blk. Comm. 104.

²⁴ Williams, *Real Prop.* (17th Internat. Ed.) 21.

²⁵ 2 Blk. Comm. 104; *Crawl v. Harrington*, 33 Neb. 107, 112, 49 N. W. 1118.

²⁶ 2 Blk. Comm. 104, 110; 4 Kent, Comm. 4; *Crawl v. Harrington*, 33 Neb. 107, 112, 49 N. W. 1118.

²⁷ 2 Blk. Comm. 104; *Hanna, J.*, in *Bradford v. State*, 15 Ind. 353; *People ex rel. Godwin v. Board of Education of Grand Rapids*, 38 Mich. 95; *Wyatt v. Irrigation Co.*, 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280. For questions of freehold, as determining the jurisdiction of a court, see *Wilson v.*

term, or at the donor's will only, or where one occupies another's land on sufferance.²⁸

In some states long terms of years are by statute declared to be freeholds,²⁹ and in others, estates for the life of another³⁰ are declared to be estates of inheritance.³¹ Estates less than freehold are chattel interests in lands, and go to the personal representative of the deceased owner, unless he has otherwise disposed of them by will.

ESTATES IN FEE SIMPLE

27. A fee simple is a freehold estate in perpetuity. It is an estate limited to a man and his heirs forever. It is the largest possible estate in land.

A man cannot have a greater estate of inheritance than fee simple.³² The word "fee" is not used here in its original meaning of a "feud" or "fee," that is, land held of a superior, as distinguished from allodial land, but it denotes an estate of inheritance, an estate that descends to a man's heirs.³³ The word "simple" means that the land descends to one's heirs generally, without being conditioned or restricted to any particular class of heirs.³⁴ In other words, a tenant in fee holds the lands for himself and for his heirs, absolutely and simply.³⁵ A fee simple³⁶ is a freehold estate in perpetuity.³⁷ It may exist in incorporeal as well as in

Dresser, 152 Ill. 387, 38 N. E. 888; *Van Meter v. Thomas*, 153 Ill. 65, 38 N. E. 1036; *Hupp v. Hupp*, 153 Ill. 490, 39 N. E. 124; *Howe v. Warren*, 154 Ill. 227, 40 N. E. 472; *Moshier v. Reynolds*, 155 Ill. 72, 39 N. E. 621.

²⁸ Bract. ff. 26b, 27a, 207a; Litt. § 57; Co. Litt. 43b; 2 Blk. Comm. chs. VII-IX; Williams, Real Prop. (17th Internat. Ed.) 70.

²⁹ *Stark v. Mansfield*, 178 Mass. 76, 59 N. E. 643. And see 1 Stim. Am. St. Law, § 1310.

³⁰ See Life Estates, post.

³¹ 1 Stim. Am. St. Law, § 1310.

³² Litt. § 11; *Bush v. Bush*, 5 Del. Ch. 144; *Brackett v. Ridlen*, 54 Me. 426; *Jecko v. Taussig*, 45 Mo. 167.

³³ Litt. § 1; Wright, Tenures, 148.

³⁴ Co. Litt. 1b; 2 Blk. Comm. 105; *Haynes v. Bourn*, 42 Vt. 686.

³⁵ Stephen's Comm. (15th Ed.) vol. I, 145.

³⁶ "Fee simple" means the same as "fee simple absolute," and generally "fee" alone is a sufficient designation. 2 Blk. Comm. 106; Co. Litt. 1b; *Clark v. Baker*, 14 Cal. 612, 631, 76 Am. Dec. 449; *Thompson, C. J.*, in *Jackson ex dem. Hicks v. Van Zandt*, 12 Johns. (N. Y.) 169.

³⁷ *Friedman v. Steiner*, 107 Ill. 125; *Jecko v. Taussig*, 45 Mo. 167; 2 Blk. Comm. 106. An estate in fee simple may, however, be subject to some condition or qualification which will put an end to it, in which case it is called a base or determinable fee. See post.

corporeal hereditaments.³⁸ A fee simple is, in theory, equal to absolute ownership, at least so far as there can be absolute ownership. Under the feudal system, however, no one except the sovereign held a fee simple. Grants of land were made to tenants to hold "in demesne as of fee," but this was not the absolute fee simple of to-day. Under the feudal grant, an interest in the land still remained in the grantor or feudal lord, represented by his right to the feudal services due from the tenant. The fee simple might well be called our normal estate. It represents the whole ownership of the land. Out of the fee simple all other estates are carved. The powers incident to estates less than fee simple are in all cases less than those of this estate. In modern estates and conveyancing, the terms "fee," "fee simple," and "fee simple absolute," are substantially synonymous.³⁹

SAME—CREATION

28. To create a fee simple estate by deed, the word "heirs" must be used, unless—

(a) The local statute makes this unnecessary, or

(b) The owner of the fee conveys by a quitclaim deed.

In case of a will, the intention of the testator governs, and, in absence of a contrary intention, a devise by the owner of a fee-simple estate passes the entire estate without technical words of limitation. By statute, in many states, a fee simple is presumed to be intended, if not otherwise expressed, when lands are devised.

Creation by Deed

Unless the statute otherwise provides,⁴⁰ in order to create an estate in fee simple by deed, it is the technical rule of the common law that the limitation, as it is called, must be to one "and his heirs"; otherwise, the grantee will take only a life estate.⁴¹ No

³⁸ 2 Blk. Comm. 106. In case of incorporeal hereditaments, the proper phrase was "seised as of fee." Id.

³⁹ Jecko v. Taussig, 45 Mo. 167.

⁴⁰ See *infra*.

⁴¹ *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377; *Stell v. Barham*, 87 N. C. 62; *Batchelor v. Whitaker*, 88 N. C. 350; *Buffum v. Hutchinson*, 1 Allen (Mass.) 58; *Jordan v. McClure*, 85 Pa. 495; *Arms v. Burt*, 1 Vt. 303, 18 Am. Dec. 680. *Contra*, *Cole v. Lake Co.*, 54 N. H. 242.

HEIRS AND ASSIGNS.—The words "heirs and assigns" are usually employed. This was necessary, originally, in order to give the grantee the power of

other words will suffice, even though the meaning be the same and the intention clear.⁴² In granting a fee simple to a corporation sole, "successors" supplies the place of "heirs," and is the proper word to use,⁴³ but in the case of a corporation aggregate no words of limitation are necessary.⁴⁴ The technical words are not required, however, in a strict quitclaim deed.⁴⁵ Thus, when one joint tenant or a coparcener⁴⁶ seised in fee simple releases his interest to his cotenant, no words of inheritance, as it is called, are necessary to 'pass a fee.⁴⁷ The rule is otherwise, however, in the case of a conveyance by a tenant in common⁴⁸ to a cotenant,⁴⁹ or where the reversion is released to the tenant for life.⁵⁰ In the

alienation. P. & M. Hist. Eng. Law, II, 14. In modern times, however, the words "and assigns" give no added value to the estate. The power of alienation exists without them. *Milman v. Lane*, [1901] 2 K. B. 745, C. A.

EQUITABLE ESTATES.—A distinction is made, however, in the necessary words of limitation in case of the grant of an equitable estate. See *Equitable Estates*, post. And see *FULLER v. MISSROON*, 35 S. C. 314, 14 S. E. 714, *Burdick Cas. Real Property*. See, also, *North v. Philbrook*, 34 Me. 532; *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065.

⁴² For instance, a life estate only was held to pass by the words "successors and assigns forever," *Sedgwick v. Laffin*, 10 Allen (Mass.) 430; "executors, administrators, and assigns," *Clearwater v. Rose*, 1 Blackf. (Ind.) 137; "and his generation so long as the waters of the Delaware run," *Foster v. Joice*, 3 Wash. C. C. 498, Fed. Cas. No. 4,974. But see *Evans v. Brady*, 79 Md. 142, 28 Atl. 1061; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352; *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237.

⁴³ *Shaw, C. J.*, in *Overseers of Poor of City of Boston v. Sears*, 22 Pick. (Mass.) 126; *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985. As heirs take from the ancestor, so doth the successor from the predecessor. Co. Litt. 9b, 94b.

⁴⁴ *Congregational Soc. of Halifax v. Stark*, 34 Vt. 243; *Wilcox v. Wheeler*, 47 N. H. 488. And see *Beach v. Haynes*, 12 Vt. 15; *Wilkes-Barre v. Wyoming Historical & Geological Soc.*, 134 Pa. 616, 19 Atl. 809. Where land is settled upon or devised to a charity, it may happen that, when the corporation managing the charity comes to an end, and the charity itself becomes impracticable, the land will return to the donor's heirs. *Stanley v. Colt*, 5 Wall. 119. And see 1 Bl. Comm. 484. *Rutherford v. Greene's Heirs*, 2 Wheat. 196, 4 L. Ed. 218, and *Proprietors of Enfield v. Permit*, 5 N. H. 280, 20 Am. Dec. 580, are often cited to the effect that technical words of limitation are not necessary to pass a fee in the case of legislative grants, but they do not support the proposition.

CORPORATION AGGREGATE.—The word "successors" is not necessary, though usually inserted; for, as the corporation never dies, such estate is perpetual, or equivalent to a fee simple. Co. Litt. 9b, 94b.

⁴⁵ Since a quitclaim deed passes whatever interest the grantor himself has. See *Deeds*, post.

⁴⁶ See post, *Joint Ownership of Estates*, chapter XII.

⁴⁷ Co. Litt. 9b; *Scott, J.*, in *Rector v. Waugh*, 17 Mo. 13, 28, 57 Am. Dec. 251.

⁴⁸ See post, chapter XII.

⁴⁹ *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251.

⁵⁰ 1 Washb. Real Prop. (5th Ed.) 90.

case of a conveyance in which reference is made to another instrument, if the necessary words of inheritance are used in the instrument referred to, their absence from the other will not prevent a fee simple passing.⁵¹ When, however, a fee simple is intended to be conveyed, but adequate words are not employed, the deed may be reformed in equity, and made to express the intention of the parties.⁵² This rule requiring the word "heirs" to be used has, in many states, been changed by statute, so that other expressions are adequate to convey a fee simple; and in some states it is to be presumed that a fee simple was intended unless the contrary appears.⁵³

Creation by Will

In order to create a fee simple estate by will, the word "heirs" is not required. In many states, there are express statutory provisions to the effect that a devise of lands shall be presumed to pass a fee simple, unless by express words, or manifest intent, it appears that a lesser estate was intended.⁵⁴ However, without the aid of such statutes, even at common law, the rule requiring the word "heirs" in case of a conveyance by deed is relaxed in the case of limitations in wills, and the intention of the testator governs, so that he can devise a fee simple without using the word "heirs," if the expression employed shows that a fee simple is intended, as, for example, a devise to one "forever," or "to one and his assigns forever," or to one "in fee simple."⁵⁵ That the

⁵¹ Co. Litt. 9b; *Lemon v. Graham*, 131 Pa. 447, 19 Atl. 48, 6 L. R. A. 663; *Mercier v. Railway Co.*, 54 Mo. 506. But see *Lytle v. Lytle*, 10 Watts (Pa.) 259; *Reaume v. Chambers*, 22 Mo. 36; *Garde v. Garde*, 3 Dr. & War. 435.

⁵² See *Fetter*, Eq. p. 314; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308. Cf. *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065; *Defraunce v. Brooks*, 8 Watts & S. (Pa.) 67.

⁵³ 1 Stim. Am. St. Law, § 1474. Pennsylvania, New Jersey, Delaware, South Carolina, Florida, Ohio, and Wyoming have not dispensed with words of inheritance in deeds. 1 Dembitz, Land Tit. 99. The latest statute should be consulted, however.

ENGLAND.—By the English Conveyancing Act of 1881 (44 & 45 Vict. c. 41) an estate in fee simple can be created by the word "heirs" or the words "in fee simple." Under this statute it is held, however, that the words "in fee" are not sufficient. *Re Ethel's Contract*, [1901] 1 Ch. 945.

⁵⁴ 4 Kent, Comm. 8. The local statutes should be consulted. See, also, 1 Stim. Am. St. Law, § 1474.

ENGLAND.—The law also, in England, is as stated in the text. See Wills Act, 1837 (7 Wm. IV & 1 Vict. c. 26, § 28).

⁵⁵ Litt. § 586; Coke, 1 Inst. 322b; 2 Blk. Comm. 108. And see the following cases: *Ferguson v. Thomason*, 87 Ky. 579, 9 S. W. 714; *Lofton v. Murchison*, 80 Ga. 391, 7 S. E. 322; *Howze v. Barber*, 29 S. C. 466, 7 S. E. 817; *Webster's Trustee v. Webster* (Ky.) 22 S. W. 920; *Lockett v. Lockett*, 94 Ky. 289, 22 S. W. 224; *Mitchell v. Campbell*, 94 Ky. 347, 22 S. W. 549; *Thomson v. Peake*,

testator meant to give a fee simple may also be implied from a charge imposed on the devisee, because, as said, if he were required to pay out money, and received only a life estate, he might die before being reimbursed from the land.⁵⁶ If, however, the charge is imposed on the land, instead of on the devisee personally, such a presumption does not obtain.⁵⁷ A fee simple may also be presumed from the nature of the land devised, if no other estate would be of any value to the devisee; for instance, a devise of wild lands, which would be of no value unless the timber could be cut, a tenant for life having no such right.⁵⁸

SAME—RIGHT OF USER

29. The owner of an estate in fee simple may, as a rule, use his land without any restrictions, provided he does not thereby cause injury to another.

The owner of an estate in fee simple has, in general, an indefinite right of user of his land. He may exercise all kinds of acts of ownership, and may commit unlimited waste, such, for example, as opening and working mines, cutting timber, pulling down buildings, or removing fixtures.⁵⁹ In fact, such acts are not technical "waste" at all, when done by an owner in fee simple.⁶⁰ In con-

38 S. C. 440, 17 S. E. 45, 725; *Boutelle v. Bank*, 17 R. I. 781, 24 Atl. 838; *Campbell v. Carson*, 12 Serg. & R. (Pa.) 54; *In re Green's Estate*, 140 Pa. 253, 21 Atl. 317; *Armstrong v. Michener*, 160 Pa. 21, 28 Atl. 447; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Dilworth v. Guskys*, 131 Pa. 343, 18 Atl. 899. In a devise it has been held that a fee simple passed by the words "all my right" or "property." *Newkerk v. Newkerk*, 2 Caines (N. Y.) 345; *Jackson ex dem. Pearson v. Housel*, 17 Johns. (N. Y.) 281. *Contra*, *Doe v. Allen*, 8 Term. R. 497. "All my estate" (by one owning a fee simple), *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621. To A. "or his heirs," *Wright v. Wright*, 1 Ves. Sr. 409. To A. "forever," *Heath v. Heath*, 1 Brown, Ch. 147. And see *BARNETT v. BARNETT*, 117 Md. 265, 83 Atl. 160, Ann. Cas. 1913E, 1284, *Burdick Cas. Real Property*.

⁵⁶ *Doe v. Richards*, 3 Term R. 356; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; *Lithgow v. Kavenagh*, 9 Mass. 161; *Wait v. Belding*, 24 Pick. (Mass.) 129; *Blinston v. Warburton*, 2 Kay & J. 400; *Pickwell v. Spencer*, L. R. 6 Exch. 190.

⁵⁷ *Jackson v. Bull*, 10 Johns. (N. Y.) 148, 6 Am. Dec. 321; *McLellan v. Turner*, 15 Me. 436; *Doe ex dem. Franklin v. Harter*, 7 Blackf. (Ind.) 488; *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136. And see *Spraker v. Van Alstyne*, 18 Wend. (N. Y.) 200.

⁵⁸ *Sargent v. Towne*, 10 Mass. 303.

⁵⁹ 2 Bk. Comm. 282; *A. G. v. Marlborough*, 3 Madd. 498; *Jervis v. Bruton*, 2 Vern. 251. But see the *Case of Mines*, 1 Plow. 310, 336; *Com. v. Tewksbury*, 11 Metc. (Mass.) 55.

⁶⁰ See, however, *Turner v. Wright*, 2 De G., F. & J. 234, 246.

nection, however, with other estates, such acts would amount to waste, and would, in consequence, be unlawful. While it is true in a general sense that the owner in fee simple may use his land as he pleases, yet the maxim, "so use your own that you do not injure another,"⁶¹ applies to him as well as to the owners of other kinds of estates. His use of his land is not absolute. He has no right to maintain a nuisance upon his premises.⁶² In case, moreover, the land is subject to restrictive covenants,⁶³ or to easements,⁶⁴ it must be used in conformity to the needs and requirements of such incumbrances.

SAME—ALIENATION

30. An estate in fee simple may be alienated either by a conveyance *inter vivos*, or by a will.

Such an estate may also be transferred by operation of law, as by way of sale for debts or taxes, or when taken for public purposes under the power of eminent domain.

Since the time of the statute of *quia emptores*,⁶⁵ the right of an owner of an estate in fee simple to alienate it has been an inherent incident of such an estate. At common law, estates in fee simple were not, however, devisable by will,⁶⁶ but since the statute of wills⁶⁷ the owner of such an estate may dispose of it by will very much as he pleases.⁶⁸ An owner of land, however, although he holds it in fee simple, cannot create estates and forms of tenure unknown to the law, or which are prohibited by law.⁶⁹ Within this principle comes the rule against perpetuities, to be discussed hereafter,⁷⁰ which prevents the creation of estates to

⁶¹ "Sic utere tuo ut alienum non lædas."

⁶² 2 Jag. Torts, p. 748; 1 Wood, Nuis. (3d Ed.) 127; Bradford Corporation v. Pickles, [1895] A. C. 587, 598.

⁶³ See post.

⁶⁴ See chapter XVII, post.

⁶⁵ A. D. 1290, 18 Edw. I. See ante.

⁶⁶ By the custom of London, however, as also by the custom of other cities and boroughs, such estates were devisable before the statute of wills. See Litt. § 167; Co. Litt. 111a.

⁶⁷ A. D. 1540, 32 Hen. VIII, c. 1.

⁶⁸ Under the statute of wills, tenants in socage could devise all their lands, but tenants by knight-service could devise only two-thirds of their holdings. The change of tenures by knight-service into tenures by socage resulted in a right to devise all lands held in fee simple. Co. Litt. 111b; Laws of England, vol. 24, p. 168. The present English statute is known as the Wills Act of 1837 (7 Wm. IV & 1 Vict. c. 26).

⁶⁹ See Doeblér's Appeal, 64 Pa. 9.

⁷⁰ See chapter XVI, post.

take effect, at a time too remote in the future. Moreover, an owner of land is not permitted to convey to others, and at the same time forbid them to dispose of it, for the law allows only very limited restraints to be imposed on alienation.⁷¹ In some states also, there is a limitation on the amount of land which a man can give by will for charitable purposes.⁷² Furthermore, no one is allowed to dispose of his land in such a way that it is a fraud on his creditors;⁷³ and, when an action is pending which involves the title to land, it cannot be conveyed away so as to prejudice the other party.⁷⁴ The most important exceptions, however, to the power of alienation, are those arising from the rights of dower, curtesy, and homestead, which will be subsequently discussed.⁷⁵

Transfer by Operation of Law

In addition to the right of voluntary alienation by the owner, an estate in fee simple may be transferred without the owner's consent, for it may be sold for taxes, or to pay his debts.⁷⁶ Land may also be taken from the owner under the power of eminent domain, but this can only be done on making compensation for the land so taken.⁷⁷ An estate, however, may be so limited that it shall terminate upon any attempt at alienation, voluntary or involuntary, and in such case it will not be available to creditors.⁷⁸ If the owner of an estate in fee simple does not dispose of it by conveyance or devise, it descends to his heirs in general, and vests in them without any act on their part.⁷⁹

⁷¹ See post. See, also, *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; *Langdon v. Ingram's Guardian*, 28 Ind. 360. Restrictions, however, as to use may be valid. *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547.

⁷² 1 Stim. Am. St. Law, § 2618; *Williams*, Real Prop. (17th Am. Ed.) p. 95, note.

⁷³ See chapter XXV, post, *Restraints and Disabilities of Transfer*.

⁷⁴ See *Lis Pendens*, post.

⁷⁵ See chapters VIII and IX, post.

⁷⁶ *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873; *Wyman v. Brigden*, 4 Mass. 150; *Nokes v. Smith*, 1 Yeates (Pa.) 238. By different acts of congress a priority is given to the claims of the United States, and these acts are constitutional. *U. S. v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. Ed. 104. Similar statutes exist in some states regulating the order of preference of claims. 2 *Werner*, Adm'n, 772. See, in general, chapter XXIV, post.

⁷⁷ *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274. See post, chapter XXIV.

⁷⁸ *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; *Emery v. Van Syckel*, 17 N. J. Eq. 564. And see post, chapter XIII.

⁷⁹ *In re Estate of Donahue*, 36 Cal. 329.

CHAPTER VI

ESTATES IN FEE TAIL

31. Definition of Estate Tail.
32. Origin of Estates Tail.
33. Classification of Estates Tail.
34. Creation of Estates Tail.
35. Incidents of Estates Tail.
36. The Barring of Estates Tail.
37. Tenant in Tail after Possibility of Issue Extinct.
38. Estates Tail in the United States.
39. Quasi Entail.

DEFINITION OF ESTATE TAIL

31. An estate tail is an estate of inheritance which descends only to the heirs of the body of the donee or to some special class of such heirs.

ORIGIN OF ESTATES TAIL

32. Such estates were created by the operation of the statute *de donis conditionalibus* upon fees conditional at common law.

Definition

An estate tail is a freehold estate of inheritance, with the peculiarity that, on the death of the donee, only the heirs of his body, or some particular class of such heirs, can inherit. This limitation of the inheritance to the heirs of one's body, instead of to the general heirs, is the distinguishing feature of an estate tail.¹ Moreover, only heirs in the direct descending line can inherit. A brother, for example, of a tenant in tail cannot take,² since the inheritance is confined to the donee's issue; that is, his children, his grandchildren, and so on in the direct course of descent. Upon the extinction of the donee's line,

¹ *Fanning v. Doan*, 128 Mo. 323, 328, 30 S. W. 1032; *Prindle v. Beveridge*, 7 Lans. (N. Y.) 225, 228; *McArthur v. Allen*, 15 Fed. Cas. No. 8,659; *Rivard v. Gisenhof*, 35 Hun (N. Y.) 247, 251; *Goodright v. Morningstar*, 1 Yeates (Pa.) 313; *Corbin v. Healy*, 20 Pick. (Mass.) 514; *Riggs v. Sally*, 15 Me. 408. Cf. *Reinhart v. Lantz*, 37 Pa. 488.

² 2 Blk. Comm. 113.

the estate terminates.³ It is apparent, therefore, that an estate tail is a lesser interest in land than an estate in fee simple. If the owner of an estate in fee simple makes a grant of an estate tail, an interest still remains in the grantor. This interest is called a reversion;⁴ that is, if at any time there is a failure of heirs within the description of those entitled to take under the gift, the property reverts to the donor or his heirs. Where the donor of an estate tail, by the same instrument which creates it, gives the interest which remains in him to a third person, the estate of such third person is called a "remainder."⁵ Prior to the statute *de donis conditionalibus*,⁶ estates tail were known as fees conditional at common law.⁷

Fees Conditional at Common Law

The chief characteristic of an estate in fee simple, as we have seen, is that it is an estate of inheritance that descends to one's heirs in general.⁸ There is no restriction or condition as to any special class of heirs. An estate may, however, be limited, at common law, to one and to a special class of heirs, as, for example, to one and the heirs of his body or to one and the heirs of his body by a certain wife. An estate so limited was called, indifferently, a fee conditional, a conditional fee, a conditional gift, a fee conditional at common law, or a conditional fee simple. It was conditional not absolute, in the sense that a condition was imposed upon the inheritance.⁹ The one who made the gift (*donum*), as it was called, was known as the "donor," and he to whom the estate was given was called the "donee."¹⁰

In early feudal times, when estates first became hereditary, and were given to a man and his heirs, the word "heirs" was considered to mean lineal heirs, or the descendants of the body of the first taker.¹¹ The collateral relations, such as brothers, sisters, and cousins, could not take. This was obviously to the advantage of the feudal lord or grantor; for, by confining the inheritance to the issue of his tenant, he was more likely to have profitable wardships and escheats than if

³ *Butler v. Huestis*, 68 Ill. 594, 599, 18 Am. Rep. 589; *Richardson v. Richardson*, 80 Me. 585, 593, 16 Atl. 250.

⁴ And therefore the statute of *quia emptores* does not apply to a fee tail, and tenure may exist between donor and donee. Dig. Hist. Real Prop. (4th Ed.) 248.

⁵ See, in general, chapter XV, post.

⁶ *Infra*.

⁷ *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Pollock v. Speidel*, 17 Ohio St. 439; *Kirk v. Furgerson*, 6 Cold. (Tenn.) 479; *EWING v. NESBITT*, 88 Kan. 708, 129 Pac. 1131, *Burdick Cas. Real Property*.

⁸ See preceding chapter.

⁹ *Willion v. Berkley*, Plowd. 222, 252; P. & M. II, 17.

¹⁰ 2 Blk. Comm. 110.

¹¹ Dig. Hist. Real Prop. (4th Ed.) 220; P. & M. Hist. Eng. Law, 11.

collateral kinsmen were admitted. At this time the heir derived his title to the estate from the grantor by designation in the grant. As the tenant acquired, however, in course of time, the power of alienating the fee, the interest of the heir became reduced to a mere expectation of succeeding, in the event of his ancestor not exercising that power. The additional grant to the heirs was then referred wholly to the estate of the ancestor, as importing merely an estate of inheritance, an essential incident of which was the power of transferring the land, and the heir no longer claimed as grantee by designation in the grant, but derived his title from the ancestor by descent.¹² The word "heirs" was also extended, so as to include collateral as well as lineal heirs.¹³

It resulted, therefore, that if a donor of land desired to confine an estate to the lineal descendants of the donee, it was necessary to limit the estate to the heirs of the donee's body. Moreover, since the tenants of land in fee simple were getting into the custom of alienating their land without consulting their heirs, the donors of the land tried to prevent this alienation by expressly providing that the land should go to a particular class of heirs.¹⁴ These limitations, did not, however, take the same form. Some, for example, were to a man and the heirs of his body; others to a man and the heirs of his body by a particular wife; others to a man and his heirs, providing he had an heir of his body.¹⁵ The interpretations put upon these various forms of limitation were not always uniform.¹⁶ In time, however, they were construed in accordance with the last form, namely, "to a man and his heirs, provided he had an heir of his body;" that is, an estate in fee simple upon the condition that an heir of the body was born.¹⁷

The birth of issue was, therefore, held to discharge the estate of its condition, and thereupon, like a fee simple absolute, the tenant had power to alien or incur it.¹⁸ It was also liable to forfeiture for treason.¹⁹ If the donee aliened the land before issue was born, the conveyance was effectual against both the donee and the donor during the donee's life. If issue was born to the donee subsequently to his conveyance, the grantee's estate became absolute, and all rights of the issue and of the donor were cut off thereby.²⁰ On the other hand, if the donee died without having had an heir of his body, or

¹² Leake, *Prop. Land.* 33.

¹³ Williams, *Real Prop.* (17th Ed.) 101.

¹⁴ P. & M. II, 18; *Holds. Hist. Eng. Law*, III, 96.

¹⁵ See Bracton, ff. 17b, 47; *Holds. Hist. Eng. Law*, III, 97, 98.

¹⁶ *Id.*

¹⁷ *Holds. Hist. Eng. Law*, III, 98.

¹⁸ *Co. Litt.* 19a.

¹⁹ *Id.*

²⁰ *Co. Litt.* 19a; 1 Spence, *Eq. Jur.* p. 141. And see *Nevill's Case*, 7 Coke, 33a; *Willion v. Berkley*, Plow. 223; *Buckworth v. Thirkell*, 3 Bos. & P. 652, note.

if, leaving an heir to whom the land descended, his issue became at any future time extinct, the land reverted to the donor. The donor did not have a strict reversion, but only a possibility of a reverter. The fee was considered to be in the donee, subject to being divested by the failure of the condition. The limitation to the heirs of his body did not otherwise affect the rights and powers of a tenant, and in respect of these it remained a fee simple. So long as the fee lasted, the tenant for the time being had all such powers, including the power of alienation, as were the inseparable incidents of an estate of inheritance. It was, however, a condition necessary to the full effect of his alienation, so as to bar, not only his issue, but also the possibility of reverting to the grantor, that he should have heritable issue.²¹

The Statute de Donis Conditionalibus

The judicial construction put upon fees conditional at common law defeated the intention of the donors of land. Since it was held that the birth of issue fulfilled the condition, and that, upon such birth, conditional fees became estates in fee simple with power of free alienation, the plans of donors to preserve the inheritance for the issue of donees were thwarted. The great landowners wished such gifts to be interpreted in accordance with their interests and with the plain meaning of their intention.²² Consequently, in 1285, they secured the passage of the famous statute "de donis conditionalibus,"²³ or, as it is often called, the statute of Westminster II. The act provided that, "where any giveth his land to any man and his wife and to the heirs begotten of their bodies, * * * the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail," etc. This statute, therefore, prevented the estate from becoming a fee simple absolute, and converted it into an estate of inheritance of a restricted nature, whence the estate was called "feudum talliatum," or an estate tail.²⁴

No forfeiture was imposed on a tenant who should alien his estate, but his conveyance was of no effect, after his death, against his heirs or the donor. The statute, in taking away from the tenant the power to alien the land, deprived his estate of that incident which chiefly

²¹ 2 Blk. Comm. 110; 1 Spence, Eq. Jur. 141; Anon., Fitzh. Abr. "Formedon," 65.

²² Holds. His. Eng. Law, III, 98.

²³ 13 Edw. I, St. 1, c. 1, § 2. See Dig. Hist. Real Prop. (5th Ed.) p. 226.

²⁴ Litt. § 18; Co. Litt. 22a; Laws of Eng. vol. 24, § 442.

characterized it as a fee simple.²⁵ "Where an estate to one and to the heirs of his body was a fee simple before the statute, now since the statute it is taken that he has but a fee tail, and this is included in the statute although it is not expressed; for when the statute restrained the donee from aliening the fee simple, or from doing other acts which he that has a fee simple may do; it was presently taken that the fee was not in him, for it would be idle to adjudge it in him when he could not do anything with it, and therefore it was taken, by collection and implication of the act, that the fee simple continued in the donor. So that he has one inheritance, viz. a fee simple, and the donee has another inheritance of an inferior degree, viz. a fee tail. And immediately upon the making of the act it had this name given it."²⁶ It was so called from the inheritance being cut down, "talliatum,"²⁷ to the line of heirs designated. The name was used for a restricted inheritance before the statute, but since the statute it is used distinctively for the new estate thereby created.²⁸

CLASSIFICATION OF ESTATES TAIL

33. Estates tail are divided into the following six classes:

- (1) Estates in tail general, the donee being the only parent named, and descending to heirs of either sex.
- (2) Estates in tail general male, only one parent named, but descending only to male heirs.
- (3) Estates in tail general female, only one parent named, but descending only to female heirs.
- (4) Estates in tail special, both parents named, and descending to heirs of either sex.
- (5) Estates in tail special male, both parents named, but descending only to male heirs.
- (6) Estates in tail special female, both parents named, but descending only to female heirs.

Where the estate is limited simply to the heirs of the donee's body, without restriction as to the spouse of the donee, the estate is an estate in tail general.²⁹ In such a case, any of the issue of the donee's body can inherit.³⁰ The inheritance, however, may be restricted to

²⁵ Hill v. Hill, 74 Pa. 173, 15 Am. Rep. 545.

²⁶ Willion v. Berkley, Plow. 251, per Dyer, C. J.

²⁷ From the mediæval Latin "talliare," to cut, to limit. Compare the words "tailor," "tally."

²⁸ Leake, Prop. Land, 37.

²⁹ Litt. § 14.

³⁰ Co. Litt. §§ 14, 15; 2 Blk. Comm. 113; Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505; Duffy v. Jarvis (C. C.) 84 Fed. 731.

the heirs of the body of the donee and another person named, as "to A. and his heirs begotten on the body of his wife, B."³¹ Or the limitation may be to two donees and the heirs of their two bodies. These cases, where both parents of the heirs who are to take are named, are called estates in tail special.³² Such limitations are valid if the persons named are husband and wife, or if there is a possibility of their becoming lawfully married,³³ no matter how improbable it is that they ever will be.³⁴ If, however, the estate is given to a man and his heirs by a woman whom he cannot marry because she is within a prohibited degree of consanguinity, the limitation to the heirs is void, and the donee will take only a life estate, the reversion remaining in the donor.³⁵ A limitation, however, in tail to two donees who are each married to other persons is good, since they may become free, by reason of death or divorce, to marry each other.³⁶ Whenever there can be no issue who can take the estate according to the form of the gift—for example, because of the death of the wife named prior to the gift—then the donee will take only a life estate.³⁷

The inheritance of an estate in general or special tail may be further restricted to the males or females of the class of heirs designated. Examples of such estates are "to A. and the heirs male of his body,"³⁸ and "to A. and his heirs male on the body of his wife, B., begotten."³⁹ Estates tail female are very rare. No one can inherit an estate in tail male who cannot trace his descent from the donee through males entirely. For this reason the son of a daughter of the donee cannot take the estate, because his mother could not have inherited. The same principle applies in estates tail female, so that only females and the female issue of females can take.⁴⁰

³¹ 2 Blk. Comm. 114; *McArthur v. Allen*, 15 Fed. Cas. No. 8,659.

³² Co. Litt. § 16; *Allen v. Craft*, 109 Ind. 476, 478, 9 N. E. 919, 58 Am. Rep. 425.

³³ Co. Litt. § 16.

³⁴ But a contrary presumption may arise, as in case of two donees who have already been married and divorced. Co. Litt. 25b, note 2.

³⁵ Co. Litt. § 283; *Jordan v. Roach*, 32 Miss. 481, 603.

³⁶ Co. Litt. § 25; *Horsley v. Hilburn*, 44 Ark. 458.

³⁷ That is, the donee has an estate tail after possibility of issue extinct. See *infra*.

³⁸ *Hulburt v. Emerson*, 16 Mass. 241.

³⁹ Co. Litt. § 25.

⁴⁰ Co. Litt. §§ 23, 24.

CREATION OF ESTATES TAIL

34. The proper way, at common law, to create an estate tail general, is to give the land to the donee and the heirs of his body. •

Estates tail cannot be created out of chattel interests in land, or out of any personal property.

Creation of Estates Tail

Estates tail may be created either by deed or by will.⁴¹ At common law, if the estate is created by deed, the phrase "to [the donee] and the heirs of his body" is the appropriate form of limitation.⁴² The old form was, however, "to [the donee] and the heirs of his body begotten," although the use of the word "begotten" is unnecessary.⁴³ The word "heirs" is necessary, however, and such words as "issue" or "seed" cannot be substituted for it.⁴⁴ The phrase "of his body" is, however, not essential, since "the heirs of his flesh" is sufficient.⁴⁵ There must always be, however, some words which show that the heirs of the donee's body, or some class of them, are to inherit the estate. If words of inheritance are absent, the donee takes only a life estate,⁴⁶ while the omission of the words of procreation, provided the word "heirs" is used, gives the donee a fee simple.⁴⁷ Any words, however, which show that the word "heirs" is to be restricted to the heirs of the body, will suffice to restrict the inheritance to a fee tail.⁴⁸

In the case of wills there is the same relaxation of technical requirements as in the creation of a fee simple, and the intention of the testator governs, even though he does not use the technical words required in a deed.⁴⁹ Consequently the word "issue,"⁵⁰ or

⁴¹ *Maslin v. Thomas*, 8 Gill (Md.) 18.

⁴² Co. Litt. 26a.

⁴³ Co. Litt. 20b; *Doe v. Hallett*, 1 M. & S. 124.

⁴⁴ Co. Litt. 20a; 2 Blk. Comm. 115; *Wheeler v. Duke*, 1 Cr. & M. 210.

⁴⁵ Co. Litt. 20b.

⁴⁶ Co. Litt. 20b; 2 Blk. Comm. 115; *Ford v. Johnson*, 41 Ohio St. 366. Cf. *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505.

⁴⁷ 2 Blk. Comm. 115; Co. Litt. 27a; *Doe v. Smeddle*, 2 Barn. & Ald. 126.

⁴⁸ *Hall's Lessee v. Vandegrift*, 3 Bin. (Pa.) 374; *Corbin v. Healy*, 20 Pick. (Mass.) 514; *Pollock v. Speidel*, 17 Ohio St. 439; *Den ex dem. Holcomb v. Lake*, 24 N. J. Law, 686; *Morgan v. Morgan*, L. R. 10 Eq. 99; *Den ex dem. Ewan v. Cox*, 9 N. J. Law, 10; *Buxton v. Inhabitants of Uxbridge*, 10 Metc. (Mass.) 87; *Brown v. Hospital*, 155 Mass. 323, 29 N. E. 625.

⁴⁹ *Reinoehl v. Shirk*, 119 Pa. 108, 12 Atl. 806; *Arnold v. Brown*, 7 R. I.

⁵⁰ *Clark v. Baker*, 3 Serg. & R. (Pa.) 470; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

"children,"⁵¹ may be sufficient to create an estate tail, without using the word "heirs," if it appears from the context that the deviser so intended.⁵² In a will the expression "heirs male" has been held to pass a fee tail, although it would create a fee simple if used in a deed.⁵³ A limitation to A. and to his heirs male, or to A. and to his heirs female, creates an estate in fee simple, because it contains no restriction to a particular line of issue. It is not limited by the gift of what body the issue male or female shall be. Inheritance by heirs general cannot be restricted to one sex; therefore, the words "males" and "females," having here no legal import, are rejected, and all the heirs, female as well as male, may inherit, because no man can institute a new kind of inheritance not allowed by law.⁵⁴ The intention to give a fee tail may appear, however, from a limitation over, as, for example, if the donee "die without heirs of his body," or similar expressions. This is called an "estate tail by construction."⁵⁵

In the case of estates in tail special, in which both parents are named, it is not necessary to name with particularity the second parent. A designation as of a class is sufficient. For example, in a recent English case,⁵⁶ a devise "to C., if he marries a fit and

189; *Manwaring v. Tabor*, 1 Root (Conn.) 79; *Clark v. Baker*, 3 Serg. & R. (Pa.) 470; *Stone v. McMullen* (May 3, 1881) 10 Wkly. Notes Cas. (Pa.) 541. But see *Hill v. Hill*, 74 Pa. 173, 15 Am. Rep. 545. "Heirs lawfully begotten" has been held, in a will, to mean "begotten by him." *Pratt's Lessee v. Flamer*, 5 Har. & J. (Md.) 10.

⁵¹ *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Fletcher v. Fletcher*, 88 Ind. 418.

⁵² See, also *Braden v. Cannon*, 24 Pa. 168; *Gause v. Wiley*, 4 Serg. & R. (Pa.) 509; *Allen v. Markle*, 36 Pa. 117; *Wheatland v. Dodge*, 10 Metc. (Mass.) 502.

⁵³ See, however, *Gilmore v. Harris* (1693) Carth. 292, where the words "heirs male," in a deed, created an estate tail, there being circumstances showing that the words "of the body" were also intended.

⁵⁴ *Co. Litt.* 13a; *Leake*, Prop. Land, 171; *Den ex dem. Crane v. Fogg*, 3 N. J. Law, 819; *Allin v. Bunce*, 1 Root (Conn.) 96; *Welles v. Olcott*, Kirby (Conn.) 118; *Den ex dem. James v. Dubois*, 16 N. J. Law, 285; *Giddings v. Smith*, 15 Vt. 344; *Pollock v. Speidel*, 17 Ohio St. 439; 4 Kent, Comm. 12; 1 Shars. & B. Lead. Cas. Real Prop. 94. See *Jewell v. Warner*, 35 N. H. 176. And see *Murrell v. Mathews*, 2 Bay (S. C.) 397; *Wright v. Herron*, 5 Rich. Eq. (S. C.) 441.

⁵⁵ *Allen v. Trustees*, 102 Mass. 262; *Appeal of Potts*, 30 Pa. 168; *Tate v. Tally*, 3 Call (Va.) 354; *Doe ex dem.* See *v. Craigen*, 8 Leigh (Va.) 449; *Den ex dem. Sanders v. Hyatt*, 8 N. C. 247; *Covert v. Robinson*, 46 Pa. 274; *Appeal of Smith*, 23 Pa. 9; *Willis v. Bucher*, 3 Wash. C. C. 369, Fed. Cas. No. 17,769; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Perry v. Kline*, 12 Cush. (Mass.) 118; *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763; *Brown v. Weaver*, 28 Ga. 377; *Child v. Baylie*, Cro. Jac. 459.

⁵⁶ *Pelham Clinton v. Newcastle*, 1 Ch. 34 C. A.; *A. C.* (1903). And see *Magee v. Martin* (1902) 1 I. R. 367, C. A.

worthy gentlewoman, and his issue male," was held to create a special tail male.

Creation by Statute

In England, the Conveyancing Act of 1881⁵⁷ permits an estate tail to be created by the use of the words "in tail," as "to A. in tail." The words "heirs of the body" are, therefore, no longer necessary. In the same way an estate in tail special may be created by the words "in tail male" or "in tail female."⁵⁸

Chattel Interests, etc.

Incorporeal, as well as corporeal, hereditaments may be created in tail,⁵⁹ but there can be no fee tail in personal property,⁶⁰ or in chattel interests, and an attempt to so limit an estate tail results in passing the donor's entire interest.⁶¹

INCIDENTS OF ESTATES TAIL

35. The rights of the owner of a fee tail are the same, at common law, as the rights of one owning a fee simple, except as to alienation.

At common law, a tenant in tail could not alien the estate;⁶² otherwise, the incidents of estates tail were the same as of those in fee simple.⁶³ The tenant in tail is not liable for waste,⁶⁴ and is not bound to pay off incumbrances or to keep down the inter-

⁵⁷ 44 & 45 Vict. c. 41.

⁵⁸ Laws of Eng. vol. 24, § 450.

⁵⁹ 2 Blk. Comm. 113; 1 Washburn, R. Prop. (6th Ed.) 86.

⁶⁰ Norris v. Beyea, 13 N. Y. 273; Paterson v. Ellis' Ex'rs, 11 Wend. (N. Y.) 259.

⁶¹ 2 Blk. Comm. 113; Paterson v. Ellis' Ex'rs, 11 Wend. (N. Y.) 259; Stockton v. Martin, 2 Bay (S. C.) 471; Albee v. Carpenter, 12 Cush. (Mass.) 382. But cf. Burkart's Lessee v. Bucher, 2 Bin. (Pa.) 455, 4 Am. Dec. 457; Shoemaker v. Huffnagle, 4 Watts & S. (Pa.) 437; Duer v. Boyd, 1 Serg. & R. (Pa.) 203.

⁶² Frazer v. Peoria County, 74 Ill. 282; Williams v. McCall, 12 Conn. 328; Croxall v. Sherrerd, 5 Wall. (U. S.) 268, 18 L. Ed. 572.

⁶³ Buxton v. Inhabitants of Uxbridge, 10 Metc. (Mass.) 87; Partridge v. Dorsey's Lessee, 3 Har. & J. (Md.) 302.

⁶⁴ 2 Blk. Comm. 116; 4 Kent, Comm. 12; Pollock v. Speidel, 17 Ohio St. 439; Hales v. Pettit, Plow. 253; Secheverel v. Dale, Poph. 193; Liford's Case, 11 Coke, 46b; Attorney General v. Marlborough, 3 Madd. 498. But he cannot authorize it after his death. Liford's Case, supra. What is meant by "waste" will be treated of under "Life Estates," post.

est on them.⁶⁵ An estate tail is subject to dower⁶⁶ and curtesy.⁶⁷ The doctrine of merger, however, does not apply to estates tail,⁶⁸ and such estates were not liable to forfeiture for treason or felony, nor chargeable with the debts of the tenant after his death.⁶⁹ A tenant in tail could convey, however, an estate during his life,⁷⁰ and at a later period the right to suffer a common recovery was an incident of all such estates.⁷¹

THE BARRING OF ESTATES TAIL

36. Despite the positive provisions of the statute *de donis*, estates tail could, in the course of time, be terminated in various ways by methods known as barring the entail. These various modes were:

- (a) Common recovery.
- (b) Fine.
- (c) Lease.
- (d) Appointment to charitable uses.
- (e) Deed.

By the provisions of the statute *de donis*,⁷² estates tail were made inalienable, and, as we have seen,⁷³ if the tenant in tail did convey them during his life, the issue in tail could re-enter, upon the death of the tenant, and recover the land.⁷⁴ Estates tail, however, soon began to prove very mischievous and productive of evil. Numerous efforts were made to repeal the statute *de*

⁶⁵ 4 Kent, Comm. 18; 1 Washburn, R. Prop. (6th Ed.) 95; *Amesbury v. Brown*, 1 Ves. Sr. 477; *Chaplin v. Chaplin*, 3 P. Wms. 235. But see *Burgess v. Mawby*, 1 Turn. & R. 176.

⁶⁶ 2 Blk. Comm. 116; *Kennedy v. Kennedy*, 29 N. J. Law, 185; *Appeal of Smith*, 23 Pa. 9.

⁶⁷ 4 Kent, Comm. 12; *Pollock v. Speidel*, 17 Ohio St. 439; *Voller v. Carter*, 4 El. & Bl. 173; *Anon.*, Fitzh. Abr. "Formedon," 66.

⁶⁸ 2 Blk. Comm. 177; *Wiscot's Case*, 2 Coke, 60a; *Challis*, Real Prop. c. 10; *Den ex dem. Holcomb v. Lake*, 24 N. J. Law, 686; *Roe v. Baldwere*, 5 T. R. 104, 2 Rev. Rep. 550.

⁶⁹ 4 Kent, Comm. 13. The statute of 26 Hen. VIII, c. 13, made estates tail forfeitable for treason; and the statute of 33 Hen. VIII, c. 39, made them liable for certain debts due the crown. In Massachusetts, by statute, such estates are liable in general for the debts of the tenant in tail. *Holland v. Cruft*, 3 Gray (Mass.) 162.

⁷⁰ That is, a base fee (see post), which the issue of the grantor might, after the grantor's death, defeat by re-entry. *Whiting v. Whiting*, 4 Conn. 179; *Waters v. Margerum*, 60 Pa. 39; *Sharp v. Thompson*, 1 Whart. (Pa.) 139.

⁷¹ See *infra*.

⁷² *Supra*.

⁷³ *Supra*.

⁷⁴ *Waters v. Margerum*, 60 Pa. 39; *Machell v. Clarke*, 2 Ld. Raym. 778.

donis, but they were unavailing. "The truth was that the lords and commons, knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were, before the said act, * * * and finding that they were not answerable for the debts or incumbrances of their ancestors, * * * they always rejected such bills."⁷⁵ Blackstone speaks of the evil results of such estates as follows:⁷⁶ "Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; * * * creditors were defrauded of their debts, * * * and treasons were encouraged."

Common Recovery

In consequence of these conditions the courts, in the course of two centuries after the passage of the statute, overrode the declared intention of the legislature, and established a method known as "common recovery," whereby the tenant in tail could bar both the issue in tail and the remainders after the estates tail.⁷⁷ The case which is commonly cited as marking the beginning of this practice is the celebrated *Taltarum's Case*.⁷⁸ It is believed, however, that the custom was older than this case, which pleads recovery as if it were a well-known expedient.⁷⁹

Common recovery consisted of a collusive suit, brought by the intended purchaser, called the "demandant," under a claim of paramount title against the tenant in tail. The latter did not defend, but claimed that his grantor had warranted the title to the lands, and asked that he be called upon to defend the suit. This was termed "vouching to warranty," or recovery "with a single voucher." In "recovery with a double voucher," which was the more usual procedure, the tenant in tail made a preliminary conveyance to a nominal tenant, known as the tenant to the *præcipe*, who was made the defendant in the action. Thereupon the tenant to the *præcipe* vouched to warrant the tenant in tail, and he, in turn, vouched the common vouchee. The vouchee, who was a person without means,⁸⁰ suffered default to be entered

⁷⁵ *Mildmay's Case* (1606) 6 Coke, 40.

⁷⁶ 2 Blk. Comm. 116, quoted in *Orndoff v. Turman*, 2 Leigh (Va.) 200, 21 Am. Dec. 608; also in *EWING v. NESBITT*, 88 Kan. 708, 129 Pac. 1131, *Burdick Cas. Real Property*.

⁷⁷ *Laws of Eng.* vol. 24, § 451.

⁷⁸ Decided in 1472, reported in Y. B. 12 Edw. IV, fo. 19, pl. 25. The correct reading of the name is *Talcarum* or *Talkarum*. See 9 L. Q. R. 1; *Holds. Hist. Eng. Law*, III, 102.

⁷⁹ *Holds. Hist. Eng. Law*, III, 102. And see *Co. Litt.* 361b.

⁸⁰ The common vouchee was usually the crier of the court, selected because

against him, thus admitting the warranty. The lands were thereupon judged to belong to the defendant, and judgment was entered against the vouchee that he reimburse the tenant in tail with lands of equal value, according to the doctrine of warranty.⁸¹ The entail was held to attach to this land, so that, in theory, the heirs and remaindermen would lose nothing. The vouchee, of course, had not in fact warranted the estate to the defendant, but was an irresponsible third person, called in to carry out the fiction, and the judgment against him was worthless. The procedure was completed by the demandant conveying the land in fee to the tenant in tail, or as he might direct.⁸²

A common recovery, being suffered, not only cut off the issue in tail, but destroyed all remainders or reversions as well, and thus effectually put an end to entailed estates;⁸³ that is, the tenant in tail had power to suffer a recovery, and no condition or restriction in the deed of gift could be devised which could prevent it.⁸⁴ The courts sanctioned this *pia fraud*, as Blackstone calls it, because they favored alienation, and in time the procedure was recognized by statute.⁸⁵ Common recoveries were recognized as a part of the common law by some of the early cases in this country.⁸⁶

Fine

Estates tail might also be barred by another kind of fictitious action called a "fine," made permissible by statute.⁸⁷ Fines were actions for the recovery of lands on a claim of title, which were

he was of no substance. Laws of Eng. vol. 24, § 452, note: Challis, Real Prop. (3d Ed.) 311.

⁸¹ As to the origin of warranty, see Digby, Hist. Real Prop. 80, note 1. See, also, post, chapter XXVIII.

⁸² Laws of Eng. vol. 24, § 452. For further accounts of common recovery, see 2 Blk. Comm. 358; Challis, Real Prop. (3d Ed.) 310; Washb. Real. Prop. (6th Ed.) § 186; Williams, Real Prop. (17th Ed.) p. 108. See, also, EWING v. NESBITT, 88 Kan. 708, 129 Pac. 1131, Burdick Cas. Real Property.

⁸³ 2 Blk. Comm. 361. A recovery could be suffered only by one in possession as tenant in tail or with the consent of the person in possession. 1 Dembitz, Land Tit. 116.

⁸⁴ Mary Portington's Case, 10 Coke, 35b; Dewitt v. Eldred, 4 Watts & S. (Pa.) 415. And see Waters v. Margerum, 60 Pa. 39; Doyle v. Mullady, 33 Pa. 264; Elliott v. Pearsoll, 8 Watts & S. (Pa.) 38; Hall v. Thayer, 5 Gray (Mass.) 523.

⁸⁵ 14 Geo. II, c. 20, § 1 (1740).

⁸⁶ See Dow v. Warren, 6 Mass. 328; Dudley v. Sumner, 5 Mass. 438; Ransley v. Stott, 26 Pa. 126; Jewell v. Warner, 35 N. H. 176; Lyle v. Richards, 9 Serg. & R. (Pa.) 322; Carter v. McMichael, 10 Serg. & R. (Pa.) 429; Wood v. Bayard, 63 Pa. 320.

⁸⁷ The statute *de donis* declared that fine should have no effect on estates tail, but this was changed by the statutes of 4 Hen. VII, c. 24, and 32 Hen.

compromised by the parties with leave of the court, and the judgment record entered in the case became the record of title. The effect of a fine was to bar the issue in tail, but not the remainderman or reversioner.⁸⁸ This method of barring estates tail was also recognized by some jurisdictions in this country.⁸⁹

Leases—Charitable Uses

Estates in tail might also be barred by certain leases permitted by statute,⁹⁰ and also, by virtue of another statute,⁹¹ by being appointed to charitable uses.

Deed—Modern Statutes

Fines and recoveries were abolished in England in 1833.⁹² They are also obsolete in this country.⁹³ By statute, however, in England,⁹⁴ and in a number of our states,⁹⁵ estates in tail may be barred by deed executed by the tenant in tail, and under such a statute the tenant in tail may mortgage the estate.⁹⁶ Even in the absence of express statute, it is held that, although fines and recoveries are obsolete, yet the substance of the proceeding, a conveyance, remains, and that such an estate may be barred by deed.⁹⁷

VIII, c. 36. As early as 1299, a statute authorized the transfer of land by means of fine without the actual transfer of seisin.

⁸⁸ Seymour's Case, 10 Coke, 95b. They would also be barred unless they made claim within a period fixed by statute. Further formalities were afterwards required called "proclamations." 2 Blk. Comm. 348; 1 Shep. Touch. c. 2. The proceedings were called fine (from the Latin "finis," end) because they were said to put an end to the alleged claim by a final amicable agreement. The plaintiff (called the conusee, or cognizee) was the person to whom, by previous agreement, the land was to be transferred. This plaintiff sued the tenant (called the conusor, or cognizor) for an alleged violation of his agreement to convey. The parties, thereupon, by leave of the court, agreed to settle their differences (?), and they were settled by the conusor (the tenant) acknowledging the claim of the conusee. This agreement was then entered upon the record, and this judgment record operated as a conveyance of the land. Hence the controversy came to an "end."

⁸⁹ See *Roseboom v. Van Vechten*, 5 Denio (N. Y.) 414; *Orndoff v. Turman*, 2 Leigh (Va.) 200, 21 Am. Dec. 608.

⁹⁰ 32 Hen. VIII, c. 28.

⁹¹ 43 Eliz. c. 4.

⁹² 3 & 4 Wm. IV, c. 74.

⁹³ *EWING v. NESBITT*, 88 Kan. 708, 129 Pac. 1131, *Burdick Cas. Real Property*.

⁹⁴ 3 & 4 Wm. IV, c. 74, § 3.

⁹⁵ *Collamore v. Collamore*, 158 Mass. 74, 32 N. E. 1034; *Hall v. Thayer*, 5 Gray (Mass.) 523; *Seibert v. Wise*, 70 Pa. 147; *Doyle v. Mullady*, 33 Pa. 264; *Minge v. Gilmour*, Fed. Cas. No. 9,631, *Brunner Col. Cas.* 383.

⁹⁶ *Todd v. Pratt*, 1 Har. & J. (Md.) 465.

⁹⁷ *EWING v. NESBITT*, 88 Kan. 708, 129 Pac. 1131, *Burdick Cas. Real Property*.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT

37. A tenant in tail after possibility of issue extinct is a tenant in special tail in whose case it has become impossible for him to have issue who can inherit under the terms of the entail.

If one is tenant in tail, and it has become impossible that there shall be issue who can inherit, he is called "tenant in tail after possibility of issue extinct." This condition can arise only in estates in special tail, as where, for example, the limitation is to "A. and his heirs begotten on the body of his wife, B.," and B. dies without issue.⁹⁸ The presumption that the possibility of issue is extinct never arises, however, from the great age of the parties, and so there can never be a tenant in tail after possibility of issue extinct in case of an estate in general tail.⁹⁹ The position of a tenant in tail after possibility of issue extinct is in some respects different from that of a tenant in tail. In quantity, his estate is an estate for life, but in quality it remains an estate tail, since the tenant is not punishable for waste, except equitable waste.¹ He cannot bar the entail, and the doctrine of merger applies.²

ESTATES TAIL IN THE UNITED STATES

38. In most of our states estates tail have been abolished or modified by statutes. Some states have turned them into either—
- (a) Estates in fee simple; or
 - (b) Life estates, with remainders in fee to the donee's heirs who would take under the entail; or
 - (c) Estates tail in the donee, with estates in fee to the issue.
- In a few states, estates tail still exist.

"Estates tail," says Kent,³ "were introduced into this country with the other parts of the English jurisprudence, and they sub-

⁹⁸ Co. Litt. §§ 32-34; 2 Blk. Comm. 124.

⁹⁹ 2 Blk. Comm. 125.

¹ Co. Litt. 27b, 28a; Bowles' Case, 11 Coke, 79b; A. G. v. Marlborough, 3 Madd. 498, 538.

² Co. Litt. 28a.

³ 4 Comm. (14th Ed.) p. 14.

sisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery."⁴

Great changes, however, have been made by the statutes. In some of our states, estates tail have been abolished, and an instrument attempting to limit an estate tail would create a fee simple in the donee who would be first entitled to the estate under the form of the gift.⁵ In others, the first taker has a life estate, with remainder over in fee simple.⁶ In still others, the estate remains as an estate tail in the first taker, but passes in fee simple to his issue.⁷ In a few states, estates tail may exist until barred,⁸ and this can be done by a simple deed or by one acknowledged in a manner provided by the statute.⁹ There are a number of states in which no statutory provisions as to estates tail exist. In these states, fees tail are as at common law,¹⁰ unless, when the question comes before the courts, such estates are held not to be adapted to the genius of our institutions.¹¹

⁴ See, also, Williams, *Real Prop.* (17th Am. Ed.) note 121.

⁵ *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *McIlhinny v. McIlhinny*, 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. Rep. 186; *Nellis v. Nellis*, 99 N. Y. 505, 3 N. E. 59; *In re Robinson's Estate*, 149 Pa. 418, 24 Atl. 297; *Ray v. Alexander*, 146 Pa. 242, 23 Atl. 383; *Durant v. Muller*, 88 Ga. 251, 14 S. E. 612; *Pruitt v. Holland*, 92 Ky. 641, 18 S. W. 852; *Pritchard v. James*, 93 Ky. 306, 20 S. W. 216; *Lanham v. Wilson* (Ky.) 22 S. W. 438; *Nicholson v. Bettle*, 57 Pa. 384; *Duffy v. Jarvis* (C. C.) 84 Fed. 731; *Rhodes v. Bouldry*, 138 Mich. 144, 101 N. W. 206.

⁶ *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Fanning v. Doan*, 128 Mo. 323, 30 S. W. 1032; *Preston v. Smith* (C. C.) 26 Fed. 884; *WHEART v. CRUSER*, 49 N. J. Law, 475, 13 Atl. 36, *Burdick Cas. Real Property*; *Doty v. Teller*, 54 N. J. Law, 163, 23 Atl. 944, 33 Am. St. Rep. 670; *Clarkson v. Clarkson*, 125 Mo. 381, 28 S. W. 446; *Brown v. Rogers*, 125 Mo. 392, 28 S. W. 630. In some states remainders after estates tail are preserved if they take effect on the death of the first taker without issue, the entail being extinct by that event. 1 *Dembitz, Land Tit.* 117.

⁷ *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Allyn v. Mather*, 9 Conn. 114; *Phillips v. Herron*, 55 Ohio St. 478, 45 N. E. 720; *Pollock v. Speidel*, 27 Ohio St. 86.

⁸ See Rev. Code Del. 1852, amended to 1893, c. 83, § 27; Rev. St. Me. 1903, c. 75, § 7; Code Pub. Gen. Laws Md. 1888, art. 21, § 24; Rev. Laws Mass. 1902, c. 127, §§ 24-27; Gen. Laws R. I. 1896, c. 201, §§ 5, 14.

⁹ 1 *Stim. Am. St. Law*, § 1313; Williams, *Real Prop.* (17th Am. Ed.) note 121; 1 *Washb. Real Prop.* (5th Ed.) 117, note 2; 1 *Shars. & B. Lead Cas. Real Prop.* 109. As to barring the entail by deed, see *Collamore v. Collamore*, 158 Mass. 74, 32 N. E. 1034.

¹⁰ *EWING v. NESBITT*, 88 Kan. 708, 129 Pac. 1131, *Burdick Cas. Real Property*.

¹¹ *Jordan v. Roach*, 32 Miss. 481. In some states it has been held that the statute *de donis conditionalibus* is not in force, and that limitations to a man and the heirs of his body create fees conditional at common law. *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90; *Rowland v. Warren*, 10 Or. 129; *Izard v.*

QUASI ENTAIL

39. A limitation to one and the heirs of his body during the life of another person is sometimes called a "quasi entail." Such an estate is not affected, however, by the statute *de donis conditionalibus*.

An estate may be limited to one and the heirs of his body during the life of another person.¹² The statute *de donis* does not apply to such an estate. It is not a fee tail, but resembles more a fee conditional at common law. This form of limitation is sometimes called a "quasi entail."¹³

Middelton, 1 Bailey, Eq. (S. C.) 228; *Barksdale v. Gamage*, 3 Rich. Eq. (S. C.) 279; *Burnett v. Burnett*, 17 S. C. 545.

¹² *Low v. Burron*, 3 P. Wms. 262, 24 Eng. Reprint, 1055; *Ex parte Sterne*, 6 Ves. 156, 31 Eng. Reprint, 989.

¹³ Further, as to quasi entail, see *Grey v. Mannock*, 2 Eden, 339; *Dillon v. Dillon*, 1 Ball & B. 77; *Allen v. Allen*, 2 Dru. & War. 307; *Campbell v. Sandys*, 1 Schoales & L. 281.

CHAPTER VII

ESTATES FOR LIFE

40. Life Estates Defined.
41. Conventional and Legal Life Estates.
42. Creation of Life Estates.
43. Incidents of Life Estates.
44. Rights and Liabilities of Life Tenant.
45. Termination of Life Estates.

LIFE ESTATES DEFINED

40. Life estates are freehold interests in land, not of inheritance.

They include:

- (a) Estates for the tenant's own life.
- (b) Estates for the life of another—*Pur autre vie*.
- (c) Estates for an uncertain period, which may continue during a life or lives.

Life estates are freehold interests in land, but not of inheritance.¹ In general terms, they are estates whose duration is limited by the length of a human life. Estates, however, of uncertain duration, which may continue during a life or lives, are also regarded as life estates.² It is immaterial how improbable it is that the estate will last during a life, since it is sufficient if by possibility it may do so.³ An estate, for example, to a woman during widowhood is a life estate. It may last during her life, but it cannot last longer.⁴

CONVENTIONAL AND LEGAL LIFE ESTATES

41. As to their mode of creation, life estates are either:

- (a) Conventional, that is, created by act of the parties; or
 - (b) Legal, that is, created by construction and operation of law.
- Conventional life estates may be measured by one or more lives.

¹ 2 Blk. Comm. 120; *CUMMINGS v. CUMMINGS*, 76 N. J. Eq. 568, 75 Atl. 210, Burdick Cas. Real Property.

² 2 Blk. Comm. 121; 4 Kent, Comm. 26; *Hurd v. Cushing*, 7 Pick. (Mass.) 169; *Warner v. Tanner*, 38 Ohio St. 118; *Beeson v. Burton*, 12 C. B. 647. Cf. *Gilmore v. Hamilton*, 83 Ind. 198.

³ *Warner v. Tanner*, 38 Ohio St. 118.

⁴ *Roseboom v. Van Vechten*, 5 Denio (N. Y.) 414.

CREATION OF LIFE ESTATES

42. At common law no words of limitation need be added to the grantee's name to create a life estate.

Estates *pur autre vie* arise by express limitations to a grantee for the life of another person, or by the assignment of an existing life estate.

Estates for life are either conventional or legal life estates.⁵ The former are those which the parties create by their acts, having the creation of such estates in view as the result of such acts, as where the owner of a fee simple grants another the land for so long as he lives.⁶ Legal life estates, on the other hand, result from the construction and operation of law, without any acts by the parties looking to such result, but from acts done for other purposes. For example, marriage may give both husband and wife life interests in the realty of the other, although nothing has been said, or no express contract made, in relation to such realty.⁷ A conventional life estate, however, cannot be created by parol, but only by a deed or will.⁸

Conventional life estates may be measured by the tenant's own life,⁹ or by the life of some other person; that is, "estates *pur autre vie*."¹⁰ They may also be measured by the tenant's own life and the life of one or more other persons.¹¹ An estate for one's own life is regarded, however, as of a higher nature than an estate *pur autre vie*.¹² Estates during two lives, as "to A. and B., during their joint lives," or "to A., during the lives of B. and C.," are in reality measured by a single life. A limitation during joint lives is in effect the same as during the life of the one dying first of those named, and one during two or more lives is equivalent to an estate during the life of the one who lives longest.¹³ An estate for joint lives must, however, be expressly so limited.¹⁴

⁵ 2 Blk. Comm. 120; 4 Kent, Comm. 24.

⁶ 2 Blk. Comm. 120. By statute in several states, life estates "may be created in a term of years and a remainder limited thereon." 1 Stim. Am. St. Law, § 1427.

⁷ See post, chapter VIII.

⁸ *Smith v. May*, 3 Pennewill (Del.) 233, 50 Atl. 59; *Stewart v. Clark*, 13 Metc. (Mass.) 79; *Garrett v. Clark*, 5 Or. 464.

⁹ Co. Litt. § 56.

¹⁰ Co. Litt. § 56; 2 Blk. Comm. 120; 4 Kent, Comm. 25.

¹¹ Co. Litt. 41b; 4 Kent, Comm. 26.

¹² 2 Blk. Comm. 121.

¹³ *Brudnel's Case*, 5 Coke, 9a. See *Clark v. Owens*, 18 N. Y. 434; *Dale's Case*, Cro. Eliz. 182.

¹⁴ *Brudnel's Case*, 5 Coke, 9a.

Creation of Life Estates

Conventional life estates may be created either by express words¹⁵ or by implication.¹⁶ At common law, if an estate is granted to a man without adding any words of limitation, he takes a life estate. Therefore no special words need be used to create a life estate,¹⁷ except where the statute provides that a fee simple is presumed to be conveyed unless otherwise restricted.¹⁸ An express life estate is not, however, enlarged to a fee by being coupled with a power to convey it.¹⁹ Since an estate for one's own life is considered a higher interest than an estate *pur autre vie*, where the conveyance does not specify for whose life the grantee is to hold, he takes it for his own life.²⁰ Where, however, the grantor can give an estate only for his own life, as where he is himself a tenant for life or a tenant in tail, then the grantee will take only what the grantor can lawfully give,²¹ that is, an estate for the grantor's life.²² A life estate may also be created by implication, as by a devise of land to the testator's heirs after the death of B., from which it would be presumed that B. was to have the land during his life.²³ If, however, the devise is to a stranger

¹⁵ 2 Blk. Comm. 121; 4 Kent, Comm. 25.

¹⁶ *Id.*

¹⁷ Jackson *ex dem.* Newkirk v. Embler, 14 Johns. (N. Y.) 198; Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Hunter v. Bryan, 5 Humph. (Tenn.) 47; Gray v. Packer, 4 Watts & S. (Pa.) 17; Jackson *ex dem.* Murphy v. Van Hoesen, 4 Cow. (N. Y.) 325; Kearney v. Kearney, 17 N. J. Eq. 59; Wusthoff v. Dracourt, 3 Watts (Pa.) 240; Bozeman v. Bishop, 94 Ga. 459, 20 S. E. 11. So a life estate may be created by a reservation. Doe *ex dem.* Smith v. Grady, 13 N. C. 395; Hodges v. Spicer, 79 N. C. 223; Richardson v. York, 14 Me. 216. Or by a quitclaim to a cotenant in common. McKinney v. Stacks, 6 Heisk. (Tenn.) 284.

¹⁸ See ante. As to what words will pass only a life estate, see Corby v. Corby, 85 Mo. 371; Leeper v. Neagle, 94 N. C. 338; Dew v. Kuehn, 64 Wis. 293, 25 N. W. 212; Lowrie v. Ryland, 65 Iowa, 584, 22 N. W. 686; Jones' Ex'rs v. Stills, 19 N. J. Eq. 324; Sheafe v. Cushing, 17 N. H. 508; Jossey v. White, 28 Ga. 265; Schaefer v. Schaefer, 141 Ill. 337, 31 N. E. 136; Robinson v. Robinson, 89 Va. 916, 14 S. E. 916. And cf. Beall's Lessee v. Holmes, 6 Har. & J. (Md.) 205; Jackson v. Wells, 9 Johns. (N. Y.) 222; Wheaton v. Address, 23 Wend. (N. Y.) 452; Moore v. Dimond, 5 R. I. 121; In re Frothingham, 63 Hun, 430, 18 N. Y. Supp. 695; Allen v. Boomer, 82 Wis. 364, 52 N. W. 426; Kiene v. Gmehle, 85 Iowa, 312, 52 N. W. 232.

¹⁹ Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336; Stuart v. Walker, 72 Me. 145, 39 Am. Rep. 311; Welsh v. Woodbury, 144 Mass. 542, 11 N. E. 762; Hinkle's Appeal, 116 Pa. 490, 9 Atl. 938.

²⁰ Jackson *ex dem.* Murphy v. Van Hoesen, 4 Cow. (N. Y.) 325.

²¹ Jackson *ex dem.* McCrea v. Mancius, 2 Wend. (N. Y.) 357; Rogers v. Moore, 11 Conn. 553; Bell v. Twilight, 22 N. H. 500.

²² Jackson *ex dem.* Murphy v. Van Hoesen, 4 Cow. (N. Y.) 325.

²³ Barry v. Shelby, 4 Hayw. (Tenn.) 229; Haskins v. Tate, 25 Pa. 249; Nicholson v. Drennan, 35 S. C. 333, 14 S. E. 719.

after B.'s death, no such presumption arises, and the estate goes to the heir during B.'s life.²⁴

Estates pur Autre Vie

An estate pur autre vie is the lowest estate of freehold.²⁵ An estate for the life of another usually arises when one who is tenant for life assigns his interest to another, who thereby becomes entitled to the land during the life of the grantor. It may, however, be expressly limited for the life of a third person. The one whose life limits the duration of the estate is called the "cestui que vie."²⁶ At common law, if the tenant of an estate pur autre vie died before the cestui que vie, whoever first entered and took possession of the land could hold it for the remainder of the term. Such a person was called a "general occupant."²⁷ If, however, the tenant had leased or assigned his estate,²⁸ or words of limitation, as "heirs" or "executor," had been added in the creation of the estate, then these were entitled to the residue, and they were called "special occupants."²⁹ By the statute, however, of 29 Car. II,³⁰ general occupancy was abolished, and thereafter, when a tenant pur autre vie died without having disposed of his estate, then, if the term was not limited to the heirs, the executor took the residue, holding it as assets for the payment of debts.³¹ This act also gave the owner power to dispose of it by will.³² In this country, also, the question of occupancy is now usually regulated by statute.³³ The usual incidents of life estates in general, and the rights and liabilities of the life tenant, apply also to estates pur autre vie.³⁴

²⁴ 1 Washb. Real Prop. (5th Ed.) p. 123.

²⁵ 4 Kent, Comm. 26.

²⁶ 2 Blk. Comm. 258; Co. Litt. 41b. It may, however, be for more than one life. Ante. In some states, however, if more than two other lives are named, the remainder nevertheless takes effect on the death of the two first named. 1 Stim. Am. St. Law, § 1422. Cf. Clark v. Owens, 18 N. Y. 434. By St. 6 Anne, c. 18, if the one who claims an estate pur autre vie cannot produce the cestui que vie, it is presumed that he is dead, and the estate is terminated.

²⁷ Co. Litt. 41b; 2 Blk. Comm. 258; 4 Kent, Comm. 26.

²⁸ Skelliton v. Hay, Cro. Jac. 554.

²⁹ Mosher v. Yost, 33 Barb. (N. Y.) 277; Salter v. Boteler, Moore, 664; Bowles v. Poore, Cro. Jac. 282; Low v. Burron, 3 P. Wms. 262; Doe v. Luxton, 6 Term R. 289; Atkinson v. Baker, 4 Term R. 229; Doe v. Robinson, 8 Barn. & C. 296; Northern v. Carnegie, 4 Drew. 587; 2 Blk. Comm. 259; Kent, Comm. 26.

³⁰ Ch. 3. And see 1 Stim. Am. St. Law, § 1310.

³¹ Doe v. Lewis, 9 Mees. & W. 662. And the balance for the estate. Ripley v. Waterworth, 7 Ves. 425. But see Wall v. Byrne, 2 Jones & L. 118.

³² 4 Kent, Comm. 27. See, also, 1 Stim. Am. St. Law, § 1335.

³³ See 3 Washb. Real Prop. (6th Ed.) 66; 4 Kent, Comm. 27. See, also, 1 Stim. Am. St. Law, § 1335.

³⁴ Co. Litt. 41b.

INCIDENTS OF LIFE ESTATES

43. (a) Life estates are alienable, either by the life tenant, or upon execution sale.

(b) Life estates are subject to merger.

Alienation

The tenant of a life estate may sell,³⁵ mortgage,³⁶ or lease³⁷ his interest, providing there is no condition of restraint in the instrument creating his estate.³⁸ He cannot, however, create any greater estate than the one he himself has.³⁹ At common law, if a tenant for life conveyed in fee by feoffment, fine, or recovery, he forfeited his estate, because such a conveyance was a renunciation of tenure, and worked a disseisin.⁴⁰ This rule did not apply, however, to conveyances operating under the statute of uses, such as a deed of bargain and sale, or lease and release,⁴¹ nor to a lease for years.⁴² This rule of forfeiture is no longer the law, however, and now, if a life tenant grants a fee, his grantee takes merely what the grantor has.⁴³ In some states the statutes also thus expressly

³⁵ *Ridgely v. Cross*, 83 Md. 161, 34 Atl. 469; *Jackson ex dem. Murphy v. Van Hoesen*, 4 Cow. (N. Y.) 325; *Jacobs v. Rice*, 33 Ill. 369; *Hunter v. Hunter*, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845.

³⁶ *Jermain v. Sharpe*, 29 Misc. Rep. 258, 61 N. Y. Supp. 700.

³⁷ 4 Kent, Comm. 73; *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Van Deusen v. Young*, 29 N. Y. 9; *McIntyre v. Clark*, 6 Misc. Rep. 377, 26 N. Y. Supp. 744.

³⁸ *Criswell v. Grumblin*, 107 Pa. 408; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170. And see *Gray*, *Restraints Alien. Prop.* § 78; *Bull v. Bank*, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Rochford v. Hackman*, 9 Hare, 475.

³⁹ *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *McIntyre v. Clark*, 6 Misc. Rep. 377, 26 N. Y. Supp. 744; *McLendon v. Horton*, 95 Ga. 54, 22 S. E. 45; *Fields v. Bush*, 94 Ga. 664, 21 S. E. 827; *Jackson ex dem. Murphy v. Van Hoesen*, 4 Cow. (N. Y.) 325.

⁴⁰ 2 Blk. Comm. 274; 4 Kent, Comm. 82, 427. See, also, *McMichael v. Craig*, 105 Ala. 382, 16 South. 883; *Jackson ex dem. McCrea v. Mancius*, 2 Wend. (N. Y.) 357; *Stump v. Findlay*, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; *French v. Rollins*, 21 Me. 372.

⁴¹ Such conveyance merely conveyed whatever interest the grantor actually had. *Goodman v. Malcom*, 5 Kan. App. 285, 48 Pac. 439; *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; *Grout v. Townsend*, 2 Hill (N. Y.) 554; *Jackson ex dem. McCrea v. Mancius*, 2 Wend. (N. Y.) 357.

⁴² *Locke v. Rowell*, 47 N. H. 46.

⁴³ *Rogers v. Moore*, 11 Conn. 553; *Sanford v. Sanford*, 55 Ga. 527; *Goodman v. Malcom*, 5 Kan. App. 285, 48 Pac. 439; *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; *Rogers v. Moore*, 11 Conn. 553; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *McKee's Lessee v. Pfout*, 3

provide.⁴⁴ A life estate is liable for taxes, and the tenant's debts,⁴⁵ and may be sold under execution.⁴⁶

Merger

Merger is the absorption of a lesser estate into a greater, where two such estates, without any intermediate estate, meet in the same person. Consequently, where an estate for years, or a life estate, and the fee meet in the same person, the smaller estate will be merged in the larger.⁴⁷ The same result will follow where an estate for years, or for life, and the next vested estate in remainder or reversion, provided the remainder or reversion is as large as the preceding estate,⁴⁸ meet in the same person,⁴⁹ since one cannot be both tenant and reversioner, or landlord and tenant, in the same property.⁵⁰ For example, when a life tenant becomes the heir of the one who has the reversion or remainder in fee, or if he conveys his life interest to the owner of such reversion, a merger takes place, and the smaller estate loses its separate existence.⁵¹ Where two estates meet in the same person and in the same right, it is immaterial, so far as merger is concerned, whether the union is produced by operation of law or by act of the parties. Where, however, the two estates vest in the same person in different rights by operation of law, merger will not ensue. Moreover, a joint interest in a life estate will not merge in a reversion owned in sev-

Dall. (Pa.) 486, 1 L. Ed. 690; *McMichael v. Craig*, 105 Ala. 382, 16 South. 883.

⁴⁴ See the statutes of the different states. And see *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *Grout v. Townsend*, 2 Hill (N. Y.) 554; *Patrick v. Sherwood*, Fed. Cas. No. 10,804, 4 Blatchf. 112; 1 Stim. Am. St. Law, § 1402 (B). So, likewise, by statute in England, 8 & 9 Vict. c. 106, § 4 (1845).

⁴⁵ *Wellington v. Janvrin*, 60 N. H. 174; *Pringle v. Allen*, 1 Hill, Eq. (S. C.) 135.

⁴⁶ *Murch v. Manufacturing Co.*, 47 N. J. Eq. 193, 20 Atl. 213; *Burhans v. Van Zandt*, 7 N. Y. 523; *Roberts v. Whiting*, 16 Mass. 186; *Wheeler v. Gorham*, 2 Root (Conn.) 328; *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719; *Thompson v. Murphy*, 10 Ind. App. 464, 37 N. E. 1094; *American Mortg. Co. of Scotland v. Hill*, 92 Ga. 297, 18 S. E. 425. But see, as to the life tenant's liability for special assessments, *Stilwell v. Doughty*, 2 Bradf. Sur. (N. Y.) 311.

⁴⁷ *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. 76; *Hovey v. Nellis*, 98 Mich. 374, 57 N. W. 255.

⁴⁸ *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; 4 Kent, Comm. 101.

⁴⁹ *Harrison v. Moore*, 64 Conn. 344, 30 Atl. 55; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 312, 45 Am. Dec. 207, 210.

⁵⁰ 4 Kent, Comm. 99; *Taylor, Landl. & Ten.* 364; *Fox v. Long*, 8 Bush (Ky.) 551, 555.

⁵¹ 2 Blk. Comm. 177; *Co. Litt.* 41b; *Mudd v. Mullican* (Ky.) 12 S. W. 263; *Webster v. Gilman*, 1 Story, 499, Fed. Cas. No. 17,335; *Cary v. Warner*, 63

eralty by one of the cotenants.⁵² If an estate *pur autre vie* is, however, assigned to one who is a tenant for his own life, it may merge, since, as has been seen, the estate for one's own life is greater than an estate *pur autre vie*.⁵³ Courts of equity may prevent estates from merging, and treat them as separate, when necessary to protect the rights of persons.⁵⁴ In general, two estates must be of the same character in order to produce a merger, and a legal estate will not merge in an equitable one,⁵⁵ although an equitable estate may merge in a legal,⁵⁶ unless, to protect equitable rights, it is essential that they be kept separate.⁵⁷

RIGHTS AND LIABILITIES OF LIFE TENANT

44. (a) The life tenant is entitled to the possession and use of the property during the life or lives by which his estate is measured.
- (b) He must pay the interest on incumbrances.
- (c) The tenant cannot recover compensation for improvements or repairs.
- (d) The tenant is entitled to estovers.
- (e) There is a right to emblements on the death of a tenant for life, but he cannot claim them when he forfeits his estate.
- (f) A tenant must not commit waste; that is, any permanent and material injury to the inheritance.
- (g) The life tenant must, as a rule, pay the taxes during the continuance of his estate.

Me. 571; *Davis v. Townsend*, 32 S. C. 112, 10 S. E. 837; *Bennett v. Trustees*, 66 Md. 36, 5 Atl. 291; *Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 483; *Harrison v. Moore*, 64 Conn. 344, 30 Atl. 55. But see *Browne v. Bockover*, 84 Va. 424, 4 S. E. 745; *In re Butler's Estate*, 14 Pa. Co. Ct. R. 667.

⁵² See *Jameson v. Hayward*, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268. See post, chapter XII, for joint estates.

⁵³ *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; 4 Kent, Comm. 101. But see *Rosse's Case*, 5 Coke, 13a; *Snow v. Boycott*, [1892] 3 Ch. 110.

⁵⁴ *Moore v. Luce*, 29 Pa. 260, 72 Am. Dec. 629; *Cole v. Grigsby* (Tex. Civ. App. 1894) 35 S. W. 680.

⁵⁵ *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107; *Hopkinson v. Dumas*, 42 N. H. 296; *Litle v. Ott*, Fed. Cas. No. 8,389, 3 Cranch, C. C. 416.

⁵⁶ *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Campbell v. Carter*, 14 Ill. 286; *Wills v. Cooper*, 25 N. J. Law, 137; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Robinson v. Codman*, Fed. Cas. No. 11,970, 1 Sumn. 121.

⁵⁷ *Bassett v. O'Brien*, 149 Mo. 381, 51 S. W. 107; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Earle v. Washburn*, 7 Allen (Mass.) 95; *Martin v. Pine*, 79 Hun, 426, 29 N. Y. Supp. 995. For equitable estates, see post, chapter XIV.

Possession and Use

During the continuance of his estate, the life tenant is entitled to the possession and use of the property.⁵⁸ The income, rents, and profits of the land belong to him,⁵⁹ although, if a tenant under a lease is in possession of the land when the life tenancy begins, and continues in possession during the life estate, the life tenant dying before the rent is due, the administrator of the life tenant has no right to any of the rent, since it all belongs to the remainderman or the reversioner.⁶⁰ Moreover, under the common-law rule, if the tenant for life make a lease reserving rent, and dies before the day the rent is due, the rent is not apportioned, and his personal representative cannot recover the amount due when the lessor died.⁶¹ The English statutes of 11 Geo. II, c. 10, § 15, and 4 Wm. IV, c. 22, provided, however, for an apportionment of rent in case of such leases made by the life tenant,⁶² and similar statutes have been enacted in some of our states.⁶³ The right of a life tenant to operate mines, quarries, and oil or gas wells, is discussed under waste.⁶⁴

Interest on Incumbrances

It is the duty of the tenant to keep down the interest on incumbrances during the continuance of his estate,⁶⁵ but he is not bound

⁵⁸ *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *McCall v. McCall*, 2 Walk. (Pa.) 202.

⁵⁹ *Dwyer v. Wells*, 5 Misc. Rep. 18, 25 N. Y. Supp. 59; *Scovel v. Roosevelt*, 5 Redf. Sur. (N. Y.) 121; *In re Ryder*, 4 Edw. Ch. (N. Y.) 338; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884; *Gairdner v. Tate*, 110 Ga. 456, 35 S. E. 697; *Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735.

⁶⁰ *Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26,

⁶¹ *Clun's Case*, 10 Coke, 127a; *Hay v. Palmer*, 2 P. Wms. 501, 24 Eng. Reprints, 835; *Van Hayes v. West*, 3 Ohio Cir. Ct. R. 64, 2 O. C. D. 37; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424; *Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735.

⁶² *Ex parte Smyth*, 1 Swanst. 337, 36 Eng. Reprints, 412; 2 Blk. Comm. 124; *Marshall v. Moseley*, 21 N. Y. 280; *Borie v. Crissman*, 82 Pa. 125; 1 Washb. Real Prop. (6th Ed.) 115.

⁶³ *Price v. Pickett*, 21 Ala. 741; *Borie v. Crissman*, 82 Pa. 125; *Henderson's Ex'r v. Boyer*, 44 Pa. 220; *Marshall v. Moseley*, 21 N. Y. 280. See 1 Stim. Am. St. Law, § 2027.

⁶⁴ See *infra*.

⁶⁵ *Plympton v. Boston Dispensary*, 106 Mass. 544; *Bowen v. Brogan*, 119 Mich. 218, 77 N. W. 942, 75 Am. St. Rep. 387; *Damm v. Damm*, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601; *Wade v. Malloy*, 16 Hun (N. Y.) 226; *Gelston v. Shields*, 16 Hun (N. Y.) 143; *Ward's Estate*, 3 Pa. Co. Ct. R. 224; *Bourne v. Maybin*, Fed. Cas. No. 1,700, 3 Woods, 724; *Barnes v. Bond*, 32 Beav. (Eng.) 653.

to pay off the principal.⁶⁶ However, if he does, he is entitled to contribution from the reversioner or remainderman.⁶⁷ If he fails to pay the interest, he is guilty of waste, and is liable to the remainderman for any damage suffered.⁶⁸ If he pays the principal, the reversioner or remainderman should reimburse him with an amount equivalent to the difference between the sum paid and the present worth of the interest for which the life tenant would have been liable during his tenancy;⁶⁹ the probable duration of the life measuring the estate being determined by standard tables of mortality.⁷⁰

Improvements and Repairs

The tenant for life is not bound to make improvements on the property,⁷¹ and he cannot ordinarily recover for any improvements which he may make.⁷² He may, however, put buildings into ten-

⁶⁶ *Plympton v. Boston Dispensary*, 106 Mass. 544; *Whitney v. Salter*, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Bourne v. Maybin*, Fed. Cas. No. 1,700, 3 Woods, 724.

⁶⁷ *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Boue v. Kelsey*, 53 Ill. App. 295; *Whitney v. Salter*, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656; *Downing v. Hartshorn*, 69 Neb. 364, 95 N. W. 801, 111 Am. St. Rep. 550.

⁶⁸ *Wade v. Malloy*, 16 Hun (N. Y.) 226.

⁶⁹ *Callicott v. Parks*, 58 Miss. 528; *Thomas v. Thomas*, 17 N. J. Eq. 356.

⁷⁰ PRESENT VALUE OF LIFE ESTATE.—There are times when the present value of a life estate in comparison with the value of the reversion or remainder is of great importance. See *Williams' Case*, 3 Bland (Md.) 186, 221. This relative value has been, at times, arbitrarily fixed at one-third of the whole value. *Clyat v. Batteson*, 1 Vern. Ch. 404, 23 Eng. Reprint, 546; *Dennison's Appeal*, 1 Pa. 201; *Datesman's Appeal*, 127 Pa. 348, 17 Atl. 1086, 1100; *Wright v. Jennings*, 1 Bailey (S. C.) 277. The proper rule, however, is to determine the value by calculating the probable duration of the life estate from tables of mortality, modified, in any particular case, by the peculiar circumstances. *Steiner v. Berney*, 130 Ala. 289, 30 South. 570; *Williams' Case*, supra; *Jones v. Sherrard*, 22 N. C. 179; *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Bell v. New York*, 10 Paige (N. Y.) 49; *Foster v. Hilliard*, supra; *Atkins v. Kron*, 43 N. C. 1; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231. But see note to *Estabrook v. Haggood*, 10 Mass. 313; *Dorsey v. Smith*, 7 Har. & J. (Md.) 345, 367.

⁷¹ *Bradley's Estate*, 3 Pa. Dist. R. 359; *Tragbar's Estate*, 2 Pa. Dist. R. 407; *Id.*, 12 Pa. Co. Ct. R. 635.

⁷² *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701; *Mayes v. Payne*, 60 S. W. 710, 22 Ky. Law Rep. 1465; *Sohier v. Eldredge*, 103 Mass. 345; *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; *In re Very's Estate*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389, 28 N. Y. Civ. Proc. 163; *Datesman's Appeal*, 127 Pa. 348, 17 Atl. 1086, 1100; *Hagan v. Varney*, 147 Ill. 281, 35 N. E. 219; *In re Lamb*, 10 Misc. Rep. 638, 32 N. Y. Supp. 225; *Merritt v. Scott*, 81 N. C. 385; *Corbett v. Laurens*, 5 Rich. Eq. (S. C.) 301; *Elam v. Parkhill*, 60 Tex. 581; *Van Bibber v. Williamson*, 37 Fed. 756; *MISSOURI CENTRAL BUILDING & LOAN ASS'N v. EVELER*, 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913A, 486, *Burdick Cas. Real Property*. Cf. *Datesman's Appeal*, 127 Pa. 348, 17 Atl. 1086, 1100.

antable condition at the expense of the estate, or complete a house begun by the donor under whom he holds.⁷³ He must make all ordinary repairs at his own expense,⁷⁴ but he is not required to replace buildings destroyed by the elements.⁷⁵ A neglect, however, by the life tenant to make necessary repairs, is waste.⁷⁶

Estovers

A tenant for life has a right to estovers or botes.⁷⁷ By this is meant a right to take wood, or to cut timber, from the land for the necessary purposes of fuel, repairs, fences, agricultural implements, and the like.⁷⁸ The word "bote" was frequently used in combination with some descriptive term, as: (1) House bote, or the right to cut wood for repairing buildings and to use for fuel,⁷⁹ the latter sometimes being termed fire bote; (2) plough bote, or the right to cut wood for repairing farming implements;⁸⁰ and (3) hay bote, or the right to cut wood for repairing fences.⁸¹ The tenant is not entitled, however, to take more than is necessary for his reasonable needs,⁸² and cannot cut timber for the purpose of selling it.⁸³ His right to estovers includes, however, what may be required for his servants.⁸⁴

⁷³ *Sohier v. Eldredge*, 103 Mass. 345; *Parsons v. Winslow*, 16 Mass. 361; *Dent v. Dent*, 30 Beav. 363, 8 Jur. N. S. 786, 31 L. J. Ch. 436. Cf. *Brough v. Higgins*, 2 Grat. (Va.) 408; *In re Laytin* (Sur.) 20 N. Y. Supp. 72.

⁷⁴ *Smith v. Blindbury*, 66 Mich. 319, 33 N. W. 391; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N. W. 657, 32 L. R. A. 756, 60 Am. St. Rep. 444; *In re Very's Estate*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389, 28 N. Y. Civ. Proc. 163; *In re Steele*, 19 N. J. Eq. 120; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Wilson v. Edmonds*, 24 N. H. 517; *Brooks v. Brooks*, 12 S. C. 422.

⁷⁵ *Miller v. Shields*, 55 Ind. 71; *Sampson v. Grogan*, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711.

⁷⁶ *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N. W. 657, 32 L. R. A. 756, 60 Am. St. Rep. 444; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

⁷⁷ Estovers and bote are Old French words, meaning necessities, aid, help.

⁷⁸ 4 Kent, Comm. 73; *Zimmerman v. Shreeve*, 59 Md. 357; *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Beam v. Woolridge*, 3 Pa. Co. Ct. R. 17.

⁷⁹ *White v. Cutler*, 17 Pick. (Mass.) 248; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Smith v. Jewett*, 40 N. H. 530; *Smith v. Poyas*, 2 Desaus. (S. C.) 65. But see *Padelford v. Padelford*, 7 Pick. (Mass.) 152. Cf. *Loomis v. Wilbur*, 5 Mason, 13, Fed. Cas. No. 8,498.

⁸⁰ 2 Blk. Comm. 35, 122.

⁸¹ *Elliot v. Smith*, 2 N. H. 430.

⁸² *Smith v. Jewett*, 40 N. H. 530; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

⁸³ *Modlin v. Kennedy*, 53 Ind. 267; *Van Syckel v. Emery*, 18 N. J. Eq. 387; *Glass v. Glass*, 6 Pa. Co. Ct. R. 408; *Beam v. Woolridge*, 3 Pa. Co. Ct. R. 17.

⁸⁴ *Smith v. Jewett*, 40 N. H. 530. But see *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

Emblements

The personal representative of a tenant for life is entitled to emblements, that is, to the crops maturing after the death of the tenant, since the tenant's estate is one of uncertain duration.⁸⁵ The tenant himself cannot claim them, however, if he forfeits his estate by not performing a condition,⁸⁶ although he can if his interest is terminated without his fault.⁸⁷ The lessee of a tenant for life is entitled to emblements;⁸⁸ and likewise the lessee of one who holds during her widowhood, but terminates her estate by marriage.⁸⁹ If, however, she herself were in possession, she could not claim emblements, because she terminated the estate by her own act.⁹⁰

Waste

A life tenant must not commit waste,⁹¹ or, in other words, he must not cause or suffer any permanent and material injury to the inheritance.⁹² He is liable for waste committed, not only by himself, but also by a stranger,⁹³ since the one next entitled to the

⁸⁵ *Bradley v. Bailey*, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; *Shaffer v. Stevens*, 143 Ind. 295, 42 N. E. 620; *Perry v. Terrel*, 21 N. C. 441; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498; *Poindexter v. Blackburn*, 36 N. C. 286; *Spencer v. Lewis*, 1 Houst. (Del.) 223. But cf. *Reiff v. Reiff*, 64 Pa. 134.

⁸⁶ 2 Blk. Comm. 123; *Oland's Case*, 5 Coke, 116a; *Hawkins v. Skegg's Adm'r*, 10 Humph. (Tenn.) 31; *Bulwer v. Bulwer*, 2 B. & Ald. 470, 21 Rev. Rep. 358. Cf. *Debow v. Colfax*, 10 N. J. Law, 128.

⁸⁷ 2 Blk. Comm. 123; 4 Kent, Comm. 73; *Price v. Pickett*, 21 Ala. 741; *King v. Whittle*, 73 Ga. 482.

⁸⁸ 2 Blk. Comm. 123; *Bradley v. Bailey*, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; *Bevans v. Briscoe*, 4 Harr. & J. (Md.) 139; *King v. Foscue*, 91 N. C. 116.

⁸⁹ 2 Blk. Comm. 124.

⁹⁰ *Hawkins v. Skegg's Adm'r*, 10 Humph. (Tenn.) 31; *Oland's Case*, 5 Coke, 116a.

⁹¹ *Van Syckel v. Emery*, 18 N. J. Eq. 387; *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. The restriction applied only to a tenant in dower and curtesy until the statute of *Marlebridge*, 52 Hen. III, c. 23. A tenant in tail after possibility of issue extinct is not liable, however, for waste. *Ante*.

⁹² *Wade v. Malloy*, 16 Hun (N. Y.) 226; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *McCullough v. Irvine's Ex'rs*, 13 Pa. 438; *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

⁹³ 4 Kent, Comm. 77; *Wood v. Griffin*, 46 N. H. 230; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Cook v. Transportation Co.*, 1 Denio (N. Y.) 91; *Austin v. Railway Co.*, 25 N. Y. 334. Cf. *Beers v. Beers*, 21 Mich. 464. Not, however, for injuries resulting from "act of God," the law, or the public enemy. *Co. Litt.* 53a, 54a; *Pollard v. Shaffer*, 1 Dall. (Pa.) 210, 1 L. Ed. 104, 1 Am. Dec. 239. Cf. *Attersoll v. Stevens*, 1 Taunt. 198; *Huntley v. Russell*, 13 Q. B. D. 572.

premises has a right to have them come to him without their value being impaired by any destruction of the corporeal thing.⁹⁴ It may, indeed, be provided, at the creation of the estate, that the tenant shall not be liable for waste, or, according to the old form, that he shall hold "without impeachment for waste."⁹⁵ Even then, wanton injury, or "equitable waste," will be restrained by a court of chancery.⁹⁶ Injury which occurs from positive acts of the tenant is "voluntary waste," and injury resulting from his neglect of duty is "permissive waste." For example, permitting a building to fall down from want of repair, as distinguished from pulling it down, would be permissive waste.⁹⁷ The English rules governing waste are more strict than in this country, particularly with reference to the use of land and the cutting of timber.⁹⁸ Moreover, owing to the great difference in conditions, the English rules are to a large extent inapplicable here.⁹⁹ Further, what would be waste in a thickly settled Eastern state might not be waste in a new and undeveloped locality.¹ In England, it is said to be waste to use land for a purpose other than its peculiar character or fitness makes most appropriate, as, for example, to convert arable

⁹⁴ *Proffitt v. Henderson*, 29 Mo. 327; *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Dejarnatte v. Allen*, 5 Grat. (Va.) 499; *Huntley v. Russell*, 13 Q. B. Div. 572, 588.

⁹⁵ 2 Blk. Comm. 283; *Belt v. Simkins*, 113 Ga. 894, 39 S. E. 430; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Pyne v. Dor*, 1 Term R. 55; *Bowles' Case*, 11 Coke, 79b. See, also, *Gent v. Harrison*, 1 Johns. Eng. Ch. 517; *Turner v. Wright*, 2 De Gex, F. & J. 234.

⁹⁶ *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Vane v. Lord Barnard*, 2 Vern. 738; *Roet v. Somerville*, 2 Eq. Cas. Abr. 759; *Lushington v. Boldero*, 15 Beav. 1. And see *Marker v. Marker*, 4 Eng. Law & Eq. 95.

⁹⁷ 2 Blk. Comm. 281. As to permissive waste by a tenant at will, see *Countess of Shrewsbury's Case*, 5 Coke, 13. And see *Herne v. Bembow*, 4 Taunt. 764. Cf. *Townshend v. Moore*, 33 N. J. Law, 284.

⁹⁸ *Keeler v. Eastman*, 11 Vt. 293; *Pynchon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Lynn's Appeal*, 31 Pa. 44, 72 Am. Dec. 721; *Drown v. Smith*, 52 Me. 141; *Crockett v. Crockett*, 2 Ohio St. 180; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733. And see *Carpenter, J.*, in *Morehouse v. Cotheal*, 22 N. J. Law, 521.

⁹⁹ *Pynchon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *McCay v. Wait*, 51 Barb. (N. Y.) 225; *Williard v. Williard*, 56 Pa. 119; *Melms v. Brewing Co.*, 104 Wis. 9, 79 N. W. 738, 46 L. R. A. 478.

¹ *Morehouse v. Cotheal*, 22 N. J. Law, 521; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Davis v. Gilliam*, 40 N. C. 308.

land into a meadow,² or to plow up pasture land.³ Such is surely not the rule in this country.⁴ If, however, one holding farming lands as tenant for life cultivates in a way not sanctioned by the rules of good husbandry, he is guilty of waste.⁵ He should not, for instance, exhaust the land by constant tillage, without change of crop or the use of fertilizers,⁶ nor should he permit brush to choke up meadow land.⁷ On the other hand, in many cases, a question of fact is raised for the jury whether certain acts complained of are waste or not.⁸

Buildings and Fences

Formerly there was a very strict rule that almost any alteration in a building was waste.⁹ This rule is now relaxed, however, and the test of whether or not the reversion has been impaired is often applied.¹⁰ It is waste, however, for the tenant to remove things made fixtures by annexation,¹¹ and it may be waste to demolish a building, even if it be untenantable.¹² Waste, also, in respect to buildings, may be committed by suffering them to become ruinous for want of repair.¹³ This is, in fact, almost the only way in which

² 2 Blk. Comm. 282. See, also, *Pynchon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

³ *Keepers, etc., of Harrow School v. Alderton*, 2 Bos. & P. 86.

⁴ *Proffitt v. Henderson*, 29 Mo. 325; *McCullough v. Irvine's Ex'rs*, 13 Pa. 438; *Clark v. Holden*, 7 Gray (Mass.) 8, 66 Am. Dec. 450; *Pynchon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Alexander v. Fisher*, 7 Ala. 514. Cf. *Chase v. Hazelton*, 7 N. H. 171.

⁵ *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. Cf. *Jackson ex dem. Van Rensselaer v. Andrew*, 18 Johns. (N. Y.) 431.

⁶ *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

⁷ *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

⁸ *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *McCay v. Wait*, 51 Barb. (N. Y.) 225; *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

⁹ This was on the ground that such change tended to destroy evidences of identity. *Huntley v. Russell*, 13 Q. B. Div. 572, 588. It made no difference that such changes increased the value of the building. *City of London v. Greyme*, Cro. Jac. 181. Cf. *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435.

¹⁰ *Agate v. Lowenbein*, 57 N. Y. 604; *Doe v. Earl of Burlington*, 5 Barn. & Adol. 507; *Young v. Spencer*, 10 Barn. & C. 145; *Hasty v. Wheeler*, 12 Me. 434.

¹¹ *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *McCullough v. Irvine's Ex'rs*, 13 Pa. 438; *Dozier v. Gregory*, 46 N. C. 100. Cf. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

¹² *McCullough v. Irvine's Ex'rs*, 13 Pa. 438; *Dooly v. Stringham*, 4 Utah, 107, 7 Pac. 405; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

¹³ *Abbot of Sherbourne's Case*, Y. B. 12 Hen. IV, 5. Cf. *Dozier v. Gregory*, 46 N. C. 100.

permissive waste occurs. As already stated, wood may be cut to keep the buildings and fences in repair; but the duty to repair exists, even when there is no wood.¹⁴ However, the tenant is not bound to put in repair buildings which are ruinous when he takes the premises.¹⁵ The tenant is also liable for negligent, but not for accidental, fires.¹⁶

Cutting Trees

As already stated, the strict English rule that the cutting of timber is waste has been greatly modified in this country.¹⁷ Generally, at common law, the tenant may take a reasonable amount of wood for estovers,¹⁸ and in this country the right to cut timber may extend to the clearing of woodland for the purposes of cultivation.¹⁹ Whether, however, this or any other cutting of timber is waste depends in each case on the customs of the locality and the condition of the estate.²⁰ A tenant for life cannot cut timber to sell,²¹ except in cases where that has been the way of enjoying the land,²² or where the timber is cut to clear the land for cultivation.²³

¹⁴ Co. Litt. 53a.

¹⁵ Wilson v. Edmonds, 24 N. H. 517; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

¹⁶ Anon., Fitzh. Abr. "Waste," pl. 30; Cornish v. Strutton, 8 B. Mon. (Ky.) 586.

¹⁷ Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308.

¹⁸ Padelford v. Padelford, 7 Pick. (Mass.) 152; Calvert v. Rice, 91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240; Gardner v. Dering, 1 Paige (N. Y.) 573; Smith v. Jewett, 40 N. H. 530; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362. And see *supra*.

¹⁹ Proffitt v. Henderson, 29 Mo. 325; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Morris v. Knight, 14 Pa. Super. Ct. 324; Drown v. Smith, 52 Me. 141; Ward v. Sheppard, 3 N. C. 283, 2 Am. Dec. 625; Owen v. Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467; Disher v. Disher, 45 Neb. 100, 63 N. W. 368; Davis v. Clark, 40 Mo. App. 515. But cf. Chase v. Hazelton, 7 N. H. 171. And can sell the wood so cut. Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527; Keeler v. Eastman, 11 Vt. 293; Crockett v. Crockett, 2 Ohio St. 180; Davis v. Gilliam, 40 N. C. 308.

²⁰ McCullough v. Irvine's Ex'rs, 13 Pa. 438; Keeler v. Eastman, 11 Vt. 293. Cf. Parkins v. Cox, 3 N. C. 339; Carr v. Carr, 20 N. C. 317.

²¹ Modlin v. Kennedy, 53 Ind. 267; Learned v. Ogden, 80 Miss. 769, 32 South. 278, 92 Am. St. Rep. 621; Davis v. Clark, 40 Mo. App. 515; Johnson v. Johnson, 18 N. H. 594; Davis v. Gilliam, 40 N. C. 308; Miller v. Shields, 55 Ind. 71; Parkins v. Cox, Mart. & H. (N. C.) 517; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Glass v. Glass, 6 Pa. Co. Ct. 408.

²² Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Ballentine v. Poyner, Mart. & H. (N. C.) 268; Den v. Kinney, 5 N. J. Law, 552. And cf. Carr v. Carr, 20 N. C. 217.

²³ See note 19, *supra*.

Mines, Quarries, Oil and Gas Wells

The rule is well established that a life tenant cannot open new mines,²⁴ quarries,²⁵ or oil or gas wells;²⁶ but he may operate, either for his own use or even for profit,²⁷ those already opened at the beginning of his tenancy.²⁸ The rule that prevents his own legal operation of new mines or wells also prevents him from giving a valid lease to another for such a purpose.²⁹ Moreover, the one entitled to the next estate cannot work the mines and quarries on the land during the continuation of the life tenant's interest without the life tenant's consent.³⁰ Whether mines, quarries, and wells are new is a question of fact. An abandoned mine cannot, as a rule, be operated by the life tenant;³¹ but a mere cessation of work, even for a long period, would not prevent his right to continue it.³²

Remedies for Waste

At early common law, the remedies for waste were the writ of prohibition and attachment and the writ of waste. At first, however, these writs were issuable only against tenants in dower and

²⁴ Hook v. Coal Co., 112 Iowa, 210, 83 N. W. 963; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280; Maher's Adm'r v. Maher, 73 Vt. 243, 50 Atl. 1063.

²⁵ Maher's Adm'r v. Maher, 73 Vt. 243, 50 Atl. 1063; Gaines v. Mining Co., 32 N. J. Eq. 86; Owings v. Emery, 6 Gill (Md.) 260. Cf. Coates v. Cheever, 1 Cow. (N. Y.) 460; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; Childs v. Railway Co., 117 Mo. 414, 23 S. W. 373.

²⁶ Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

²⁷ Neel v. Neel, 19 Pa. 323; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280.

²⁸ Gaines v. Mining Co., 33 N. J. Eq. 603; HIGGINS OIL & FUEL CO. v. SNOW, 113 Fed. 433, 51 C. C. A. 267, Burdick Cas. Real Property; Astry v. Ballard, 2 Mod. 193; Neel v. Neel, 19 Pa. 323; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308. Cf. Russell v. Bank, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368; Billings v. Taylor, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; Reed's Ex'rs v. Reed, 16 N. J. Eq. 248; Lynn's Appeal, 31 Pa. 44, 72 Am. Dec. 721. And see Irwin v. Covode, 24 Pa. 162. The life tenant is allowed new shafts into old veins. Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528; Clavering v. Clavering, 2 P. Wms. 388.

²⁹ Hook v. Coal Co., 112 Iowa, 210, 83 N. W. 963; Gerkins v. Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601.

³⁰ See Kier v. Peterson, 41 Pa. 357.

³¹ Hook v. Coal Co., 112 Iowa, 210, 83 N. W. 963; Gaines v. Mining Co., 33 N. J. Eq. 603, reversing 32 N. J. Eq. 86. See Bagot v. Bagot, 32 Beav. 509, 8 Jur. N. S. 1022, 33 L. J. Ch. 116.

³² Id.

by the curtesy and guardians in chivalry,³³ but later, by force of the statutes of Marlbridge³⁴ and Gloucester,³⁵ against those holding for terms of life or for years. This latter statute enacted that the place wasted should be forfeited, and that the person "attainted of waste shall recompense thrice so much as the waste shall be taxed at."³⁶ The writ of waste is now abolished in England,³⁷ and in that country a tenant for life is liable only for damages in an action for waste already done.³⁸ In this country, some states have held that the statute of Gloucester, providing for forfeiture and treble damages, is in force,³⁹ while other states have held the contrary.⁴⁰ In some jurisdictions, an action on the case in the nature of waste is held a proper remedy,⁴¹ although, in most states, actions for waste are regulated by the local statutes.⁴² Threatened waste may be restrained by injunction;⁴³ but an injunction may be denied where the injury complained of is such that an action for damages will afford adequate relief.⁴⁴ Trees or minerals, when unlawfully severed from the land by waste, belong to the reversioner or remainderman, and he may maintain trover or other appropriate action for their recovery.⁴⁵

³³ Co. Litt. 54; *Townshend v. Moore*, 33 N. J. Law, 284.

³⁴ 52 Hen. III, c. 23, § 2 (A. D. 1267).

³⁵ 6 Edw. I, c. 5 (A. D. 1278).

³⁶ 1 Cruise, Dig. 119, §§ 25, 26; *Sackett v. Sackett*, 8 Pick. (Mass.) 313; *Townshend v. Moore*, 33 N. J. Law, 284.

³⁷ St. 3 & 4 Wm. IV, c. 27, § 36.

³⁸ Williams, Real Prop. (17th Internat. Ed.) 128.

³⁹ *Sackett v. Sackett*, 8 Pick. (Mass.) 313; *Dozier v. Gregory*, 46 N. C. 100.

⁴⁰ *Moore v. Ellsworth*, 3 Conn. 483; *Woodward v. Gates*, 38 Ga. 205.

⁴¹ 4 Kent, Comm. 81; *Townshend v. Moore*, 33 N. J. Law, 284; *Yocum v. Zahner*, 162 Pa. 468, 29 Atl. 778.

⁴² See 1 Washb. Real Prop. (5th Ed.) p. 157; *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2; *Hatch v. Hatch*, 31 Wkly. Law Bul. (Ohio) 57; *Donald v. Elliott*, 11 Misc. Rep. 120, 32 N. Y. Supp. 821; 1 Stim. Am. St. Law, §§ 1332, 1353.

⁴³ *Porch v. Fries*, 18 N. J. Eq. 204; *Salles v. Salles*, 3 Sandf. Ch. (N. Y.) 601; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. See *Fetter*, Eq. 299; *Obrien v. Obrien*, Amb. 107; *Perrot v. Perrot*, 3 Atk. 94. See, also, *Smyth v. Carter*, 18 Beav. 78; *Cahn v. Hewsey*, 8 Misc. Rep. 384, 29 N. Y. Supp. 1107; *Arment v. Hensel*, 5 Wash. 152, 31 Pac. 464; *Webster v. Peet*, 97 Mich. 326, 56 N. W. 558; *Perry v. Hamilton*, 138 Ind. 271, 35 N. E. 836. Cf. *Jackson ex dem. Van Rensselaer v. Andrew*, 18 Johns. (N. Y.) 431.

⁴⁴ *Greathouse v. Greathouse*, 46 W. Va. 21, 32 S. E. 994.

⁴⁵ *Whitfield v. Bewit*, 2 P. Wms. 240; *Castlemain v. Craven*, 22 Vin. Abr. 523, pl. 11. And see *Bewick v. Whitfield*, 3 P. Wms. 267; *Bateman v. Hotchkin*, 31 Beav. 486; *Honywood v. Honwood*, L. R. 18 Eq. 306; *Nicklase v. Mor-*

Taxes and Assessments

Unless relieved by an agreement to the contrary,⁴⁶ the life tenant must pay the taxes during the continuance of his estate.⁴⁷ A failure to pay taxes, with the consequent sale of the land for the same, will amount to waste.⁴⁸ In the case of assessments, the life tenant is bound to pay in full for temporary benefits enjoyed only by himself;⁴⁹ but for permanent improvements he is under obligation to pay only his equitable part of the assessments,⁵⁰ and where he makes full payment of such assessments he is entitled to contribution.⁵¹

TERMINATION OF LIFE ESTATES

45. Life estates are terminated by the death of the person by whose life the estate is measured. They may also be terminated by forfeiture for waste, by nonpayment of taxes, by breach of condition, by surrender, and by foreclosure sale.

risson, 56 Ark. 553, 20 S. W. 414; *Stowell v. Waddingham*, 100 Cal. 7, 34 Pac. 436; *Mooers v. Wait*, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667.

⁴⁶ *Abernethy v. Orton*, 42 Or. 437, 71 Pac. 327, 95 Am. St. Rep. 774; *Griffin v. Fleming*, 72 Ga. 697; *Bruner's Estate*, 6 Pa. Co. Ct. R. 221.

⁴⁷ *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Jeffers v. Sydnam*, 129 Mich. 440, 89 N. W. 42; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N. W. 657, 32 L. R. A. 756, 60 Am. St. Rep. 444; *Hall v. French*, 165 Mo. 430, 65 S. W. 769; *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791; *Jewell's Estate*, 11 Phila. (Pa.) 73; *Pike v. Wassell*, 94 U. S. 711, 24 L. Ed. 307; *Jenks v. Horton*, 96 Mich. 13, 55 N. W. 372; *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Chaplin v. United States*, 29 Ct. Cl. 231; *Varnéy v. Stevens*, 22 Me. 331; *Patrick v. Sherwood*, 4 Blatchf. 112, Fed. Cas. No. 10,804; *Fleet v. Dorland*, 11 How. Prac. (N. Y.) 489; *Johnson v. Smith*, 5 Bush (Ky.) 102. See *Cochran v. Cochran*, 2 Desaus. (S. C.) 521.

⁴⁸ *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N. W. 657, 32 L. R. A. 756, 60 Am. St. Rep. 444; *Clark v. Middlesworth*, 82 Ind. 240; *Wade v. Malloy*, 16 Hun (N. Y.) 226.

⁴⁹ *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482; *Hitner v. Ege*, 23 Pa. 305.

⁵⁰ *Hutson v. Tribbetts*, 171 Ill. 547, 49 N. E. 711, 63 Am. St. Rep. 275; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482; *Chamberlin v. Gleason*, 163 N. Y. 214, 57 N. E. 487; *Peck v. Sherwood*, 56 N. Y. 615; *Gunning v. Carman*, 3 Redf. Surr. (N. Y.) 69.

⁵¹ *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482; *In re Bradley's Estate*, 3 Pa. Dist. R. 359; *Bobb v. Wolff*, 54 Mo. App. 515; *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105. Cf. *In re Wyatt's Estate*, 9 Misc. Rep. 285, 30 N. Y. Supp. 275 (insurance premiums).

A life estate is terminated by the death of the tenant where the estate is for his own life,⁵² or by the death of the cestui que vie in case of a life estate *pur autre vie*.⁵³

In some states, the forfeiture of the estate may be a penalty for waste,⁵⁴ or for a failure to pay the taxes on the property.⁵⁵ Forfeiture may also follow a breach of condition, where the instrument creating the estate so expressly provides.⁵⁶

The life tenant may surrender his estate to the reversioner or remainderman,⁵⁷ and foreclosure under a mortgage sale will terminate his interest.⁵⁸

⁵² *Ratcliff v. Ratcliff*, 12 Smedes & M. (Miss.) 134; *Henderson v. Henderson*, 4 Pa. Dist. R. 688; *Sutton v. Hiram Lodge*, 83 Ga. 770, 10 S. E. 585, 6 L. R. A. 703; *Flagg v. Badger*, 58 Me. 258; *In re Tracey*, 136 Cal. 385, 69 Pac. 20; *Avery v. Everett*, 36 Hun (N. Y.) 6.

⁵³ *Livingston v. Tanner*, 14 N. Y. 64; *Clarke v. Cummings*, 5 Barb. (N. Y.) 339; *Walker v. Fenner*, 20 Ala. 192.

⁵⁴ *City of Chauncy v. Brown*, 99 Ga. 766, 26 S. E. 763; *Kent v. Bentley*, 10 Ohio Cir. Ct. R. 132, 6 O. C. D. 457; *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503.

⁵⁵ *Estabrook v. Royon*, 52 Ohio St. 318, 39 N. E. 808, 32 L. R. A. 805, reversing 5 Ohio Cir. Ct. R. 315, 3 O. C. D. 156.

⁵⁶ *Gilker v. Brown*, 47 Mo. 105; *Jackson ex dem. Stevens v. Silvernail*, 15 Johns. (N. Y.) 278; *Schroeder v. King*, 38 Conn. 78; *Moore v. Pitts*, 53 N. Y. 85.

⁵⁷ *Curtis v. Hollenbeck*, 92 Ill. App. 34; *Livingston v. Potts*, 16 Johns. (N. Y.) 28; *Fisher v. Edington*, 12 Lea (Tenn.) 189; *Snook v. Munday*, 90 Md. 701, 45 Atl. 1004.

⁵⁸ *Fidelity Ins., Trust & Safe-Deposit Co. v. Dietz*, 132 Pa. 36, 18 Atl. 1090; *Holmes v. Winler*, 47 Fed. 257.

CHAPTER VIII

LIFE ESTATES ARISING FROM MARRIAGE

46. Classes of Legal Life Estates.
47. Estate During Coverture.
48. Curtesy.
49. Estates Subject to Curtesy.
50. Incidents.
51. How Defeated.
52. Statutory Changes.
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54. Estates Subject to Dower.
55. Assignment of Dower—Quarantine.
56. Procedure in Assignment.
57. Actions to Compel Assignment.
58. Incidents of Dower.
59. How Barred.
60. Statutory Changes.

CLASSES OF LEGAL LIFE ESTATES

46. Legal life estates are life interests in land created by the construction and operation of law. In this country all legal life estates of practical importance arise out of the marital relation. They are:

I. At common law:

- (a) Estate during coverture, or by marital right.
- (b) Curtesy.
- (c) Dower.

II. By force of statute: Homesteads.

Legal life estates have already been defined as those created by act of law. In our system of law these estates all arise out of the marital relation, with the possible exception of an estate tail after possibility of issue extinct,¹ which is by some classed as a legal life estate. In England, there are also certain life estates held by persons subject to peculiar laws, as, for example, life estates held by benefited clergymen. These estates, however, are exceptions to the general law.²

¹ See ante.

² Williams, Real Prop. (17th Internat. Ed.) 147.

ESTATE DURING COVERTURE

47. The estate during coverture, or by marital right, is the right which the husband acquires at common law to the use and profits of his wife's real property, and to her chattels real. This right of the husband is qualified or abrogated by—

- (a) The equitable doctrine of the wife's separate property.
- (b) By statutory changes in nearly all the states.

The Husband's Estate During Coverture

By the fact of marriage the husband acquires, at common law, a freehold interest, during the joint lives of himself and his wife, in all such freehold estates of inheritance as she was seised of at the time of the marriage, or in such as she may become seised of during the coverture.³ Moreover, life estates in lands held by a woman, whether for her own life or during the life of some other person, inure upon her marriage to the benefit of her husband.* In all the freehold estates of the wife, husband and wife are jointly seised.⁵ At the common law, the husband is entitled, during coverture, to all the uses, rents, and profits of his wife's lands.⁶ To the extent of his life interest,⁷ they belong to him

³ Co. Litt. 67a; FOSTER v. MARSHALL, 22 N. H. 491, Burdick Cas. Real Property; ROSE v. ROSE, 104 Ky. 48, 46 S. W. 524, 41 L. R. A. 353, 84 Am. St. Rep. 430, Burdick Cas. Real Property; Junction R. Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618; Nicholls v. O'Neill, 10 N. J. Eq. 88; Shallenberger v. Ashworth, 25 Pa. 152; Elliott v. Teal, Fed. Cas. No. 4,396, 5 Sawy. 249; Starr v. Hamilton, Fed. Cas. No. 13,314, 1 Deady, 268. His interest is a life estate, because it may last during his life; i. e. if he should die before his wife. Co. Litt. 351a (Butl. & H. Notes) note 1; Babb v. Perley, 1 Me. 6; Melvin v. Proprietors, 16 Pick. (Mass.) 161; Nunn's Adm'r's v. Givhan's Adm'r, 45 Ala. 370. Parties in contemplation of marriage may by contract fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his or her decease. Desnoyer v. Jordan, 27 Minn. 295, 7 N. W. 140.

⁴ 2 Kent, Comm. 134; Pringle v. Allen, 1 Hill, Eq. (S. C.) 135.

⁵ National Metropolitan Bank v. Hitz, 1 Mackey (D. C.) 111; Junction R. Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618; Melvin v. Proprietors Merrimack River Locks, etc., 16 Pick. (Mass.) 161; Dyer v. Wittler, 14 Mo. App. 52.

⁶ Nunn's Adm'r's v. Givhan's Adm'r, 45 Ala. 370; Hayt v. Parks, 39 Conn. 357; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Chancey v. Strong, 2 Root (Conn.) 369; Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236; Lucas v. Rickerich, 1

⁷ Brasfield v. Brasfield, 96 Tenn. 580, 36 S. W. 384; Lucas v. Rickerich, 1 Lea (Tenn.) 726; Trask v. Patterson, 29 Me. 499; Butterfield v. Beall, 3 Ind. 203; Coleman v. Satterfield, 2 Head (Tenn.) 259.

absolutely,⁸ may be assigned by him, and are liable for his debts. The wife's leasehold estates, or chattels real, also belong at common law to the husband's use absolutely during coverture.⁹ If, however, he does not dispose of them during coverture, they vest absolutely in the wife, should she survive him,¹⁰ but if he be the survivor they belong to him.¹¹ He cannot, however, dispose of them by will to the prejudice of the wife, since, should she survive him, she is entitled to them regardless of the will.¹²

At common law, the husband, being a tenant for life, could not commit waste,¹³ although the wife's remedy was imperfect, because she could not sue him.¹⁴ He might, however, be restrained by injunction.¹⁵ When waste was committed by the husband's assignee, this difficulty as to the remedy did not exist.¹⁶

Lea (Tenn.) 726; *Royston v. Royston*, 21 Ga. 161; *Bishop v. Blair*, 36 Ala. 80; *Gray v. Mathis*, 52 N. C. 502; *Meriwether v. Howe*, 48 Mo. App. 148. And he may assign his right. *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; *Bailey v. Duncan*, 4 T. B. Mon. (Ky.) 256; *Co. Litt.* 351a; *Burt v. Hurlburt*, 16 Vt. 292; *Barber v. Root*, 10 Mass. 260. Separation does not terminate his right. *Haralson v. Bridges*, 14 Ill. 37; *Van Note v. Downey*, 28 N. J. Law, 219; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Mattocks v. Stearns*, 9 Vt. 326; *Fairchild v. Chastelleux*, 1 Pa. 176, 44 Am. Dec. 117; *Fairchild v. Chastelleux*, 8 Watts (Pa.) 412; *Dold's Trustee v. Geiger's Adm'r*, 2 Grat. (Va.) 98.

⁸ *Clapp v. Stoughton*, 10 Pick. (Mass.) 463; *Tracey v. Dutton*, Cro. Jac. 617, Palm. 206.

⁹ *Gunn v. Sinclair*, 52 Mo. 327. See also, *Wellborn v. Finley*, 52 N. C. 228; *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Riley's Adm'r v. Riley*, 19 N. J. Eq. 229; *Packer v. Wyndham*, Prec. Ch. 412; *Sym's Case*, Cro. Eliz. 33; *Loftus' Case*, Id. 279; *Grute v. Locroft*, Id. 287; *Daniels v. Richardson*, 22 Pick. (Mass.) 565; *Mattocks v. Stearns*, 9 Vt. 326; *Meriwether v. Booker*, 5 Litt. (Ky.) 254; *Appleton, C. J.*, in *Allen v. Hooper*, 50 Me. 374; *Robertson v. Norris*, 11 Q. B. 916. But not by will, if he die first. *Co. Litt.* 351a.

¹⁰ *Co. Litt.* 351a; *Bacon*, Abr. tit. "Baron & Feme," (c) 2; 2 Blk. Comm. 434; *In re Bellamy*, 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. Rep. N. S. 708, 32 Wkly. Rep. 358; *Riley's Adm'r v. Riley*, 19 N. J. Eq. 229.

¹¹ *In re Bellamy*, 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. Rep. N. S. 708, 32 Wkly. Rep. 358; *Hanchett's Case*, 2 Dyer, 251a; *Archer v. Lavender*, 1 R. 9 Eq. 220.

¹² *Doe v. Polgrean*, 1 H. Bl. 535, *Co. Litt.* 351a; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362; *Schuyler v. Hoyle*, 5 Johns. Ch. (N. Y.) 196; *Butterfield v. Beall*, 3 Ind. 203; *Coleman v. Satterfield*, 2 Head (Tenn.) 259.

¹³ *Stroebe v. Fehl*, 22 Wis. 337.

¹⁴ *Davis v. Gilliam*, 40 N. C. 308; *Babb v. Perley*, 1 Greenl. (Me.) 6. Cf. 1 Bish. Mar. Wom. 393.

¹⁵ See *Mellen, C. J.*, in *Babb v. Perley*, 1 Greenl. (Me.) 9. Cf. *Stroebe v. Fehl*, 22 Wis. 337.

¹⁶ *Stroebe v. Fehl*, 22 Wis. 337; *Davis v. Gilliam*, 40 N. C. 308; *Dejarnatte v. Allen*, 5 Grat. (Va.) 499. Cf. *Ware v. Ware*, 6 N. J. Eq. 117.

The Wife's Separate Estate

A married woman's separate estate is that from which the dominion and control of the husband is excluded and from which he is to derive no benefit by reason of the marital relation as at common law.¹⁷ It may be equitable or statutory, according to the mode of its creation.¹⁸

Equitable Separate Estate

A married woman's equitable separate estate is a trust securing property to her sole and separate use during coverture, recognized and upheld by courts of equity to the exclusion of the husband's common-law rights.¹⁹ If the words of the instrument which creates the trust, whether a deed,²⁰ or a will,²¹ clearly show that it is the intention to exclude the common-law rights of the husband,²² an equitable separate estate is created, and is thus distinguished from an ordinary equitable estate held by her, to which the common-law marital rights of the husband attach.²³ In order to create an equitable separate estate, the words "to her sole and separate use" are the most generally approved,²⁴ yet other expressions are also adequate to effect the purpose.²⁵

¹⁷ *Alston v. Rowles*, 13 Fla. 117; *Thompson v. McCloskey*, 4 Ky. Law Rep. 899; *Briggs v. Mitchell*, 60 Barb. (N. Y.) 288. And see *Bowen v. Seabee*, 2 Bush (Ky.) 112.

¹⁸ *Stone v. Gazzam*, 46 Ala. 269; *Colvin v. Currier*, 22 Barb. (N. Y.) 371. See *McMillan v. Peacock*, 57 Ala. 127; *Lippencott v. Mitchell*, 94 U. S. 767, 24 L. Ed. 315; *Huff v. Wright*, 39 Ga. 41.

¹⁹ *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249; *Perkins v. Elliott*, 23 N. J. Eq. 526; *People's Sav. Bank v. Denig*, 131 Pa. 241, 18 Atl. 1083.

²⁰ *Paul v. Leavitt*, 53 Mo. 595.

²¹ *Russell v. Andrews*, 120 Ala. 222, 24 South. 573; *Holliday v. Hively*, 198 Pa. 335, 47 Atl. 988.

²² *Lee v. Lee*, 77 Ala. 412; *Payne v. Pollard*, 3 Bush (Ky.) 127; *Paul v. Leavitt*, 53 Mo. 595; *Tritt's Adm'r v. Colwell*, 31 Pa. 228. And see *Starr v. Hamilton*, Fed. Cas. No. 13,314, 1 Dedy, 268; *Mutual Fire Ins. Co. v. Baltimore County v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

²³ *Pollard v. Merrill*, 15 Ala. 169; *Cushing v. Blake*, 30 N. J. Eq. 689. And see *Bell v. Watkins*, 82 Ala. 512, 1 South. 92, 60 Am. Rep. 756; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368.

²⁴ *Goodrum v. Goodrum*, 43 N. C. 313; *Swain v. Duane*, 48 Cal. 358; *Brandt v. Mickle*, 28 Md. 436; *Beeman v. Cowser*, 22 Ark. 429; *Pollard v. Merrill*, 15 Ala. 169; *Morrison v. Thistle*, 67 Mo. 596; *Porter v. Bank*, 19 Vt. 410.

²⁵ *Bland v. Dawes*, 17 Ch. D. 794, 50 L. J. Ch. 252, 43 L. T. Rep. N. S. 751, 29 Wkly. Rep. 474; *Lewis v. Mathews*, L. R. 2 Eq. 177, 12 Jur. (N. S.) 542, 35 L. J. Ch. 638, 14 Wkly. Rep. 682; *Prout v. Roby*, 15 Wall. 471, 21 L. Ed. 58; *Brandt v. Mickle*, 28 Md. 436; *Stuart v. Kissam*, 2 Barb. (N. Y.) 493; *Flournoy v. Flournoy*, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39; *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 688. Cf. *Buck v. Wroten*, 24 Grat. (Va.) 250; *In re Quin's Estate*, 144 Pa. 444, 22 Atl. 965. For expressions which are not

Statutory Changes—Married Women's Property Acts

In all the American states,²⁶ and also in England,²⁷ statutes have been passed modifying or abolishing the husband's common-law rights in the property of his wife, and making such property, with varying details as to her control of it, and her contractual rights over the same, the separate property of the wife. For the local law, the statutes of each particular jurisdiction must, however, be consulted.²⁸

CURTESY

48. At common law, a husband is entitled to curtesy, which is an estate for the life of the husband in all the wife's estates of inheritance, provided the following requisites concur:

- (a) Valid marriage.
- (b) Issue born alive and capable of inheriting.
- (c) Sufficient seisin of the wife during coverture.
- (d) Death of wife before husband.

Curtesy is said to be initiate when issue capable of inheriting is born alive, and consummate at the wife's death, providing the other requisites have existed.

The husband's estate during coverture in the lands of his wife lasted during their joint lives.²⁹ If no child was born of the marriage, the wife's inheritable realty descended, at common law, to her heirs. If, however, a child capable of inheriting her estate was born of the marriage, the husband, upon the wife's death, became entitled to a life estate in all the lands of which she was seised, either in fee simple or in fee tail.³⁰ This estate was call-

sufficient, see *Scott v. Causey*, 89 Ga. 749, 15 S. E. 650; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669. And see *Gaston v. Wright*, 83 Tex. 282, 18 S. W. 576; *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 15 S. E. 997; *Clifton v. Anderson*, 47 Mo. App. 35. See, in general, the article *Husband and Wife* (by the author of this present work) in 21 Cyc. 1358.

²⁶ See the statutes of the various states.

CONSTITUTIONAL PROVISIONS.—In some of the states, the constitution declares that the property of married women shall be held by them as separate estate, and directs legislative action for the protection of the same.

²⁷ 45 & 46 Vict. c. 75 (1882), known as the Married Women's Property Act.

²⁸ See *Husband and Wife*, 21 Cyc. 1364 et seq.; 1 Stim. Am. St. Law, art. 642; *Williams, Real Prop.* (17th Ed.) Am. note, 373; 1 Washb. Real Prop. (5th Ed.) 346, note; *Schouler, Husb. & W.* 248; 2 Bish. Mar. Wom. 5.

²⁹ Supra.

³⁰ *Billings v. Baker*, 28 Barb. (N. Y.) 343; *Wescott v. Miller*, 42 Wis. 454; *Barr v. Galloway*, Fed. Cas. No. 1,037, 1 McLean, 476; *Stoddard v. Gibbs*, 23

ed tenancy by "curtesy," or, by some of the older writers, "tenancy by the law of England," or "by the curtesy of England."³¹ The origin of the estate, and even of the word "curtesy," is, however, obscure.³²

Requisites—Marriage

The first requisite of curtesy is lawful marriage. If the marriage was absolutely void, no curtesy will attach; but if it is only voidable, and is not annulled during the wife's life, then the husband will be entitled to the estate.³³

Birth of Issue

Another requisite of the common-law estate by curtesy is the birth of legitimate issue.³⁴ The issue must be born alive,³⁵ and it must be capable of inheriting the mother's estate.³⁶ Thus, the

Fed. Cas. No. 13,468, 1 Sumn. 263; Co. Litt. § 30a; Schermerhorn v. Miller, 2 Cow. (N. Y.) 439; Adair v. Lott, 3 Hill (N. Y.) 182; Rawlings v. Adams, 7 Md. 26; Foster v. Marshall, 22 N. H. 491; Buckworth v. Thirkell, 3 Bos. & P. 652, note. The husband and wife are seised jointly. Guion v. Anderson, 8 Humph. (Tenn.) 298; Junction R. Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618; Wass v. Bucknam, 38 Me. 356.

³¹ Britton, 1, 220; Co. Litt. 29a, § 35; 2 Blk. Comm. 126, 127. And see P. & M. II, 412, 413; Alexander v. Warrance, 17 Mo. 228.

³² Blackstone derives "curtesy" from "curialitas"; that is, an attendance upon the lord's court or "curtis." 2 Blk. Comm. 126, 127. This derivation is very improbable, however. See P. & M. II, 412. Coke says that the estate is of English origin. Co. Litt. 29a, § 35. There was, however, an analogous custom in Normandy (P. & M. II, 413), and there is a possibility that the origin goes back to the Roman law. In the time of Constantine, the law gave the father a life interest in all property coming to the son, through the mother. See Scrutton, Roman Law and The Law of England, 98; Codex, 6, 60, 2; Wright, Ten. 194. The custom seems to be unknown in Saxon times.

³³ 2 Blk. Comm. 127; 1 Cruise, Dig. 107; 1 Washb. Real Prop. (6th Ed.) § 318; Wells v. Thompson, 13 Ala. 793, 48 Am. Dec. 76.

³⁴ Schermerhorn v. Miller, 2 Cow. (N. Y.) 439; Comer v. Chamberlain, 6 Allen (Mass.) 166; Ryan v. Freeman, 36 Miss. 175. A child born out of wedlock, but made legitimate by force of statute, by a subsequent marriage, gives curtesy. Hunter v. Whitworth, 9 Ala. 965. Such is not, however, the English law.

³⁵ Nicrosi v. Phillipi, 91 Ala. 299, 8 South. 561; Marsellis v. Thalhimier, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Comer v. Chamberlain, 6 Allen (Mass.) 166; Brock v. Kellock, 30 Law J. Ch. 498; Goff v. Anderson, 91 Ky. 303, 15 S. W. 866, 12 Ky. Law Rep. 888, 11 L. R. A. 825; In re Winne, 1 Lans. (N. Y.) 508; Ryan v. Freeman, 36 Miss. 175; Doe ex dem. Barrett v. Roe, 5 Houst. (Del.) 14; Goff v. Anderson, 91 Ky. 303, 15 S. W. 866, 12 Ky. Law Rep. 888, 11 L. R. A. 825.

³⁶ Heath v. White, 5 Conn. 228; Sumner v. Partridge, 2 Atk. 47, 26 Eng. Reprint. 425; Day v. Cochran, 24 Miss. 261; Janney v. Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557.

birth of a daughter would give the husband no curtesy in lands of which the wife was tenant in tail male, because the daughter could not inherit the estate.³⁷ Moreover, the issue must be born during the wife's life; that is, it will not be sufficient, to give curtesy, if the mother die in childbirth, and the child is afterwards delivered by the Cæsarean operation.³⁸ It is immaterial, however, whether the birth of issue is before or after the wife's estate is acquired.³⁹ Curtesy will not be defeated by the subsequent death of the issue, either in the mother's lifetime or after her death.⁴⁰ In several states the birth of issue is made unnecessary by statute.⁴¹

Sufficient Seisin During Coverture

By the strict common-law rule, in order that the husband might have curtesy, it was essential that the wife be seised in fact,⁴² or, as otherwise expressed, that she have actual seisin,⁴³ and this rule is followed in some states at the present time.⁴⁴ However, in many states, the rule as to seisin in fact has been relaxed,⁴⁵

³⁷ *Day v. Cochran*, 24 Miss. 261; *Heath v. White*, 5 Conn. 228, 236; *Barker v. Barker*, 2 Sim. 249; *Sumner v. Partridge*, 2 Atk. 46.

³⁸ Co. Litt. 29b; *Marsellis v. Thalhimier*, 2 Paige (N. Y.) 42, 21 Am. Dec. 66; *In re Winne*, 1 Lans. (N. Y.) 508; *Paine's Case*, 8 Coke, 34a.

³⁹ Co. Litt. 29b; 2 Blk. Comm. 128; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Comer v. Chamberlain*, 6 Allen (Mass.) 166; *Guion v. Anderson*, 8 Humph. (Tenn.) 307; *Heath v. White*, 5 Conn. 236; *Witham v. Perkins*, 2 Me. 400. Cf. *Hathon v. Lyon*, 2 Mich. 93.

⁴⁰ Co. Litt. 29b; 2 Blk. Comm. 128; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Heath v. White*, 5 Conn. 235; *Foster v. Marshall*, 22 N. H. 491.

⁴¹ *Forbes v. Sweesy*, 8 Neb. 520, 1 N. W. 571; *Hershizer v. Florence*, 39 Ohio St. 516; *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641; 1 Stim. Am. St. Law, § 3301 B; *Kingsley v. Smith*, 14 Wis. 360.

⁴² *Hopper v. Demarest*, 21 N. J. Law, 525; *Wescott v. Miller*, 42 Wis. 454. The reason assigned for this is that the husband can at any time perfect the wife's seisin by making an entry. 2 Ham. Blk. Comm. 233, note 32; *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. (Ky.) 401; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38.

⁴³ Co. Litt. 29a; *Stinebaugh v. Wisdom*, 13 B. Mon. (Ky.) 467; *Parker v. Carter*, 4 Hare, 400, 416; *Davis v. Mason*, 1 Pet. 507, 7 L. Ed. 239.

⁴⁴ See *Petty v. Malier*, 15 B. Mon. (Ky.) 591; *Hopper v. Demarest*, 21 N. J. Law, 525; *Green v. Liter*, 8 Cranch, 229, 3 L. Ed. 545.

⁴⁵ *Ferguson v. Tweedy*, 56 Barb. (N. Y.) 163; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Wass v. Bucknam*, 38 Me. 356; *Reaume v. Chambers*, 22 Mo. 36, 54; *Bush v. Bradley*, 4 Day (Conn.) 298; *Kline v. Beebe*, 6 Conn. 494; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Ellsworth v. Cook*, 8 Paige (N. Y.) 643; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Adams v. Logan*, 6 T. B. Mon. (Ky.) 175; *Watkins v. Thornton*, 11 Ohio St. 367; *Rabb v. Griffin*, 26 Miss. 579; *Childers v. Bumgarner*, 53 N. C. 297.

and seisin in law is held sufficient to give curtesy, particularly in the case of the wife's taking by descent,⁴⁶ or where the land is wild and unoccupied,⁴⁷ or where there is no adverse possession.⁴⁸ The seisin of a lessee is regarded as the seisin of the wife,⁴⁹ as is also the seisin of a cotenant.⁵⁰ The seisin is sufficient if it occurs at any time during coverture, whether before or after the birth of issue.⁵¹ The rule as to actual seisin does not apply, moreover, to incorporeal hereditaments, of which no actual possession is possible.⁵²

Death of Wife

The fourth and final requisite is that the wife must die prior to the death of the husband.⁵³

⁴⁶ *Borland's Lessee v. Marshall*, 2 Ohio St. 308; *Day v. Cochran*, 24 Miss. 261; *Adair v. Lott*, 3 Hill (N. Y.) 182; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Chew v. Commissioners*, 5 Rawle (Pa.) 160; *Stephens v. Hume*, 25 Mo. 349; *Harvey v. Wickham*, 23 Mo. 115; *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747; *Ellis v. Dittey* (Ky.) 23 S. W. 366; *Merritt's Lessee v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298; *Eager v. Furnivall*, 17 Ch. Div. 115; *Withers v. Jenkins*, 14 S. C. 597; *McKee v. Cottle*, 6 Mo. App. 416.

⁴⁷ *Ferguson v. Tweedy*, 43 N. Y. 543; *Wescott v. Miller*, 42 Wis. 454; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Green v. Litter*, 8 Cranch, 249, 3 L. Ed. 545; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1,037; *Den ex dem. Pierce v. Wanett*, 32 N. C. 446; *McDaniel v. Grace*, 15 Ark. 465; *Day v. Cochran*, 24 Miss. 261; *Clay v. White*, 1 Munf. (Va.) 162; *De Grey v. Richardson*, 3 Atk. 469; *Lowry's Lessee v. Steele*, 4 Ohio, 170; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320. Contra, *Neely v. Butler*, 10 B. Mon. (Ky.) 48.

⁴⁸ *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Stephens v. Hume*, 25 Mo. 349; *Buchanan v. Duncan*, 40 Pa. 82.

⁴⁹ *De Grey v. Richardson*, 3 Atk. 469. Or of a tenant at sufferance. *Taylor v. Gould*, 10 Barb. (N. Y.) 388; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Lowry's Lessee v. Steele*, 4 Ohio, 170; *Green v. Litter*, 8 Cranch, 245, 3 L. Ed. 545; *Powell v. Gosson*, 18 B. Mon. (Ky.) 179; *Day v. Cochran*, 24 Miss. 261; *Carter v. Williams*, 43 N. C. 177; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76.

⁵⁰ *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43.

⁵¹ *Comer v. Chamberlain*, 6 Allen (Mass.) 166; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435. But see *Gentry v. Wagstaff*, 14 N. C. 270.

⁵² *Co. Litt.* 29a; *Davis v. Mason*, 1 Pet. 507, 7 L. Ed. 239; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38; *Buckworth v. Thirkell*, 3 Bos. & P. 652, note. And see *Eager v. Furnivall*, 17 Ch. D. 115.

⁵³ *Wheeler v. Hotchkiss*, 10 Conn. 225; *Porch v. Fries*, 18 N. J. Eq. 204; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433.

Curtesy Initiate and Consummate

The husband's right to curtesy is said to be initiate as soon as there is issue of the marriage, such issue being capable of inheriting.⁵⁴ When this right attaches to the lands of the wife, it is a vested interest, which cannot be taken away by the legislature.⁵⁵ Upon the death of the wife, prior to the husband's decease, the husband's curtesy is consummate.⁵⁶ without any assignment or other formality.⁵⁷ Curtesy, having vested in the husband, cannot be defeated by a disclaimer.⁵⁸

SAME—ESTATES SUBJECT TO CURTESY

49. The husband is entitled to curtesy in the following estates:

- (a) Estates of inheritance, in general.
- (b) Equitable estates.
- (c) Estates in expectancy, when they vest in possession during the wife's life.
- (d) Joint estates, except joint tenancies.
- (e) Determinate estates, when they are determined by a shifting use or executory devise, and in all cases until they are defeated.

Estates of Inheritance

As already seen, a husband has curtesy only in the wife's estates of inheritance, since her estates not of inheritance end with the death of the wife, and there is nothing left out of which the husband could have curtesy. In other words, a fee simple or a fee tail in the wife gives the husband curtesy,⁵⁹ but a life estate

⁵⁴ 2 Blk. Comm. 127; *FOSTER v. MARSHALL*, 22 N. H. 491, *Burdick Cas. Real Property*; *Nicholls v. O'Neill*, 10 N. J. Eq. 88; *Billings v. Baker*, 28 Barb. (N. Y.) 343; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Schermerhorn v. Miller*, 2 Cow. (N. Y.) 439; *Comer v. Chamberlain*, 6 Allen (Mass.) 166. A child born out of wedlock, but made legitimate by a subsequent marriage, gives curtesy. *Hunter v. Whitworth*, 9 Ala. 965.

⁵⁵ *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Wyatt v. Smith*, 25 W. Va. 813; *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577.

⁵⁶ *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; *Gamble's Estate*, 1 Pars. Eq. Cas. (Pa.) 489.

⁵⁷ Co. Litt. 30a; 2 Blk. Comm. 128.

⁵⁸ *Watson v. Watson*, 13 Conn. 83.

⁵⁹ *Northcut v. Whipp*, 12 B. Mon. (Ky.), 65; *Thornton's Ex'rs v. Krepps*, 37 Pa. 391; *Barker v. Barker*, 2 Sim. 249; *Sumner v. Partridge*, 2 Atk. 47; *Janney v. Sprigg*, 7 Gill (Md.) 197, 48 Am. Dec. 557. If the wife was tenant

does not.⁶⁰ By statute, however, a husband may be entitled to curtesy in the leasehold estates of his wife.⁶¹ The husband's curtesy attaches, likewise, to the wife's inheritable statutory separate estates, provided, where she is given power to dispose of the same, she leaves them undisposed of by will.⁶² In her inheritable legal estates, settled upon her by express limitation, he has also his right of curtesy.⁶³

Equitable Estates

Curtesy attaches to the beneficial interest of the wife in equitable estates of inheritance, as well as to legal interests,⁶⁴ and this rule

in tall, and died leaving no issue, still the husband would take curtesy, providing issue capable of inheriting had been born, because the estate had been one of inheritance. *Paine's Case*, 8 Coke, 34; *Buchannan's Lessee v. Sheffer*, 2 Yeates (Pa.) 374; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453; *Buckworth v. Thirkell*, 3 Bos. & P. 652, note; *Holden v. Wells*, 18 R. I. 802, 31 Atl. 265.

⁶⁰ *Janney v. Sprigg*, 7 Gill (Md.) 197, 48 Am. Dec. 557; *Spencer v. O'Neill*, 100 Mo. 49, 12 S. W. 1054; *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237.

⁶¹ *Murdock v. Reed*, 1 Disn. (Ohio) 274.

⁶² *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679; *Johnson v. Cummins*, 16 N. J. Eq. 97, 84 Am. Dec. 142; *Hatfield v. Sneden*, 54 N. Y. 280; *Burke v. Valentine*, 52 Barb. (N. Y.) 412; *Rouse's Estate v. Directors of Poor*, 169 Pa. 116, 32 Atl. 541; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *Kingsley v. Smith*, 14 Wis. 360; *Smith v. Colvin*, 17 Barb. (N. Y.) 157; *BOZARTH v. LARGENT*, 128 Ill. 95, 21 N. E. 218, *Burdick Cas. Real Property*.

⁶³ *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128; *Rank v. Rank*, 120 Pa. 191, 13 Atl. 827; *Freyvogel v. Hughes*, 56 Pa. 228. But see *Sayers v. Wall*, 26 Grat. (Va.) 354, 21 Am. Rep. 303.

⁶⁴ *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Payne v. Payne*, 11 B. Mon. (Ky.) 138; *Young v. Langbein*, 7 Hun (N. Y.) 151; *Alexander v. Warrance*, 17 Mo. 228; *Dubs v. Dubs*, 31 Pa. 149; *Ege v. Medlar*, 82 Pa. 86; *Rawlings v. Adams*, 7 Md. 26; *Pierce v. Hakes*, 23 Pa. 231; *Baker v. Heiskell*, 1 Cold. (Tenn.) 641; *Norman's Ex'r v. Cunningham*, 5 Grat. (Va.) 63; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Robie v. Chapman*, 59 N. H. 41; *Nightingale v. Hidden*, 7 R. I. 115; *Sentill v. Robeson*, 55 N. C. 510; *Cushing v. Blake*, 30 N. J. Eq. 689; *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017; *Gilmore v. Burch*, 7 Or. 374, 33 Am. Rep. 710; *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151. But see *Hall v. Crabb*, 56 Neb. 392, 76 N. W. 865. Receipt by the wife of the rents and profits is a sufficient seisin. *Hearle v. Greenbank*, 3 Atk. 717; *Withers v. Jenkins*, 14 S. C. 597; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Cushing v. Blake*, 30 N. J. Eq. 689; *Payne v. Payne*, 11 B. Mon. (Ky.) 138; *Taylor v. Smith*, 54 Miss. 50; *Sentill v. Robeson*, 55 N. C. 510. So the husband may have curtesy in the proceeds of sale of the wife's land, *Clepper v. Livergood*, 5 Watts (Pa.) 113; *Houghton v. Hapgood*, 13 Pick. (Mass.) 154; *Forbes v. Smith*, 43 N. C. 369; *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; *Williams' Case*, 3 Bland (Md.) 186; and in money directed to be laid out in land, *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 Brown, Ch. 404; *Cunningham v. Moody*, 1 Ves. Sr. 174;

applies generally to her equitable separate estates,⁶⁵ unless the instrument creating such an estate excludes the husband's curtesy.⁶⁶ A wife's equity of redemption is also subject to curtesy.⁶⁷

Estates in Expectancy

The estate must have been one in possession during the wife's life. For this reason, there can be no curtesy in a reversion or a remainder,⁶⁸ unless the prior particular freehold estate determined before her death, and the wife's estate thereby became vested in possession.⁶⁹ Curtesy attaches, however, to a reversion after a term of years, since in such a case the seisin is in the wife.⁷⁰

Watts v. Ball, 1 P. Wms. 108; *Chaplin v. Chaplin*, 3 P. Wms. 229; *Casborne v. Scarfe*, 1 Atk. 603.

⁶⁵ *Richardson v. Stodder*, 100 Mass. 528; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Dubs v. Dubs*, 31 Pa. 149; *Ege v. Medlar*, 82 Pa. 86. See *Jones v. Jones' Ex'r*, 96 Va. 749, 32 S. E. 463; also *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128.

⁶⁶ *McTIGUE v. McTIGUE*, 116 Mo. 138, 22 S. W. 501, *Burdick Cas. Real Property*; *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Pool v. Blakie*, 53 Ill. 495; *Stokes v. McKibbin*, 13 Pa. 267; *Payne v. Payne*, 11 B. Mon. (Ky.) 138; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660; *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60; *Rigler v. Cloud*, 14 Pa. 361; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879; *Clark v. Clark*, 24 Barb. (N. Y.) 582; *Withers v. Jenkins*, 14 S. C. 597; *Cushing v. Blake*, 30 N. J. Eq. 689; *Ege v. Medlar*, 82 Pa. 86; *Waters v. Tazewell*, 9 Md. 291. But see *Dubs v. Dubs*, 31 Pa. 149; *Nightingale v. Hidden*, 7 R. I. 115. If the husband conveys land to the wife, he has no curtesy in it. *Sayers v. Wall*, 26 Grat. (Va.) 374, 21 Am. Rep. 303; *Leake v. Benson*, 29 Grat. (Va.) 153; *Irvine v. Greever*, 32 Grat. (Va.) 411; *Dugger's Children v. Dugger*, 84 Va. 130, 4 S. E. 171. *Contra*, *Frazier v. Hightower*, 12 Heisk. (Tenn.) 94; *Cushing v. Blake*, 29 N. J. Eq. 399.

⁶⁷ *Robinson v. Lakenan*, 28 Mo. App. 135; *De Camp v. Crane*, 19 N. J. Eq. 166; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239, 4 Kent, Comm. 30.

⁶⁸ *Adair v. Lott*, 3 Hill (N. Y.) 182; *Adams v. Logan*, 6 T. B. Mon. (Ky.) 175; *Stoddard v. Gibbs*, 1 Sumn. 263, Fed. Cas. No. 13,468; *Lowry's Lessee v. Steele*, 4 Ohio, 170; *Watkins v. Thornton*, 11 Ohio St. 367; *Chew v. Commissioners*, 5 Rawle (Pa.) 160; *Hitner v. Ege*, 23 Pa. 305; *Orford v. Benton*, 36 N. H. 395; *Planters' Bank of Tennessee v. Davis*, 31 Ala. 626; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Ferguson v. Tweedy*, 43 N. Y. 543; *Shores v. Carley*, 8 Allen (Mass.) 425; *Manning's Case*, 8 Coke, 96; *Robertson v. Stevens*, 36 N. C. 247; *Tayloe v. Gould*, 10 Barb. (N. Y.) 388; *Reed v. Reed*, 3 Head (Tenn.) 491, 75 Am. Dec. 777; *Stewart v. Barclay*, 2 Bush (Ky.) 550; *De Grey v. Richardson*, 3 Atk. 469.

⁶⁹ *Ferguson v. Tweedy*, 43 N. Y. 543; *Keller v. Lamb*, 10 Kulp (Pa.) 246; *Waller v. Martin*, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. Rep. 882; *Kent v. Hartpoole*, 3 Keb. 731; *Doe v. Scudamore*, 2 Bos. & P. 294; *Boothby v. Vernon*, 2 Eq. Cas. Abr. 728, 9 Mod. 147; *Hooker v. Hooker*, Cas. t. Hardw. 13; *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; *Webster v. Ellsworth*, 147 Mass. 602, 18 N. E. 569; *Moore v. Calvert*, 6 Bush (Ky.) 356;

⁷⁰ *Withers v. Jenkins*, 14 S. C. 587.

Joint Estates

The husband is entitled to curtesy in estates held by his wife as a tenant in common or in coparcenary,⁷¹ but not in her estates in joint tenancy.⁷²

Determinable Estates

Estates of the wife which are determined, or terminated, at common law, by some limitation or condition,⁷³ before the time that they would otherwise naturally terminate, are not subject to curtesy if determined during the wife's life.⁷⁴ If, however, the estate which arises and cuts off the wife's interest is a shifting use,⁷⁵ or an executory devise,⁷⁶ the husband is entitled to curtesy in the estate of which the wife was seised.⁷⁷

SAME—INCIDENTS

50. Estates by curtesy have the usual incidents of life estates.

The usual incidents of life estates attach to curtesy, such, for example, as liability for waste and the right to emblements and estovers.⁷⁸ The husband is entitled to possession,⁷⁹ and to all

Hatfield v. Sneden, 54 N. Y. 280; Gentry v. Wagstaff, 14 N. C. 270; Hitner v. Ege, 23 Pa. 305; Mackey v. Proctor, 12 B. Mon. (Ky.) 433; Watkins v. Thornton, 11 Ohio St. 367; Shores v. Carley, 8 Allen (Mass.) 425; Tayloe v. Gould, 10 Barb. (N. Y.) 388.

⁷¹ Buckley v. Buckley, 11 Barb. (N. Y.) 43; Sterling v. Penlington, 2 Eq. Cas. Abr. 730; Wass v. Bucknam, 38 Me. 360; Vanarsdall v. Fauntleroy's Heirs, 7 B. Mon. (Ky.) 401; Carr v. Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747.

⁷² Co. Litt. § 45. In joint tenancies, the surviving joint tenant has the right to the entire estate. See Joint Tenancies, post.

⁷³ See Estates upon Condition, and Estates upon Limitation, chapter XIII, post.

⁷⁴ Co. Litt. 241, note; Grout v. Townsend, 2 Hill (N. Y.) 554; Wright v. Herron, 6 Rich. Eq. (S. C.) 406; Buckworth v. Thirkell, 3 Bos. & P. 652, note; Moody v. King, 2 Bing. 447; Hatfield v. Sneden, 54 N. Y. 285; Evans v. Evans, 9 Pa. 190; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641; Webb v. Trustees, 90 Ky. 117, 13 S. W. 362; Withers v. Jenkins, 14 S. C. 597; Thornton's Ex'rs v. Krepps, 37 Pa. 391; Weller v. Weller, 28 Barb. (N. Y.) 588; Harvey v. Brishin, 143 N. Y. 151, 38 N. E. 108.

⁷⁵ See post, chapter XV.

⁷⁶ See post, Id.

⁷⁷ Martin v. Renaker, 9 S. W. 419, 10 Ky. Law Rep. 469; Hatfield v. Sneden, 54 N. Y. 280; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641.

⁷⁸ Learned v. Ogden, 80 Miss. 769, 32 South. 278, 92 Am. St. Rep. 621; Barnsdall v. Boley, 119 Fed. 191; McCullough v. Irvine, 13 Pa. 438; Armstrong v. Wilson, 60 Ill. 226; Bates v. Shraeder, 13 Johns. (N. Y.) 260.

⁷⁹ Jacobs v. Rice, 33 Ill. 369; Miller v. Early, 64 Mo. 478; Miller v. English, 61 Mo. 444.

the rents and profits of the property.⁸⁰ He takes his curtesy subject, however, to all existing incumbrances on the land.⁸¹ On the estate becoming initiate, the husband's interest is liable for his debts,⁸² or he can sell and dispose of it, as he may see fit.⁸³ No alienation of the husband alone is effectual, however, for a longer period than his life,⁸⁴ nor does the disseisin of the husband bar the rights of the wife's heirs or devisees.⁸⁵ After the termination of the husband's estate by his death, the realty is disposed of according to the testamentary direction of the wife, where the wife has executed a valid will, or it is governed by the usual rules of descent.

⁸⁰ *Muldowney v. Morris, etc.*, R. Co., 42 Hun (N. Y.) 444; *Bedford v. Bedford*, 32 Ill. App. 455; *Hart v. Chase*, 46 Conn. 207.

⁸¹ *Barker v. Barker*, 2 Sim. 249. But when incumbrances are paid off, they will be apportioned. *In re Freeman*, 116 N. C. 199, 21 S. E. 110.

⁸² *Gay v. Gay*, 123 Ill. 221, 13 N. E. 813; *Burd v. Dansdale*, 2 Bin. (Pa.) 80; *Watson v. Watson*, 13 Conn. 83; *Rose v. Sanderson*, 38 Ill. 247; *Canby's Lessee v. Porter*, 12 Ohio, 79; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Roberts v. Whiting*, 16 Mass. 186; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Wyatt v. Smith*, 25 W. Va. 813; *Hitz v. Bank*, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577; *Jacobs v. Rice*, 33 Ill. 369; *Gardner v. Hooper*, 3 Gray (Mass.) 398. But see *Evans v. Lobdale*, 6 Houst. (Del.) 212, 22 Am. St. Rep. 358; *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; *Van Duzer v. Van Duzer*, 6 Paige, Ch. (N. Y.) 366, 31 Am. Dec. 257. This has been changed in some states by statute. *Curry v. Bott*, 53 Pa. 400; *Staples v. Brown*, 13 Allen (Mass.) 64; *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91; *Churchill v. Hudson*, 34 Fed. 14. See *BOZARTH v. LARGENT*, 128 Ill. 95, 21 N. E. 218, *Burdick Cas. Real Property*.

⁸³ *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Jacobs v. Rice*, 33 Ill. 369; *Deming v. Miles*, 35 Neb. 739, 53 N. W. 665, 37 Am. St. Rep. 464; *Robertson v. Norris*, 11 Q. B. 916; *Shortall v. Hinckley*, 31 Ill. 219; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Ward v. Thompson*, 6 Gill & J. (Md.) 349; *Hutchins v. Dixon*, 11 Md. 29; *Denton's Guardians v. Denton's Ex'rs*, 17 Md. 403; *Schermerhorn v. Miller*, 2 Cow. (N. Y.) 439; *Koltenbrock v. Cracraft*, 36 Ohio St. 584.

⁸⁴ *Flagg v. Bean*, 25 N. H. 49; *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537.

⁸⁵ *Foster v. Marshall*, 22 N. H. 491; *Robertson v. Norris*, 11 Q. B. 916; *Miller v. Shackelford*, 4 Dana (Ky.) 264; *Lessee of Thompson's Heirs v. Green*, 4 Ohio St. 216; *Wass v. Bucknam*, 38 Me. 356. But see *Melvin v. Proprietors*, 16 Pick. (Mass.) 161; *Weisinger v. Murphy*, 2 Head (Tenn.) 674; *Coe v. Manufacturing Co.*, 35 Conn. 175; *Watson v. Watson*, 10 Conn. 75.

SAME—HOW DEFEATED

51. Curtesy may be defeated by:

- (a) The wife's conveyance, or devise, of her estate, in some states.
- (b) Husband's release, and, formerly, by husband's feoffment in fee.
- (c) Joint conveyance of husband and wife.
- (d) Annulment of marriage, and, in some states, by divorce or desertion.
- (e) Adverse possession.
- (f) Wife's debts, in some states.
- (g) Alienage of husband, at common law.

At common law, the wife cannot, by her conveyance, defeat the right of curtesy;⁸⁶ but the married women's acts in some states give the wife power to dispose of her estate so as to cut off the right,⁸⁷ and in the other states the husband may do so by joining in his wife's conveyance.⁸⁸ Likewise, under statutes giving married women the right to dispose of their real property by will with the husband's consent, a devise of her property with such consent will bar curtesy.⁸⁹ In some jurisdictions, moreover, the husband's consent may not be required.⁹⁰ In some cases, also, a husband may be obliged to elect between curtesy and a devise in his favor.⁹¹

⁸⁶ *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Johnson v. Fritz*, 44 Pa. 449; *Mildmay's Case*, 1 Coke, 41; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Pool v. Blakie*, 53 Ill. 495; *Cooper v. Macdonald*, 7 Ch. Div. 288; *Robinson v. Buck*, 71 Pa. 386.

⁸⁷ *Neelly v. Lancaster*, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752; *Thurber v. Townsend*, 22 N. Y. 517; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Browne v. Bockover*, 84 Va. 424, 4 S. E. 745; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; *Silsby v. Bullock*, 10 Allen (Mass.) 94. And see *Scott v. Guernsey*, 60 Barb. (N. Y.) 163; *Oatman v. Goodrich*, 15 Wis. 589; *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. 666.

⁸⁸ *Baker v. Baker*, 167 Mass. 575, 46 N. E. 391; *Hayden v. Pierce*, 165 Mass. 359, 43 N. E. 119; *Middleton v. Steward*, 47 N. J. Eq. 293, 20 Atl. 846; *Stewart v. Ross*, 50 Miss. 776; *Haines v. Ellis*, 24 Pa. 253; *Jackson v. Hodges*, 2 Tenn. Ch. 276; *Carpenter v. Davis*, 72 Ill. 14.

⁸⁹ *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023, 13 Ky. Law Rep. 726; *Silsby v. Bullock*, 10 Allen (Mass.) 94; *McBride's Estate*, 81 Pa. 303; *Hutchings v. Commercial Bank*, 91 Va. 628, 20 S. E. 950.

⁹⁰ *Stewart v. Ross*, 50 Miss. 776; *Ex parte Watts*, 130 N. E. 237, 41 S. E. 289; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879.

⁹¹ *Beirne's Ex'rs v. Beirne*, 33 W. Va. 663, 11 S. E. 46. See *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139.

The husband's curtesy, or his statutory "dower" in lieu of curtesy,⁹² may be released by him,⁹³ and this may be done, even before marriage, by contract between the intended husband and wife.⁹⁴ At common law, a feoffment in fee by the husband forfeited his curtesy;⁹⁵ but, as already seen, this rule no longer applies to life tenants.⁹⁶ Annulment of the marriage or absolute divorce,⁹⁷ especially for the husband's fault,⁹⁸ and in some states desertion of the wife, forfeits all rights to curtesy.⁹⁹ The husband has no curtesy in lands of the wife held in adverse possession during the coverture,¹ and in some states the liability of the wife's lands for her debts may defeat the husband's curtesy.² Formerly, alienage of the husband was a bar to his curtesy;³

⁹² See *infra*.

⁹³ *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *McBreen v. McBreen*, 154 Mo. 323, 55 S. W. 463, 77 Am. St. Rep. 758 [overruling *Shaffer v. Kugler*, 107 Mo. 58, 17 S. W. 698]; *Moore v. Hemp's Ex'rs*, 68 S. W. 1, 24 Ky. Law Rep. 121.

⁹⁴ *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171. But see *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Charles v. Charles*, 8 Grat. (Va.) 486, 56 Am. Dec. 155. Contra, *Rochon v. Lecatt*, 2 Stew. (Ala.) 429. And see *Kennedy v. Koopmann*, 166 Mo. 87, 65 S. W. 1020.

⁹⁵ 4 Kent, Comm. 83; *French v. Rollins*, 21 Me. 372; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76. But not a bargain and sale deed, *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; *McKee's Lessee v. Pfout*, 3 Dall. (Pa.) 486, 1 L. Ed. 690; a modern statutory deed, *Miller v. Miller*, Meigs (Tenn.) 484, 33 Am. Dec. 157; nor a lease in fee, *Grout v. Townsend*, 2 Hill (N. Y.) 554.

⁹⁶ *Ante*. And see *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178.

⁹⁷ *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259; *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Burgess v. Muldoon*, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798. But see *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239.

⁹⁸ *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239; *Pinneo v. Goodspeed*, 104 Ill. 184; 1 Stim. Am. St. Law, §§ 3307, 6247, 6248, 6306; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Mattocks v. Stearns*, 9 Vt. 326; *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259. But not against prior assignees of the husband. *Gillespie v. Worford*, 2 Cold. (Tenn.) 632. But not divorce a mensa et thoro. *Smoot v. Lecatt*, 1 Stew. (Ala.) 590; *Rochon v. Lecatt*, 2 Stew. (Ala.) 429.

⁹⁹ *Hinton v. Whittaker*, 101 Ind. 344; *Thomas v. Hughes*, 25 S. W. 591, 15 Ky. Law Rep. 792; 1 Stim. Am. St. Law, § 3307; *Hahn v. Bealor*, 132 Pa. 242, 19 Atl. 74; *Hart v. McGrew* (Pa. 1887) 11 Atl. 617.

¹ *Jacobs v. Rice*, 33 Ill. 369; *Jenkins v. Dewey*, 49 Kan. 49, 30 Pac. 114; *Hopper v. Demarest*, 21 N. J. Law, 525; *Baker v. Oakwood*, 49 Hun, 416, 3 N. Y. Supp. 570; *Crow v. Kightlinger*, 25 Pa. 343.

² *Arrowsmith v. Arrowsmith*, 8 Hun (N. Y.) 606; *Whitney v. Londonderry*, 54 Vt. 41; *Kemple v. Belknap*, 15 Ind. App. 77, 43 N. E. 891; *Hampton v. Cook*, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194.

³ *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Reese v. Waters*, 4 Watts & S. (Pa.)

but this rule is changed by statute in many states.⁴ In any case, if the wife's title is defeated by a superior title, the husband is barred from any right of curtesy in the lands affected.⁵

SAME—STATUTORY CHANGES

52. In some states curtesy exists as at common law, but in others it has been abolished by statute, or made the same as the wife's dower interest in the husband's lands.

In some states there has been legislation which has made radical changes in the estate of curtesy. In some states curtesy has been expressly abolished by statute;⁶ in some, the estate is made the same as dower;⁷ and in others, a distributive share is given.⁸ Moreover, the changes effected by the married women's acts, already mentioned, have nearly abolished curtesy initiate by giving wives extensive powers to control and dispose of their realty.⁹

145; *Mussey v. Pierre*, 24 Me. 559; *Den ex dem. Paul v. Ward*, 15 N. C. 247; *Den ex dem. Copeland v. Sauls*, 46 N. C. 70.

⁴ 1 Stim. Am. St. Law, § 102; 1 Washb. Real Prop. (5th Ed.) p. 80, note; 1 Shars. & B. Lead. Cas. Real Prop. 276.

⁵ Co. Litt. 241a (Butl. & H. Notes) note 4.

⁶ For example, in New York, also in Kansas. See, in general, the statutes of the respective states. See, also, *Ex parte Watts*, 130 N. C. 237, 41 S. E. 289.

⁷ *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434 [overruling *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956]; *McClaren v. Stone*, 18 Ohio Cir. Ct. 854.

⁸ 1 Stim. Am. St. Law, art. 330. In several states the husband has no curtesy in lands which descend to the issue of the wife by a former husband. *Id.* § 3302 B. Further, as to the statutory changes, see 1 Shars. & B. Lead. Cas. Real Prop. 286; 1 Washb. Real Prop. (5th Ed.) 170; Williams, Real Prop. (17th Am. Ed.) note 375; *Smith v. Smith*, 21 D. C. 289.

⁹ *Hitz v. Bank*, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Evans v. Lobdale*, 6 Houst. (Del.) 212, 22 Am. St. Rep. 358; *Porch v. Fries*, 18 N. J. Eq. 204; *Thurber v. Townsend*, 22 N. Y. 517; *Walker v. Long*, 109 N. C. 510, 14 S. E. 299; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427.

DOWER

53. Dower is the provision which the law makes for a widow out of the lands or tenements of the husband for her support.

At common law, it is a life estate in one-third of the husband's estates of inheritance. The requisites of dower are:

- (a) Marriage.
- (b) Seisin of the husband during coverture.
- (c) Death of the husband before the wife.

Nature and Origin

By the English common law a widow is entitled, as a provision for her support, for the term of her natural life, to a third part of all the lands and tenements whereof the husband was seised, in fee simple or in fee tail, at any time during the coverture.¹⁰ This legal life estate is called dower.¹¹ It developed, probably, from a primitive Anglo-Saxon custom, wherein a husband made provision for his wife at the time of marriage.¹² In later days, when the right of alienation of lands became established, some limitation upon the husband's right to alienate must have become necessary in order that his widow might not be left destitute. At any rate, as early as the fourteenth century, we find a definite rule of law to the effect that a widow is entitled to a third of all the estates of inheritance of which her husband was

¹⁰ Litt. § 36; Co. Litt. 30a; 2-Blk. Comm. 129; Sisk v. Smith, 6 Ill. 503, 506. See Johnson v. Goss, 132 Mass. 274; May v. Specht, 1 Mich. 187; House v. Jackson, 50 N. Y. 161, 164; Gray v. McCune, 23 Pa. 447, 451; Combs v. Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

¹¹ Dower (Latin, dos, doarium, from dare, to give) is, originally, the same word as dowry, although the two words are quite distinct in meaning in modern times. See Johnson v. Goss, 132 Mass. 274; 2 Blk. Comm. 129. In the Roman law, dos (or dowry) is the marriage portion which the wife brings to the husband as a help in defraying the family expenses. Glanvil and Bracton use the word "dos," however, to mean a gift, or a provision for the wife, which it is the husband's duty to make. Glan. VI, c. 1; Brac. f. 92. Littleton and Coke, on the other hand, use "dos," or "dower" in the later common-law meaning, the widow's one-third interest in her deceased husband's estates of inheritance. Litt. § 36; Co. Litt. 31a.

¹² Among the Anglo-Saxons, the husband, in connection with the marriage, usually arranged for a settlement upon the wife, also for a suitable provision for her in case of his death. "This settlement was, perhaps, one of the germs of the later dower." Holds. Hist. Eng. Law, II, 77. "The dower of English common law is derived in an unbroken historical development through the dos ad ostium ecclesiæ of Bracton and Glanvil, the Norman douaire, and the Frankish tertia, from the purchase price and 'the morning gift' of the heathen Germans." Essays in Anglo-Saxon Law, 174.

seised.¹⁸ According to Littleton,¹⁴ there are five kinds of dower, namely: (1) Dower by the common law; (2) dower by the custom; (3) dower ad ostium ecclesiæ; (4) dower ex assensu patris; (5) and dower de la plus belle.¹⁵ Dower by the common law is, however, the only form of dower that has prevailed in the United States.¹⁶ The widow's right of dower is one of the bulwarks of English law. The right was recognized in Magna Charta.¹⁷ An early note in Britton says: "Dower was ordained by the common constitution of the people, and cannot be undone by any single person."¹⁸ Coke also tells us that, next to life and liberty, it is to be held sacred.¹⁹ Intended for the support of the widow, and for the nurture and education of her children, dower is, perhaps, of all others, the estate most favored in law and equity.²⁰

¹⁸ Litt. § 37. And see Holds. Hist. Eng. Law, III, 161. The same author says: "There can be little doubt but that in the twelfth and thirteenth centuries the widow's rights were very uncertain." III, 159.

A MARITAL RIGHT.—Dower is not an inheritance, but a wife's property right by virtue of marriage. CRENSHAW v. MOORE, 124 Tenn. 528, 137 S. W. 924, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913A, 165, Burdick Cas. Real Property.

¹⁴ Litt. §§ 38-40, 51; Co. Litt. 33b, 34a-37b; 2 Blk. Comm. 132, 133.

¹⁵ Dower by the custom was the dower allowed by the custom of the particular locality. Thus, dower by the custom of gavelkind extended to a half of the husband's lands, and by the custom of borough English it may extend to all his lands. Co. Litt. 33b; Litt. § 166; 2 Blk. Comm. 132. Dower ad ostium ecclesiæ (at the door of the church) was the provision which the husband made for his wife at the church door when they came there to be married. Sometimes the husband endowed the wife with all his lands, although a half, or even a lesser part thereof, might be her portion. Litt. § 39; 2 Blk. Comm. 132, 133. Dower ex assensu patris (with the consent of the father) was the dower assigned to the wife, likewise at the church door, at the time of the marriage, by a husband out of his father's lands, the father consenting to the same. In either of these two forms of dower, the widow could enter upon her lands thus assigned immediately upon the death of her husband. No further assignment was necessary, as at common law. Litt. § 40, 43; Co. Litt. 35b. Dower de la plus belle (of the fairest lands) was connected with the different forms of tenure. For example, where a man died seised of lands held in knight-service, and also of other lands held in socage tenure, leaving a widow and infant son, the widow could select "the fairest" of the socage tenements for her dower, leaving the lands held by knight-service to the lord as guardian in chivalry of the son. Litt. § 48; Co. Litt. 38a. Dower de la plus belle was abolished in 1660 (12 Car. II, c. 24), and dower ad ostium ecclesiæ, as also dower ex assensu patris, were abolished in 1833 (3 & 4 Wm. IV, c. 105).

¹⁶ Randall v. Krieger, 23 Wall. 137, 23 L. Ed. 124.

¹⁷ 4 Kent, Comm. 36.

¹⁸ II, 247, note in MS. N.

¹⁹ Co. Litt. 124b.

²⁰ 3 Brown's Ch. 204; Lawrence v. Miller, 2 N. Y. 245; 2 Blk. Comm. 130; Co. Litt. 30a; 4 Kent, Comm. 35; Sutherland v. Sutherland, 69 Ill. 481;

Requisites

The requisites of dower, at common law, are three: A valid marriage; seisin of the husband during coverture; and the death of the husband prior to the death of the wife. It is not necessary, as in the case of curtesy, that issue should be born.²¹

Valid Marriage

A valid marriage is an essential prerequisite to the right of dower.²² No dower can be claimed if the marriage was void.²³ If, however, it is merely voidable, and not avoided during coverture, the widow may have dower.²⁴ As a general rule, the law of the place of marriage governs its validity, and a marriage entered into in any state or country, according to its own laws, is recognized as valid in any other state or country whose laws or policy it does not contravene.²⁵

Upon marriage, the right to dower attaches,²⁶ although it remains inchoate until the death of the husband.²⁷

Seisin of Husband

To entitle a widow to dower, the husband must have been solely seised of an estate of inheritance in possession in the land at some time during coverture.²⁸ If the husband had, previous

Sisk v. Smith, 6 Ill. 503; *Seager v. McCabe*, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; *Wait v. Wait*, 4 Barb. (N. Y.) 192.

²¹ *Infra*.

²² *Higgins v. Breen*, 9 Mo. 497; *Pearson v. Howey*, 11 N. J. Law, 12; *Cropsey v. Ogden*, 11 N. Y. 228; *Jones v. Jones*, 28 Ark. 19; *Moore v. Mayor*, etc., 8 N. Y. 110, 59 Am. Dec. 473; *Besson v. Gribble*, 39 N. J. Eq. 111; *De France v. Johnson*, 26 Fed. 891.

²³ *Jenkins v. Jenkins*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; *Wiser v. Lockwood*, 42 Vt. 720; *McIlvain v. Scheibly*, 109 Ky. 455, 59 S. W. 498, 22 Ky. Law Rep. 942; *Bonham v. Badgley*, 7 Ill. 622; *Adkins v. Holmes*, 2 Ind. 197.

²⁴ *Bonham v. Badgley*, 7 Ill. 622; *Tomppert v. Tomppert*, 13 Bush (Ky.) 326, 26 Am. Rep. 197; *Price v. Price*, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359 [reversing 54 Hun, 349, 7 N. Y. Supp. 474]; *Higgins v. Breen*, 9 Mo. 497; *Jenkins v. Jenkins' Heirs*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *Smith v. Smith*, 5 Ohio St. 32; *Smart v. Whaley*, 6 Smedes & M. (Miss.) 308.

²⁵ *McIlvain v. Scheibly*, 109 Ky. 455, 59 S. W. 498, 22 Ky. Law Rep. 942; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255; *Smith v. Woodworth*, 44 Barb. (N. Y.) 198. And see *Van Voorhis v. Brintnoll*, 86 N. Y. 18, 40 Am. Rep. 505.

²⁶ *Buzick v. Buzick*, 44 Iowa, 259, 24 Am. Rep. 740.

²⁷ Inchoate dower is not an estate in land, but only an interest. *Blodget v. Brent*, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553; *Moore v. Mayor*, etc., 8 N. Y. 110, 59 Am. Dec. 473; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313; *McArthur v. Franklin*, 16 Ohio St. 193; *Gunnison v. Twitchel*, 38 N. H. 62. And that it is not even an interest, see *I Washb. Real Prop.* (5th Ed.) 312.

²⁸ *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Smallridge v.*

to his death, merely a reversion in fee, or a vested remainder, expectant upon an estate for life, his widow cannot be endowed.²⁹ A mere right of entry, moreover, will not give dower at common law,³⁰ though this has been changed by statute in some states.³¹ Contrary, however, to the common-law rule governing curtesy,³² the husband's seisin may be either seisin in fact or seisin in law;³³ but the husband must be seised one way or the other during coverture.³⁴ In a number of states, however, by statute, the widow takes dower only in lands of which the husband died seised.³⁵ Although the rule is that the husband's seisin need be only for an instant of time,³⁶ yet if his seisin is merely transitory, where, for example, he is a mere conduit for passing the seisin to another,³⁷ or if he acquires and parts with the seisin again by the

Hazlett, 112 Ky. 841, 66 S. W. 1043, 23 Ky. Law Rep. 2228; Hill v. Pike, 174 Mass. 582, 55 N. E. 324; Wheeler v. Smith, 50 Mich. 93, 15 N. W. 108; Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23; Phelps v. Phelps, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625; Durando v. Durando, 23 N. Y. 331; Pritts v. Ritchey, 29 Pa. 71; Sharp v. Pettit, 4 Dall. (Pa.) 212, 1 L. Ed. 805; Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814; Robison v. Codman, Fed. Cas. No. 11,970, 1 Sumn. 121; Price v. Hobbs, 47 Md. 359; Houston v. Smith, 88 N. C. 312; Butler v. Cheatham, 8 Bush (Ky.) 594; Poor v. Horton, 15 Barb. (N. Y.) 485; Crabb v. Pratt, 15 Ala. 843; Blood v. Blood, 23 Pick. (Mass.) 80; Miller v. Wilson, 15 Ohio, 108; Gray v. McCune, 23 Pa. 447; Amcotts v. Catherich, Cro. Jac. 615.

²⁹ Co. Litt. 32a; Durando v. Durando, 23 N. Y. 331. See, however, CUMMINGS v. CUMMINGS, 76 N. J. Eq. 568, 75 Atl. 210, Burdick Cas. Real Property.

³⁰ 1 Scrib. Dower (2d Ed.) 255. See Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23; Thompson v. Thompson, 46 N. C. 430.

³¹ For example, Ky. St. 1903, § 2134; Code Va. 1887, § 2263. Also in England, by Dower Act 1833, 3 & 4 Wm. IV, c. 105, s. 3.

³² See *supra*.

³³ Green v. Chelsea, 24 Pick. (Mass.) 71; Bartlett v. Tinsley, 175 Mo. 319, 75 S. W. 143; Durando v. Durando, 23 N. Y. 331; Nichols v. Park, 78 App. Div. 93, 79 N. Y. Supp. 547; Atwood v. Atwood, 22 Pick. (Mass.) 283; Apple v. Apple, 1 Head (Tenn.) 348; McIntyre v. Costello, 47 Hun (N. Y.) 289, 14 N. Y. St. Rep. 370.

³⁴ Co. Litt. 31a; 2 Blk. Comm. 131.

³⁵ Stewart v. Stewart, 5 Conn. 317; Flowers v. Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75; Blood v. Blood, 23 Pick. (Mass.) 80; Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 500.

³⁶ 2 Blk. Comm. 132; Co. Litt. 31a; Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243; Coates v. Cheever, 1 Cow. (N. Y.) 460; Broughton v. Randall, Cro. Eliz. 503; Stanwood v. Dunning, 14 Me. 290; McCauley v. Grimes, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; Sutherland v. Sutherland, 69 Ill. 481; Stanwood v. Dunning, 14 Me. 290; Smith v. McCarty, 119 Mass. 519; Douglass v. Dickson, 11 Rich. Law (S. C.) 417. Such seisin is good as against strangers, though it be tortious. Randolph v. Doss, 3 How. (Miss.) 205; Edmondson v. Welsh, 27 Ala. 578.

³⁷ Hugunin v. Cochrane, 51 Ill. 302, 2 Am. Rep. 303; Smith v. McCarty,

same transaction, then no right of dower arises. This is the case, for example, when the husband buys land and gives a mortgage back for the purchase money.³⁸ The wife, in such a case, is entitled to dower in the equity of redemption alone.³⁹ The husband must, at common law, be solely seised, and, consequently, his seisin with another in a joint tenancy, with the attendant incident of survivorship,⁴⁰ will not give the widow dower.⁴¹ This rule does not apply, however, to a tenancy in common,⁴² and under statutes abolishing the rule of survivorship in joint tenancies, turning such estates into tenancies in common, dower may attach in such cases.⁴³

Death of the Husband

The other requisites of dower being present, the right becomes consummate upon the death of the husband.⁴⁴ Until that occurs,

119 Mass. 519; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Stow v. Tift*, 15 Johns (N. Y.) 458, 8 Am. Dec. 266; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Fontaine v. Savings Inst.*, 57 Mo. 552.

³⁸ *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Nottingham v. Calvert*, 1 Ind. 527; *Moore v. Rollins*, 45 Me. 493; *Smith v. McCarty*, 119 Mass. 519; *King v. Stetson*, 11 Allen (Mass.) 407; *Mills v. Van Voorhies*, 20 N. Y. 412; *Cunningham v. Knight*, 1 Barb. (N. Y.) 399; *Reed v. Morrison*, 12 Serg. & R. (Pa.) 18; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646.

³⁹ *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *King v. Stetson*, 11 Allen (Mass.) 407; *Stow v. Tift*, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Wheatley's Heirs v. Calhoun*, 42 Leigh (Va.) 264, 37 Am. Dec. 654; *Ragsdale v. O'Day*, 61 Mo. App. 230; *Griggs v. Smith*, 12 N. J. Law, 22; *Ratliffe v. Mason*, 92 Ky. 190, 17 S. W. 438; *Moore v. Esty*, 5 N. H. 489. But see *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Rawlings v. Lowndes*, 34 Md. 639; *Butler v. Thornburg*, 131 Ind. 237, 30 N. E. 1073; *Jefferies v. Fort*, 43 S. C. 48, 20 S. E. 755. The mortgage may be to a third person. *Glenn v. Clark*, 53 Md. 580; *Johnson v. Plume*, 77 Ind. 166; *Roush v. Miller*, 39 W. Va. 638, 20 S. E. 663. And the mortgage may even be on another parcel of land which is acquired as a part of the same transaction. *Adams v. Hill*, 29 N. H. 202.

⁴⁰ See post, Joint Tenancies, chapter XII.

⁴¹ Litt. § 45; Co. Litt. 37b; *Mayburry v. Brien*, 15 Pet. (U. S.) 21, 10 L. Ed. 646; *Cockrill v. Armstrong*, 31 Ark. 580; *Babbitt v. Day*, 41 N. J. Eq. 392, 5 Atl. 275; *Reed v. Kennedy*, 2 Strob. (S. C.) 67.

⁴² Litt. § 45; *Harvill v. Holloway*, 24 Ark. 19; *Ross v. Wilson*, 58 Ga. 249; *French v. Lord*, 69 Me. 537; *Hill v. Gregory*, 56 Miss. 341; *Smith v. Smith*, 6 Lans. (N. Y.) 313; *Hudson v. Steere*, 9 R. I. 106; *Davis v. Bartholomew*, 3 Ind. 485.

⁴³ *Davis v. Bartholomew*, 3 Ind. 485; *Pyncheon v. Lester*, 6 Gray (Mass.) 314; *Steltz v. Schreck*, 60 Hun, 74, 14 N. Y. Supp. 106; *Nutt v. Mechanics' Bank*, Fed. Cas. No. 10,382, 4 Cranch, C. C. 102; 1 Stim. Am. St. Law, §§ 1371, 3211; 1 Scrib. Dower (2d Ed.) 338; *Weir v. Tate*, 39 N. C. 264; *Davis v. Logan*, 9 Dana (Ky.) 185.

⁴⁴ *Sisk v. Smith*, 6 Ill. 503; *McCraney v. McCraney*, 5 Iowa, 232, 68 Am.

the wife has only a contingent interest, which, however, becomes vested if the husband dies before the wife.⁴⁵ The husband's death may also be presumed by long absence, no knowledge of his existence being possessed.⁴⁶

SAME—ESTATES SUBJECT TO DOWER

54. At common law, a widow has dower, in general, in the husband's estates of inheritance, providing the estate is one which issue of the wife could inherit.

This right of dower extends to land, and to all incorporeal real hereditaments; that is, those which savor of the realty.

(a) In some states the land must be capable of beneficial enjoyment as a life estate.

(b) The estate must not be terminated by the happening of a contingency.

(c) At common law, the husband's estate must be a legal one. At the present time, however, there may be dower in equities of redemption, and in many states, by statute, in all equitable estates.

(d) The husband must be seised in possession, not in expectancy.

(e) The estate must be one not in joint tenancy.

Estate of Inheritance

The widow's dower attached, at common law, only to the husband's estates of inheritance; that is, to a fee simple or a fee tail.⁴⁷ In the case of a fee tail, there may be dower, even though the estate be at an end, by failure of heirs, at the husband's death.⁴⁸ There

Dec. 702; *Wait v. Wait*, 4 N. Y. 95; *Randall v. Krieger*, 23 Wall. (U. S.) 137, 23 L. Ed. 124.

⁴⁵ *Sutliff v. Forgey*, 1 Cow. (N. Y.) 89; *Truett v. Funderburk*, 93 Ga. 686, 20 S. E. 260. There must be natural death; civil death will not give dower. *Wooldridge v. Lucas*, 7 B. Mon. (Ky.) 49; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 129. In a few states divorce makes the right to dower consummate. 1 Stim. Am. St. Law, § 6251 A (1). So an assignment for creditors. *Wright v. Gelvin*, 85 Ind. 128. And in some states judicial sale of the husband's lands. 1 Stim. Am. St. Law, § 3204. And see *Kelley v. Canary*, 129 Ind. 460, 29 N. E. 11; *Whitney v. Marshall*, 138 Ind. 472, 37 N. E. 964; *Huffmaster v. Ogden*, 135 Ind. 661, 35 N. E. 512. Contra, *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318.

⁴⁶ *Sherod v. Elwell*, 104 Iowa, 253, 73 N. W. 493.

⁴⁷ Litt. § 36; 2 Blk. Comm. 181; 4 Kent, Comm. 41; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Kennedy v. Kennedy*, 29 N. J. Law, 185; *Johnson v. Jacob*, 11 Bush (Ky.) 646; *Chew v. Chew*, 1 Md. 163.

⁴⁸ *Smith's Appeal*, 23 Pa. 9; *Moody v. King*, 2 Bing. 447; *Northcut v. Whipp*, 12 B. Mon. (Ky.) 65.

is no dower, however, where an estate tail is by statute changed into a life estate and a remainder.⁴⁹ Nor is a widow dowable of her husband's life estates,⁵⁰ except where an estate *pur autre vie* is made an estate of inheritance.⁵¹ A widow, moreover, is not endowable with leasehold estates,⁵² no matter how long they may run,⁵³ unless some statute provides to the contrary.⁵⁴ The estates of inheritance to which the right of dower attaches must also be, at common law, such estates as issue born of the wife might inherit.⁵⁵ For example, if the husband was tenant in tail special, the heirs of his body by a certain wife being designated, such wife would be endowable, since her issue might have inherited. Should such wife die, however, and the husband again marry, the second wife would not be entitled to dower in such lands.⁵⁶ It is not necessary, however, that the wife should have issue, nor need there be a physical ability to bear offspring.⁵⁷ Dower thus differs from curtesy, for which birth of issue is necessary.⁵⁸

Land

The widow's right of dower extends to all her husband's land.⁵⁹ This includes standing timber,⁶⁰ also crops growing at the time

⁴⁹ *Trumbull v. Trumbull*, 149 Mass. 200, 21 N. E. 366, 4 L. R. A. 117. And see *Edwards v. Bibb*, 54 Ala. 475.

⁵⁰ *Trumbull v. Trumbull*, 149 Mass. 200, 21 N. E. 366, 4 L. R. A. 117; *Burris v. Page*, 12 Mo. 358; *Harriot v. Harriot*, 25 App. Div. 245, 49 N. Y. Supp. 447; *Gillis v. Brown*, 5 Cow. (N. Y.) 388 (*pur autre vie*); *Knickerbacker v. Seymour*, 46 Barb. (N. Y.) 198; *In re Watson's Estate*, 139 Pa. 461, 22 Atl. 638; *Thompson v. Vance*, 1 Mete. (Ky.) 669; *Edwards v. Bibb*, 54 Ala. 475; *Alexander v. Cunningham*, 27 N. C. 430; *Kenyon v. Kenyon*, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787.

⁵¹ See *ante*. And see *Stull v. Graham*, 60 Ark. 461, 31 S. W. 46.

⁵² *Gaunt v. Wainman*, 3 Bing. N. C. 69; *Spangler v. Stanler*, 1 Md. Ch. 36; *Goodwin v. Goodwin*, 33 Conn. 314; *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725.

⁵³ *Oliver v. Jones*, 6 Ohio S. & C. Pl. Dec. 194, 3 Ohio N. P. 129; *Spangler v. Stanler*, 1 Md. Ch. 36; *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725.

⁵⁴ *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Rankin v. Oliphant*, 9 Mo. 239.

⁵⁵ *Spangler v. Stanler*, 1 Md. Ch. 36; *Butler v. Cheatham*, 8 Bush (Ky.) 594.

⁵⁶ *Litt.* § 53; *Paine's Case*, 8 Co. Rep. 34a.

⁵⁷ *Co. Litt.* 40a; 1 *Scrib. Dower* (2d Ed.) 227. At common law, however, the widow cannot receive dower unless she is at least nine years old at the husband's death; such age being regarded as her minimum age of possibility of issue. A woman is never presumed, however, by the common law, to be too old to bear a child. *Litt.* § 36; *Co. Litt.* 40a; 2 *Blk. Comm.* 131.

⁵⁸ *Ante*.

⁵⁹ 2 *Blk. Comm.* 132.

⁶⁰ *Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. 740.

dower is assigned,⁶¹ and, likewise, mines that are open and in operation during coverture.⁶² Corporate stock, however, in railway companies, or other corporations dealing largely with land properties, is generally regarded as personalty, and not subject to dower,⁶³ since the dower right attaches only to real property.⁶⁴

Incorporeal Hereditaments

A widow, says Blackstone,⁶⁵ may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal. Chitty, however, in his note upon this passage, says: "Our author, we may be sure, did not mean to intimate that a widow was entitled to dower out of *all* her husband's incorporeal hereditaments, of what nature soever, but only out of such incorporeal hereditaments as savor of the realty."⁶⁶ Thus, dower extends to rents,⁶⁷ franchises,⁶⁸ and common appendant or in gross,⁶⁹ but not to mere personal hereditaments.⁷⁰ For example, dower has been granted in a fishing right,⁷¹ in a right of ferry,⁷² and of wharfage.⁷³ If the husband is owner of a rent in fee or in tail, the widow can

⁶¹ *Ralston v. Ralston*, 3 Greene (Iowa) 533; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Clark v. Battorf*, 1 Thomp. & C. (N. Y.) 58; *Davis v. Brown*, 2 Ohio Dec. (Reprint) 644, 4 West, L. Month. 272.

⁶² *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 361, 367; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308.

⁶³ *McDougald v. Hepburn*, 5 Fla. 568; *Johns v. Johns*, 1 Ohio St. 350. And see *Copeland v. Copeland*, 7 Bush (Ky.) 349; *Price v. Price*, 6 Dana (Ky.) 107.

⁶⁴ *Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. 740; *Brackett v. Leighton*, 7 Me. 383; *Buckeridge v. Ingram*, 2 Ves. Jr. 652. The term "widow's thirds," designating her share of the husband's personal estate, is sometimes confused with dower, and is at other times included in a popular, or even a statutory, use of the word "dower." At common law, however, there is no such thing as dower in personal property.

⁶⁵ 2 Comm. 132.

⁶⁶ Chitty, note to Blk. Comm. II, 132, and citing *Buckeridge v. Ingram*, 2 Ves. Jr. 664; 30 Eng. Rep. 834.

⁶⁷ *Co. Litt.* 144b; *Chaplin v. Chaplin*, 3 P. Wms. 229, 24 Eng. Reprint, 1040; *Herbert v. Wren*, 7 Cranch (U. S.) 370, 3 L. Ed. 374. See also, *Williams v. Cox*, 3 Edw. Ch. (N. Y.) 178.

⁶⁸ *Co. Litt.* 31b, 32a.

⁶⁹ *Co. Litt.* 32a; 2 Blk. Comm. 132.

⁷⁰ *Co. Litt.* 32; *Lyster v. Mahoney*, 1 Dr. & War. 236; *Aubin v. Daly*, 4 B. & Ald. 59.

⁷¹ *Bracton*, 98, 208; *Co. Litt.* 32a; *Fletcher*, lib. 5, c. 23. And see *Wyman v. Oliver*, 75 Me. 421.

⁷² *Stevens' Heirs v. Stevens*, 3 Dana (Ky.) 371.

⁷³ *Bedlow v. Stilwell*, 158 N. Y. 292, 53 N. E. 26; *Gale v. Kinzie*, 80 Ill. 132; *Kingman v. Sparrow*, 12 Barb. (N. Y.) 201.

have her dower in it;⁷⁴ but not if it is merely for life.⁷⁵ On the other hand, if the husband grants to another an interest in land, and reserves a rent, she will take her share of the rent as an incident of the dower which she takes in the land itself.⁷⁶

Beneficial Enjoyment

Although it is generally said that a widow is dowable of all the real property of which her husband was seised during coverture, yet there are cases which hold that unless the land in question would be of benefit to the widow, but on the contrary would be a clog and expense to her, by reason of taxes, no dower therein can be assigned to her.⁷⁷ For this reason, in some states, it has been held that dower does not attach to wild lands, since to clear them would be waste,⁷⁸ and not to clear them for cultivation would leave them useless for her enjoyment.⁷⁹ The general rule seems to be, however, that even to wild and uncultivated lands her right of dower attaches.⁸⁰ At common law, however, a widow is not dowable of mines and quarries, unless they have been opened and thus made workable for her benefit.⁸¹

⁷⁴ 2 Blk. Comm. 132; 1 Scrib. Dower (2d Ed.) 373.

⁷⁵ 1 Scrib. Dower (2d Ed.) 374; Co. Litt. 32a. See, also, *Chaplin v. Chaplin*, 3 P. Wms. 229.

⁷⁶ Co. Litt. 32a; *Stoughton v. Leigh*, 1 Taunt. 402; *Bland, Ch.*, in *Chase's Case*, 1 Bland (Md.) 227; 17 Am. Dec. 277; *Weir v. Tate*, 39 N. C. 264; *Herbert v. Wren*, 7 Cranch, 370, 3 L. Ed. 374.

⁷⁷ *Conner v. Shepherd*, 15 Mass. 164.

⁷⁸ *Conner v. Shepherd*, 15 Mass. 164; *Webb v. Townsend*, 1 Pick. (Mass.) 21, 11 Am. Dec. 132; *White v. Cutler*, 17 Pick. (Mass.) 248; *Johnson v. Perley*, 2 N. H. 56, 9 Am. Dec. 35; *Kuhn v. Kaler*, 14 Me. 409. But see *Shattuck v. Gragg*, 23 Pick. (Mass.) 88; *White v. Willis*, 7 Pick. (Mass.) 143; *Mosher v. Mosher*, 15 Me. 371; *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367. This is not true where clearing wild lands is not waste. *Allen v. McCoy*, 8 Ohio, 418; *Schnebly v. Schnebly*, 26 Ill. 116; *Brown v. Richards*, 17 N. J. Eq. 32.

⁷⁹ *Ford v. Erskine*, 50 Me. 227; *Shattuck v. Gragg*, 23 Pick. (Mass.) 88; *White v. Willis*, 7 Pick. (Mass.) 143; *Fuller v. Wason*, 7 N. H. 341.

⁸⁰ *Schnebly v. Schnebly*, 26 Ill. 116; *In re Campbell*, 2 Dougl. (Mich.) 141; *Brown v. Richards*, 17 N. J. Eq. 32; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480.

⁸¹ *Rex v. Dunsford*, 2 A. & E. 568, 593, 1 H. & N. 93, 4 L. J. M. C. 59, 4 N. & M. 349; *Stoughton v. Leigh*, 1 Taunt. 402, 11 Rev. Rep. 810; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Billings v. Taylor*, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; *Moore v. Rollins*, 45 Me. 493; *Hendrix v. McBeth*, 61 Ind. 473, 23 Am. Rep. 680. Cf. *Black v. Mining Co.*, 49 Fed. 549. But see, as to mining leases, *Seager v. McCabe*, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397. There is no dower in a mining claim. *Black v. Mining Co.*, 3 C. C. A. 312, 52 Fed. 859.

Determinable Estates

If the husband is seised of an inheritable estate, the fact that it may be determined, either by limitation or by a condition subsequent,⁸² does not in itself defeat the wife's right of dower; yet if the estate is terminated, by the happening of the event upon which it depends, her dower is defeated. In other words, if the event occurs before the husband's death, dower never becomes consummate; if after his death, the enjoyment of the land assigned as dower is cut off.⁸³ It is held, however, that in case of an executory devise, defeasible by the death of the devisee without issue, the widow of the devisee takes dower, even if there be no issue.⁸⁴

Equitable Estates

At common law, the husband must be seised of a legal estate in order to give the wife dower.⁸⁵ Moreover, the court of chancery, although it allowed a husband curtesy in a wife's equitable estate, did not grant a wife the privilege of dower out of the equitable estates of the husband.⁸⁶ This rule, however, has been changed in many states by statute.⁸⁷ In other states, the common-law rule holds, and the widow has no dower in estates held in active trust by another for the benefit of the husband.⁸⁸ Where the hus-

⁸² As to determinable estates, see, post, chapter XIII.

⁸³ 1 Scribner, Dower, 289; 4 Kent, Comm. 49; Beardslee v. Beardslee, 5 Barb. (N. Y.) 324; Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 408, 39 Atl. 750.

⁸⁴ Northcut v. Whipp, 12 B. Mon. (Ky.) 65; Moody v. King, 2 Bing. 447; Weller v. Weller, 28 Barb. (N. Y.) 588; Clark v. Clark, 84 Hun, 362, 32 N. Y. Supp. 325; Evans v. Evans, 9 Pa. 190; Pollard v. Slaughter, 92 N. C. 72, 53 Am. Rep. 402; Milledge v. Lamar, 4 Desaus. (S. C.) 617; Jones v. Hughes, 27 Grat. (Va.) 560; Medley v. Medley, 27 Grat. (Va.) 568. Contra, Edwards v. Bibb, 54 Ala. 475.

⁸⁵ Rice v. Rice, 108 Ill. 199; Beebe v. Lyle, 73 Mich. 114, 41 N. W. 944; 1 Scribner, Dower, 386-398. See also, Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Chaplin v. Chaplin, 3 P. Wms. 229; Blakeney v. Ferguson, 20 Ark. 547; Gully v. Ray, 18 B. Mon. (Ky.) 107; Stelle v. Carroll, 12 Pet. 201, 9 L. Ed. 1056; Williams v. Barrett, 2 Cranch, C. C. 673, Fed. Cas. No. 17,714; Hamlin v. Hamlin, 19 Me. 141; Mayburry v. Brien, 15 Pet. 21, 10 L. Ed. 646; Crawl v. Harrington, 33 Neb. 107, 49 N. W. 1118.

⁸⁶ 1 Roper, Husband and Wife, 354; Williams, Real Prop. (17th Ed.) 368.

⁸⁷ Atkin v. Merrill, 39 Ill. 62; McMahan v. Kimball, 3 Blackf. (Ind.) 1; Everitt v. Everitt, 71 Iowa, 221, 32 N. W. 273; Yeo v. Mercereau, 18 N. J. Law, 387; Hawley v. James, 5 Paige (N. Y.) 318; McClure v. Fairfield, 153 Pa. 411, 26 Atl. 446; Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Davis v. Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90; Clark v. Clark, 147 N. Y. 639, 42 N. E. 275; 1 Stim. Am. St. Law, § 3212; 1 Shars. & B. Lead. Cas. Real Prop. 312; 1 Scrib. Dower (2d Ed.) 401; also in England, by Dower Act, 3 & 4 Wm. IV, c. 105.

⁸⁸ Stewart v. Stewart, 5 Conn. 317; Hill v. Hill, 81 Ga. 516, 8 S. E. 879;

band, moreover, holds the mere legal estate as a trustee for another, the wife is not entitled to dower.⁸⁹ The effect of the statute of uses,⁹⁰ namely, the turning of uses into legal estates, renders such estates, however, liable to dower, when vested in the husband.⁹¹

Equities of Redemption

In connection with the rule allowing no dower in equitable estates, the widow received, at common law, no dower in her deceased husband's equities of redemption.⁹² At the present time, however, either by force of statute, or, in some states, even without an express statute, the general rule is that she is entitled to dower in such interests.⁹³ The widow of the mortgagor, who has released her dower, has, consequently, the right to redeem a mortgage given by her husband,⁹⁴ by paying the amount of the mortgage debt.⁹⁵ The widow of a mortgagee, however, has no dower

Lenox v. Notrebe, 15 Fed. Cas. 319, No. 8,246c, *Hempst.* 251; *Shoemaker v. Walker*, 2 Serg. & R. (Pa.) 554.

⁸⁹ *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245; *Rice v. Rice*, 108 Ill. 199; *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104; *Kager v. Brenne-man*, 47 App. Div. 63, 62 N. Y. Supp. 339; *Robison v. Codman*, 1 Sumn. 121, Fed. Cas. 11,970; *Derush v. Brown*, 8 Ohio, 412; *Bartlett v. Gouge*, 5 B. Mon. (Ky.) 152; *Cowman v. Hall*, 3 Gill & J. (Md.) 398; *Cooper v. Whitney*, 3 Hill (N. Y.) 95.

⁹⁰ See post, chapter XIV.

⁹¹ *Williams*, *Real Prop.* (17th Ed.) 370; *Davenport v. Farrar*, 2 Ill. 314; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523. And see *Tink v. Walker*, 148 Ill. 234, 35 N. E. 765. *Contra*, *Phelps v. Phelps*, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625.

⁹² 1 *Scribner*, *Dower*, 463; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Powell v. Monson*, etc., *Mfg. Co.*, Fed. Cas. No. 11,357, 3 *Mason*, 459.

⁹³ *Cox v. Garst*, 105 Ill. 342; *McMahan v. Kimball*, 3 *Blackf.* (Ind.) 1; *Newton v. Cook*, 4 *Gray* (Mass.) 46; *Snyder v. Snyder*, 6 *Mich.* 470; *Manning v. Laboree*, 33 *Me.* 343; *Walker v. Griswold*, 6 *Pick.* (Mass.) 416; *Hinchman v. Stiles*, 9 *N. J. Eq.* 361; *Smith v. Eustis*, 7 *Me.* 41; *Eaton v. Simonds*, 14 *Pick.* (Mass.) 98; *Burrall v. Bender*, 61 *Mich.* 608, 28 *N. W.* 731; *Whitehead v. Middleton*, 2 *How.* (Miss.) 692; *Heth v. Cocke*, 1 *Rand.* (Va.) 344; *Woods v. Wallace*, 30 *N. H.* 384; *Roan v. Holmes*, 32 *Fla.* 295, 13 *South.* 339, 21 *L. R. A.* 180; *Matthews v. Duryee*, 45 *Barb.* (6 *N. Y.*) 69; *McGowan v. Smith*, 44 *Barb.* (N. Y.) 232; *Dubs v. Dubs*, 31 *Pa.* 149; *Van Ness v. Hyatt*, 13 *Pet.* (U. S.) 294, 10 *L. Ed.* 168. Compare *Beebe v. Lyle*, 73 *Mich.* 114, 40 *N. W.* 944.

⁹⁴ *Barr v. Vanalstine*, 120 *Ind.* 590, 22 *N. E.* 965; *Hays v. Cretin*, 102 *Md.* 695, 62 *Atl.* 1028, 4 *L. R. A.* (N. S.) 1039; *Phelan v. Fitzpatrick*, 84 *Wis.* 240, 54 *N. W.* 614. And see *Davis v. Wetherell*, 13 *Allen* (Mass.) 60, 90 *Am. Dec.* 177. The right extends to mortgages by the husband before marriage, *Wheeler v. Morris*, 2 *Bosw.* (N. Y.) 524; *Coles v. Coles*, 15 *Johns.* (N. Y.) 319; and to purchase-money mortgages, *Mills v. Van Voorhies*, 20 *N. Y.* 412.

⁹⁵ That is, where the holder of the equity of redemption does not redeem, or where the widow redeems alone. See *McCabe v. Bellows*, 7 *Gray* (Mass.)

in the mortgaged premises unless the estate has become absolute by foreclosure.⁹⁶ Except as changed by statute,⁹⁷ the widow of one who, during coverture, has given a mortgage in which she has not joined has dower out of the whole estate;⁹⁸ but when she has joined in the mortgage,⁹⁹ or if it was executed by the husband before marriage,¹ she takes her dower subject to the mortgage.² If the mortgage is foreclosed, either before or after the husband's death,

148, 66 Am. Dec. 467; *Wheeler v. Morris*, 2 Bosw. (N. Y.) 524. Where, however, the heir, or the holder of the equity of redemption, redeems, the widow may, as a party to the suit, redeem her dower interest by contributing her share of the mortgage debt. *Cox v. Garst*, 105 Ill. 342; *Neffts v. Koss*, 29 Ill. App. 301; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Bell v. Mayor, etc.*, 10 Paige (N. Y.) 49; *Niles v. Nye*, 13 Metc. (Mass.) 135; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Woods v. Wallace*, 30 N. H. 384; *Richardson v. Skolfield*, 45 Me. 386. But see *Shope v. Schaffner*, 140 Ill. 470, 30 N. E. 872. For the method of computing her share, see *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Gibson v. Crehore*, 5 Pick. (Mass.) 146. When the mortgage is paid by the husband or by any other person in his place, the mortgage is extinguished, so that the widow is not required to contribute. *Bolton v. Ballard*, 13 Mass. 227; *Hastings v. Stevens*, 29 N. H. 564; *Young v. Tarbell*, 37 Me. 509; *Mathewson v. Smith*, 1 R. I. 22; *Runyan v. Stewart*, 12 Barb. (N. Y.) 537; *Harrison v. Eldridge*, 7 N. J. Law, 392.

⁹⁶ *Foster v. Dwinel*, 49 Me. 44; *Crittenden v. Johnson*, 11 Ark. 94; *Reed v. Shepley*, 6 Vt. 602; *Waller v. Waller's Adm'r*, 33 Grat. (Va.) 83; *Weir v. Tate*, 39 N. C. 264; *Cooper v. Whitney*, 3 Hill (N. Y.) 95.

⁹⁷ 1 Stim. Am. St. Law, § 3213.

⁹⁸ *Wedge v. Moore*, 6 Cush. (Mass.) 8.

⁹⁹ *Cox v. Garst*, 105 Ill. 342; *Smith v. Eustis*, 7 Greenl. (Me.) 41; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Glenn v. Clark*, 53 Md. 580; *State Bank of Ohio v. Hinton*, 21 Ohio St. 509; *Schweitzer v. Wagner*, 94 Ky. 458, 22 S. W. 883.

¹ *Carll v. Butman*, 7 Me. 102; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Heth v. Cocke*, 1 Rand. (Va.) 344. But see *Shope v. Schaffner*, 140 Ill. 470, 30 N. E. 872.

² *Mantz v. Buchanan*, 1 Md. Ch. 202; *Holmes v. Book*, 1 Ohio N. P. 58. But not when a grantee has assumed the mortgage, she not joining in the conveyance to him. *McCabe v. Swap*, 14 Allen (Mass.) 188. Dower is also subject to a vendor's lien for the purchase price. *Williams v. Woods*, 1 Humph. (Tenn.) 408; *Crane v. Palmer*, 8 Blackf. (Ind.) 120; *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Ellicott v. Welch*, 2 Bland (Md.) 242; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Johnson v. Cantrell*, 92 Ky. 59, 17 S. W. 206. Or a judgment recovered against the husband before marriage, where a judgment is a lien. *Robbins v. Robbins*, 8 Blackf. (Ind.) 174; *Trustees of Poor of Queen Anne County v. Pratt*, 10 Md. 5; *Brown v. Williams*, 31 Me. 403; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773. But see *Ingram v. Morris*, 4 Har. (Del.) 111. Or a charge created by a testator on lands devised to the husband. *Shiell v. Sloan*, 22 S. C. 151. But dower is superior to a mechanic's lien for buildings on the husband's land. *Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615; *Van Vronker v. Eastman*, 7 Metc. (Mass.) 157; *Shaeffer v. Weed*, 3 Gilman (Ill.) 511; *Pifer v. Ward*, 8 Blackf.

she has dower in the surplus proceeds of the sale.³ The widow has a right, moreover, to have the mortgage paid off out of the husband's personal estate.⁴

Estates in Expectancy

The husband must be seised in possession and not in expectancy.⁵ In other words, there can be no dower assigned to the widow out of an estate that is still in reversion or remainder after a freehold estate when the husband dies.⁶ This rule may, however, be changed by statute,⁷ and even at common law, if the preceding estate determines during coverture, the husband thus obtaining the

(Ind.) 252. *Contra*, *Nazareth Literary & Benevolent Institute v. Lowe*, 1 B. Mon. (Ky.) 257.

³ *Unger v. Leiter*, 32 Ohio St. 210; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Thompson v. Cochran*, 7 Humph. (Tenn.) 72, 46 Am. Dec. 68; *Mathews v. Duryee*, 45 Barb. (N. Y.) 69; *Culver v. Harper*, 27 Ohio St. 464; *Vreeland v. Jacobus*, 19 N. J. Eq. 231; *Jennison v. Hapgood*, 14 Pick. (Mass.) 345. When foreclosure occurs before the death of the husband, the wife's right in the surplus will be secured to her by its investment. *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *De Wolf v. Murphy*, 11 R. I. 630; *Vreeland v. Jacobus*, 19 N. J. Eq. 231. *Contra*, *Newhall v. Bank*, 101 Mass. 428, 3 Am. Rep. 387. In certain states this right is given by statute. 1 Stim. Am. St. Law, § 3216.

⁴ *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; *Jennison v. Hapgood*, 14 Pick. (Mass.) 345; *Henagan v. Harllee*, 10 Rich. Eq. (S. C.) 285; *Caroon v. Cooper*, 63 N. C. 386; *Mantz v. Buchanan*, 1 Md. Ch. 202. *Contra*, *Peckham v. Hadwen*, 8 R. I. 160. The right does not exist against creditors, *Creedy v. Pearce*, 69 N. C. 67; *Rossiter v. Cossit*, 15 N. H. 38; nor when the mortgage was assumed by the husband, *Campbell v. Campbell*, 30 N. J. Eq. 415. The right is given by statute in Vermont. R. L. 1880, § 2218; 1 Stim. Am. St. Law, § 3214. Where the husband dies seised of the equity of redemption, the widow may require redemption out of the assets. *King v. King*, 100 Mass. 224; *Mathewson v. Smith*, 1 R. I. 22; *Henagan v. Harllee*, 10 Rich. Eq. (S. C.) 285.

⁵ *Supra*.

⁶ *Co. Litt.* 32a; *Hill v. Pike*, 174 Mass. 582, 55 N. E. 324; *Ván Arb v. Thomas*, 163 Mo. 33, 63 S. W. 94; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814; *Robison v. Codman*, 20 Fed. Cas. 1056, No. 11,970, 1 Sumn. 121; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Durando v. Durando*, 23 N. Y. 331; *Apple v. Apple*, 1 Head (Tenn.) 348; *Cocke's Ex'r v. Philips*, 12 Leigh (Va.) 248; *Gardner v. Greene*, 5 R. I. 104; *Brooks v. Everett*, 13 Allen (Mass.) 457; *Otis v. Parshley*, 10 N. H. 403; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; *Young v. Morehead*, 94 Ky. 608, 23 S. W. 511; *Boothby v. Vernon*, 9 Mod. 147. But, if the husband purchases the prior estate, the wife will have dower. *House v. Jackson*, 50 N. Y. 161.

⁷ *Cote's Appeal*, 79 Pa. 235; *Starr's Estate*, 16 Phila. (Pa.) 206. Compare *Shoemaker v. Walker*, 2 Serg. & R. (Pa.) 554. And see 1 Stim. Am. St. Law, § 3211, as to Ohio.

entire estate, the widow's dower attaches.⁸ Where the preceding estate is merely for a term of years, the husband's reversion or remainder is regarded as an estate in possession, and dower attaches.⁹

Connected with the doctrine that dower is excluded from estates in expectancy is the rule, or maxim, that dower cannot be assigned out of dower.¹⁰ For example, lands may descend or be devised to a son, subject to a right of dower in his mother.¹¹ If the son dies before the mother, his wife cannot have dower out of the lands assigned as his mother's dower.¹² If, however, the junior widow's dower is first assigned, her right is only suspended by a subsequent assignment to the mother; and if the mother dies first, the son's widow may re-enter upon the part taken from her.¹³

Joint Tenancies

It has already been stated, in connection with the requisite of the husband's seisin,¹⁴ that in a joint tenancy the possibility of survivorship in the cotenants prevents dower from attaching. This, however, does not apply when the husband has survived his cotenants, or there has been partition of the estate.¹⁵ Dower is also an incident of estates in coparcenary¹⁶ and likewise of estates in common.¹⁷ If partition is made of such an estate, the right of dower no longer exists in the whole land, but merely in the portion set

⁸ *Strawn v. Strawn*, 50 Ill. 33; *House v. Jackson*, 50 N. Y. 161. And see *Powers v. Jackson*, 57 N. Y. 654; 1 *Scrib. Dower* (2d Ed.) 321.

⁹ *Boyd v. Hunter*, 44 Ala. 705; *Sykes v. Sykes*, 49 Miss. 190; *Sheaf v. Cave*, 24 Beav. 259; *Stoughton v. Leigh*, 1 Taunt. 402.

¹⁰ *Stahl v. Stahl*, 114 Ill. 375, 2 N. E. 160; *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Null v. Howell*, 111 Mo. 273, 20 S. W. 24; *Elwood v. Klock*, 13 Barb. (N. Y.) 50; *Safford v. Safford*, 7 Paige (N. Y.) 259, 32 Am. Dec. 633.

¹¹ *Robinson v. Miller*, 2 B. Mon. (Ky.) 284. If he take them by purchase, the rule is different. *Co. Litt.* 31a; *In re Cregier*, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416. But cf. *Durando v. Durando*, 23 N. Y. 331.

¹² *Reynolds v. Reynolds*, 5 Paige (N. Y.) 161; *Safford v. Safford*, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; *Bear v. Snyder*, 11 Wend. (N. Y.) 592; *Manning v. Laboree*, 33 Me. 343; *Reitzel v. Eckard*, 65 N. C. 673; *Carter v. McDaniel*, 94 Ky. 564, 23 S. W. 507; *Peckham v. Hadwen*, 8 R. I. 160. But possession under a right of quarantine does not prevent the heir's widow taking dower. *Null v. Howell*, 111 Mo. 273, 20 S. W. 24.

¹³ *Steele v. La Frambois*, 68 Ill. 456; *In re Cregier*, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416.

¹⁴ *Supra*.

¹⁵ 1 *Scrib. Dower* (2d Ed.) 337. But a sale by one tenant of his interest is not such partition as gives his wife dower. *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Cockrill v. Armstrong*, 31 Ark. 580; *Babbitt v. Day*, 41 N. J. Eq. 392, 5 Atl. 275.

¹⁶ *Jourdan v. Haran*, 56 N. Y. Super. Ct. R. 185, 3 N. Y. Supp. 541; *Baker v. Leibert*, 125 Pa. 106, 17 Atl. 236; 1 *Scrib. Dower* (2d Ed.) 341.

¹⁷ *Supra*.

apart to the husband.¹⁸ In estates of entirety,¹⁹ the widow has no dower, since she becomes vested with the whole estate by the right of survivorship.²⁰ In the case of partnership lands, the English rule is that no dower right attaches, since it is treated as personal property.²¹ In this country, however, the prevailing rule is that the widow of a deceased partner has dower in his share of the partnership realty which is left after the firm debts are paid.²²

SAME—ASSIGNMENT OF DOWER

55. At common law the widow cannot enter upon and occupy any part of her husband's lands until her dower is assigned to her.

Assignment is the setting out to the widow of her share in the husband's lands. It is:

- (a) Of common right, which is an assignment of a life estate in one-third by metes and bounds.
- (b) Against common right, which is an assignment in some other manner by agreement of the parties.

¹⁸ *Potter v. Wheeler*, 13 Mass. 504; *Wilkinson v. Parish*, 3 Paige (N. Y.) 653; *Totten v. Stuyvesant*, 3 Edw. Ch. (N. Y.) 500; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Mosher v. Mosher*, 32 Me. 412; *Lloyd v. Conover*, 25 N. J. Law, 47; *Holley v. Glover*, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883. So a sale in partition divests the wife's whole interest. *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355. But see *Coburn v. Herring-ton*, 114 Ill. 104, 29 N. E. 478.

¹⁹ See post, chapter XII.

²⁰ *Roulston v. Hall*, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97; *McCreary v. McCorkle* (Tenn. Ch. App. 1899) 54 S. W. 53.

²¹ *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637; *Essex v. Essex*, 20 Beav. 442; *Phillips v. Phillips*, 1 My. & K. 649.

²² *Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. 347; *Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; *Simpson v. Leech*, 86 Ill. 286; *Hale v. Plummer*, 6 Ind. 121; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Mowry v. Bradley*, 11 R. I. 370; *Free v. Beatley*, 95 Mich. 426, 54 N. W. 910; *Dawson v. Parsons*, 10 Misc. Rep. 428, 31 N. Y. Supp. 78; *Riddell v. Riddell*, 85 Hun, 482, 33 N. Y. Supp. 99; *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325; *Deering & Co. v. Kerfoot's Ex'r*, 89 Va. 491, 16 S. E. 671; *Young v. Thrasher*, 115 Mo. 222, 21 S. W. 1104; *Woodward-Holmes Co. v. Nudd*, 53 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. Rep. 503; *Holton v. Guinn*, 65 Fed. 450. But see *Ratcliffe v. Mason*, 92 Ky. 190, 17 S. W. 438; *Shipp v. Snyder*, 121 Mo. 155, 25 S. W. 900; *Hughes v. Allen*, 66 Vt. 95, 28 Atl. 882; *Shearer v. Shearer*, 98 Mass. 107; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228.

QUARANTINE—Quarantine is the right, at common law, of a widow to remain in her husband's principal mansion house for forty days after his death, pending the assignment of her dower.

The duration of quarantine has been extended by statutes in some states.

Necessity and Duty of Assignment—Quarantine

Immediately upon the death of the husband, the widow is entitled to her dower.²³ It must, however, be assigned, or allotted, to her. Since before such assignment it is not an estate,²⁴ she has no right of entry,²⁵ and she cannot file a suit for partition.²⁶ Her right is practically a mere chose in action.²⁷ At law, this right is not liable for the widow's debts,²⁸ nor can she transfer her right,²⁹ although a transfer may be enforced in equity.³⁰ Her dower, should be assigned, at common law, within forty days after her husband's decease. During this period the widow has the right

²³ *Austell v. Swann*, 74 Ga. 278; *Potter v. Worley*, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; *Tenbrook v. Jessup*, 60 N. J. Eq. 234, 46 Atl. 516.

²⁴ *Park, Dower*, 334; *Union Brewing Co. v. Meier*, 163 Ill. 424, 45 N. E. 264; *Sears v. Sears*, 121 Mass. 267; *Rayner v. Lee*, 20 Mich. 384; *Aikman v. Harsell*, 98 N. Y. 186; *Jones v. Hollopeter*, 10 Serg. & R. (Pa.) 326; *Blodget v. Brent*, 3 Cranch, C. C. 394, Fed. Cas. No. 1,553; *Reynolds v. McCurry*, 100 Ill. 356; *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

²⁵ *Trask v. Baxter*, 48 Ill. 406; *Hildreth v. Thompson*, 16 Mass. 191; *Collins v. Warren*, 29 Mo. 236; *Jackson v. O'Donaghy*, 7 Johns. (N. Y.) 247.

²⁶ *Reynolds v. McCurry*, 100 Ill. 358; *Coles v. Coles*, 15 Johns. (N. Y.) 319; *Brown v. Adams*, 2 Whart. (Pa.) 188. Cf. *Jones v. Hollopeter*, 10 Serg. & R. (Pa.) 326.

²⁷ *Newman v. Willetts*, 48 Ill. 534; *McMahon v. Grey*, 150 Mass. 289, 22 N. E. 923, 5 L. R. A. 748, 15 Am. St. Rep. 202; *Aikman v. Harsell*, 98 N. Y. 186; *Rayner v. Lee*, 20 Mich. 384; *Summers v. Babb*, 13 Ill. 483; *Weaver v. Sturtevant*, 12 R. I. 537; *Downs v. Allen*, 10 Lea (Tenn.) 652.

²⁸ *Gooch v. Atkins*, 14 Mass. 378; *Petty v. Malier*, 15 B. Mon. (Ky.) 591; *Waller v. Mardus*, 29 Mo. 25; *Summers v. Babb*, 13 Ill. 483; *Nason v. Allen*, 5 Greenl. (Me.) 479; *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. Dec. 262. But that it may be reached by creditors' bill, see *Payne v. Becker*, 87 N. Y. 153; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Thomas v. Simpson*, 3 Pa. 60; *Shaupe v. Shaupe*, 12 Serg. & R. (Pa.) 9; *Boltz v. Stoltz*, 41 Ohio St. 540. Contra, *Maxon v. Gray*, 14 R. I. 641.

²⁹ *Summers v. Babb*, 13 Ill. 483; *McDonald v. Hannah*, 51 Fed. 73; *Blain v. Harrison*, 11 Ill. 384; *Hoots v. Graham*, 23 Ill. 81; *Jackson v. Aspell*, 20 Johns. (N. Y.) 411; *Dillon, C. J.*, in *Huston v. Seeley*, 27 Iowa, 198; *Parton v. Allison*, 109 N. C. 674, 14 S. E. 107; *Saltmarsh v. Smith*, 32 Ala. 404. But she may mortgage it. *Ferry v. Burnell*, 14 Fed. 807; *Pope v. Mead*, 99 N. Y. 201, 1 N. E. 671; *Herr v. Herr*, 90 Iowa, 538, 58 N. W. 897.

³⁰ *Strong v. Clem*, 32 Ind. 37, 74 Am. Dec. 200; *Parton v. Allison*, 109 N. C. 674, 14 S. E. 107.

to reside in the mansion house³¹ of her late husband,³² and to be supported out of his estate.³³ This right is called the "widow's quarantine."³⁴ The right can be claimed, however, only as to property of which the widow is dowerable.³⁵ She can lease³⁶ the premises, but her quarantine right is not subject to sale or execution.³⁷ By common law quarantine was forfeited by her marriage,³⁸ or by her departure from the house, during the forty days.³⁹ This latter rule does not obtain, however, in this country.⁴⁰ In some states the statutes give the widow a longer term of residence,⁴¹ and in some jurisdictions she is permitted to remain until her dower is assigned.⁴²

Assignment of Common Right and Against Common Right

At common law, the assignment of dower is said to be either of common right, or against common right. Assignment of common right is where the widow's third is set out to her by metes and bounds.⁴³ She must be given an absolute and unconditional life

³¹ In some states the right has been extended to other property besides the house. 1 Washb. Real Prop. (5th Ed.) 282; Weaver v. Crenshaw, 6 Ala. 873; Stewart's Lessee v. Stewart, 3 J. J. Marsh. (Ky.) 49; Grimes v. Wilson, 4 Blackf. (Ind.) 331. See McKAIG v. McKAIG, 50 N. J. Eq. 325, 25 Atl. 181, Burdick Cas. Real Property.

³² Oakley v. Oakley, 30 Ala. 131. The right exists only against those claiming under the husband. Taylor v. McCrackin, 2 Blackf. (Ind.) 260.

³³ Magna Charta, 1224; Co. Litt. 32b, 34b; Lloyd v. Trimleston, 2 Mol. 81.

³⁴ From the Latin quadraginta, forty.

³⁵ Harrison v. Boyd, 36 Ala. 203. She cannot claim quarantine in the whole of a house held in common. Collins v. Warren, 29 Mo. 236. Except in states where such interests are made subject to dower, quarantine does not extend to leasehold estates. Voelckner v. Hudson, 1 Sandf. (N. Y.) 215; Pizzala v. Campbell, 46 Ala. 35.

³⁶ Wallace v. Hall's Heirs, 19 Ala. 367; White v. Clarke, 7 T. B. Mon. (Ky.) 641; Craige v. Morris, 25 N. J. Eq. 467. Cf. Doe d. Caillaret v. Bernard, 7 Smedes & M. (Miss.) 319. And see, contra, Stokes v. McAllister, 2 Mo. 163.

³⁷ Cook v. Webb, 18 Ala. 810. She need not pay the taxes on the premises. Branson v. Yancy, 16 N. C. 77. And see Roach v. Davidson, 3 Brev. (S. C.) 80; Bleecker v. Hennion, 23 N. J. Eq. 123.

³⁸ 2 Scrib. Dower (2d Ed.) 63.

³⁹ Kettlesby v. Kettlesby, 1 Dyer, 76b.

⁴⁰ Shelton v. Carrol, 16 Ala. 148.

⁴¹ In several it is now one year. 1 Stim. Am. St. Law, § 3278; 1 Shars. & B. Lead. Cas. Real Prop. 403; 1 Washb. Real Prop. (5th Ed.) 282.

⁴² 1 Stim. Am. St. Law, § 3278; 1 Washb. Real Prop. (5th Ed.) 282; Pharis v. Leachman, 20 Ala. 662; Rambo v. Bell, 3 Ga. 207; Graham's Heirs v. Graham, 6 T. B. Mon. (Ky.) 561, 17 Am. Dec. 166; Chaplin v. Simmons' Heirs, 7 T. B. Mon. (Ky.) 337; Stewart's Lessee v. Stewart, 3 J. J. Marsh. (Ky.) 48; Caillaret v. Bernard, 7 Smedes & M. (Miss.) 319.

⁴³ 2 Scrib. Dower (2d Ed.) 80; Stevens' Heirs v. Stevens, 3 Dana (Ky.) 371; Schnebly v. Schnebly 26 Ill. 116; Benner v. Evans, 3 Pen. & W. (Pa.) 454; French v. Pratt, 27 Me. 381.

estate in the premises assigned.⁴⁴ Assignment of common right is the method which must be adopted by the tenant when he makes the assignment without the widow's consent,⁴⁵ or by the sheriff or commissioners on the order of the court.⁴⁶ In assignment against common right the widow receives some other share in lieu of one-third by metes and bounds.⁴⁷ This method of assignment is valid only by consent of parties;⁴⁸ but they may agree upon a share in common, or any other method, provided the provision for the widow is out of the lands of which she is dowable.⁴⁹ When dower is assigned by a competent party, the assignment is conclusive.⁵⁰ If the assignment has been made, however, by judicial proceedings, and subsequently a superior title is enforced against the widow's share, so that she loses it, she can call for a new assignment;⁵¹ and the same right exists in favor of the heir against the widow.⁵² In many states the statute provides that no assignment by the tenant is binding upon the widow, unless the same is accepted by her.⁵³

56. PROCEDURE IN ASSIGNMENT—BY WHOM ASSIGNED

—At common law, dower can be assigned only by the tenant of the freehold. In many states, however, the assignment of dower is conferred, by statute, upon the probate court.

SAME—ASSIGNMENT BY PAROL—At common law, dower may be assigned by parol.

⁴⁴ *Wentworth v. Wentworth*, Cro. Eliz. 452.

⁴⁵ 2 Scrib. Dower (2d Ed.) 80.

⁴⁶ 2 Scrib. Dower (2d Ed.) 582.

⁴⁷ *French v. Peters*, 33 Me. 396; *French v. Pratt*, 27 Me. 381; *Marshall v. McPherson*, 8 Gill & J. (Md.) 333; *Welch v. Anderson*, 28 Mo. 293; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328.

⁴⁸ *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Welch v. Anderson*, 28 Mo. 293.

⁴⁹ 2 Scrib. Dower (2d Ed.) 82; *Hale v. James*, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; *Marshall v. McPherson*, 8 Gill & J. (Md.) 333; *Fitzhugh v. Foote*, 3 Call (Va.) 13.

⁵⁰ Co. Litt. 35a; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Meserve v. Meserve*, 19 N. H. 240; *Campbell v. Moore*, 15 Ill. App. 129; *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Johnson v. Neil*, 4 Ala. 166. Compare *French v. Pratt*, 27 Me. 381.

⁵¹ *French v. Peters*, 33 Me. 396; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Holloman v. Holloman*, 5 Smedes & M. (Miss.) 559; *St. Clair v. Williams*, 7 Ohio, pt. 2, p. 110, 30 Am. Dec. 194.

⁵² *Singleton's Ex'r v. Singleton's Heirs*, 5 Dana (Ky.) 87.

⁵³ Consult the local statutes. And see *Clark v. Muzzey*, 43 N. H. 59.

SAME—METHOD OF DIVISION—Land subject to dower is divided by metes and bounds when practicable; otherwise, it may be sold, and the proceeds divided, or there may be a division of the rents and profits.

SAME—VALUATION OF THE PROPERTY—In assigning dower, both the quality and quantity of the lands should be considered. Against an heir, the value is estimated at the time of assignment; against a grantee of the husband, at the time of alienation, in most states; in some states, at the time of assignment.

57. ACTIONS TO COMPEL ASSIGNMENT—The procedure for the recovery of dower wrongfully detained varies greatly in the several states. In most states, however, no demand is necessary before bringing suit.

Who may Assign

Dower may be assigned, at common law, immediately upon the death of the husband, by the person authorized to make the assignment; no judicial proceedings being required.⁵⁴ It can be voluntarily assigned only by the tenant of the freehold; that is, by the heir, devisee, or grantee of the husband.⁵⁵ In other words, any one may voluntarily assign dower who could be compelled to assign by a suit.⁵⁶ An assignment by an infant⁵⁷ or by a guardian may be good,⁵⁸ although, if a minor heir has made an excessive as-

⁵⁴ 4 Kent, 63; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Boyers v. Newbanks*, 2 Ind. 388; *Shattuck v. Gragg*, 23 Pick. (Mass.) 88; *Den ex dem. Miller v. Miller*, 4 N. J. Law, 321; *Aikmann v. Harsell*, 98 N. Y. 186.

⁵⁵ *Park, Dower*, 265; Co. Litt. 34b, 35a; *Pearce v. Pearce*, 184 Ill. 289, 56 N. E. 311; *Hopper v. Hopper*, 22 N. J. Law, 715; *Hill's Adm'rs v. Mitchell*, 5 Ark. 608; *Drost v. Hall*, 52 N. J. Eq. 68, 28 Atl. 81; *Id.* (N. J. Ch.) 29 Atl. 437 (a chattel interest gives no power to assign). But see 2 *Scrib. Dower* (2d Ed.) 76; *Rutherford v. Graham*, 4 Hun (N. Y.) 796.

⁵⁶ *Park, Dower*, 265; Co. Litt. 34b, 35a; *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Meserve v. Meserve*, 19 N. H. 240; *Richardson v. Harms*, 11 Misc. Rep. 254, 32 N. Y. Supp. 808. And see, as to parties to suit, *Kenyon v. Kenyon*, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787; *Parton v. Allison*, 111 N. C. 429, 16 S. E. 415; *Coburn v. Herrington*, 114 Ill. 104, 29 N. E. 478.

⁵⁷ 2 *Scrib. Dower* (2d Ed.) 78; 1 *Greenleaf's Cruise*, 195; *McCormick v. Taylor*, 2 Ind. 336; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Curtis v. Hobart*, 41 Me. 230. *Contra*, *Bonner v. Peterson*, 44 Ill. 253.

⁵⁸ *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Id.*, 2 B. Mon. (Ky.) 284; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Boyers v. Newbanks*, 2 Ind. 388. But see *Bonner v. Peterson*, 44 Ill. 260. For assignment by a joint tenant, see 2 *Scrib. Dower* (2d Ed.) 79.

signment, he may have a redistribution on reaching his majority.⁵⁹ In many states, however, it is provided by statute that dower may be assigned by the probate court in which the husband's estate is being settled.⁶⁰

Assignment by Parol

A parol assignment of dower, whether the assignment be of common right or against common right, is good at common law.⁶¹ A statute, however, may require some writing or even a sealed instrument.⁶²

Method of Allotment

Whenever practicable, the widow's interest in dower lands is, according to common right, set out by metes and bounds.⁶³ This method of allotment is expressly provided for by statute in a number of states.⁶⁴ In assigning dower, however, the convenience and interests of all parties concerned should be considered,⁶⁵ and a widow may be given one of three parcels of land, instead of one-third of each.⁶⁶ If, however, the several parcels have been aliened to different persons by the husband, dower must at common law be assigned in each one.⁶⁷ If, on the other hand, only part of them

⁵⁹ *Young v. Tarbell*, 37 Me. 509; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *McCormick v. Taylor*, 2 Ind. 336.

⁶⁰ *Draper v. Baker*, 12 Cush. (Mass.) 288; *Garris v. Garris*, 7 B. Mon. 461; *Woerther v. Miller*, 13 Mo. App. 567; 1 Stim. Am. St. Law, § 3272; *Serry v. Curry*, 26 Neb. 353, 42 N. W. 97; *Wood v. Sealy*, 32 N. Y. 105; *Brown's Appeal*, 84 Pa. 457; *Neeld's Appeal*, 70 Pa. 113.

⁶¹ *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Johns v. Fenton*, 88 Mo. 64; *Gibbs v. Esty*, 22 Hun (N. Y.) 266; *Johnson v. Neil*, 4 Ala. 166; *Curtis v. Hobart*, 41 Me. 230; *Meserve v. Meserve*, 19 N. H. 240; *Shattuck v. Gragg*, 23 Pick. (Mass.) 88.

⁶² 2 Scrib. Dower (2d Ed.) 74.

⁶³ Co. Litt. 34b; *Pierce v. Williams*, 3 N. J. Law, 709; *James v. Fields*, 5 Heisk. (Tenn.) 394; *Leggett v. Steele*, 15 Fed. Cas. 248, No. 8,211, 4 Wash. 305.

⁶⁴ *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 18 L. R. A. 425, 39 Am. St. Rep. 19; *Moore v. Dick*, 134 Ill. 43, 24 N. E. 768; *Gourley v. Kinley*, 66 Pa. 270; *Leggett v. Steele*, 15 Fed. Cas. 248, No. 8,211, 4 Wash. 305.

⁶⁵ *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 18 L. R. A. 425, 39 Am. St. Rep. 19; *Moore v. Dick*, 134 Ill. 43, 24 N. E. 768; *Gourley v. Kinley*, 66 Pa. 270.

⁶⁶ *Milton v. Milton*, 14 Fla. 369; *Compton v. Pruitt*, 88 Ind. 171; *Jones v. Jones*, 44 N. C. 177; *Rowland v. Carroll*, 81 Ill. 224; *Alderson's Heirs v. Henderson*, 5 W. Va. 182. Contra, *Hardin v. Lawrence*, 40 N. J. Eq. 154. In some states, the statutes provide for such an equitable allotment. *Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081; *Price v. Price*, 41 Hun (N. Y.) 486, 11 N. Y. Civ. Proc. 359.

⁶⁷ *Walsh v. Reis*, 50 Ill. 477; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Coulter v. Holland*, 2 Har. (Del.) 330; *Cook v. Fisk*, 1 Walk. (Miss.) 423; *Ellicott*

has been sold, then dower is to be assigned in what remains, if sufficient, and the alienees exonerated.⁶⁸ In some states, the dwelling house is by statute included in the widow's share;⁶⁹ but when her third does not entitle her to all of it, certain rooms may be assigned, with a right to use the halls and stairs.⁷⁰ Where lands are held by the husband as a cotenant with others, dower may be assigned in common.⁷¹ Sometimes, as in case of a mine, mill, or ferry, the only practical method of assigning dower is to give alternate enjoyment⁷² or to divide the profits.⁷³ In some states, when a division is impossible, or would cause considerable loss, the land subject to dower may be sold.⁷⁴ When there has been a sale, or when there is a sum of money in court subject to dower, there are two ways of making the assignment. In some jurisdictions, one-third is invested, and the proceeds paid to the widow during her life.⁷⁵ In others, she is given a gross sum at once, equal to the present worth of an annuity for the probable duration of her life.⁷⁶

v. Mosier, 11 Barb. (N. Y.) 574; *Thomas v. Hesse*, 34 Mo. 13, 84 Am. Dec. 66; *Fosdick v. Gooding*, 1 Greenl. (Me.) 30, 10 Am. Dec. 25; *Peyton v. Jeffries*, 50 Ill. 143.

⁶⁸ 2 Scrib. Dower (2d Ed.) 637; *Wood v. Keyes*, 6 Paige (N. Y.) 478; *Lawson v. Morton*, 6 Dana (Ky.) 471; *Morgan v. Conn*, 3 Bush (Ky.) 58; *Goodrum v. Goodrum*, 56 Ark. 532, 20 S. W. 353.

⁶⁹ *Gregory v. Ellis*, 86 N. C. 579; *Latta v. Brown*, 96 Tenn. 343, 34 S. W. 417, 31 L. R. A. 840; *Taylor v. Lusk*, 7 J. J. Marsh. (Ky.) 636; 1 Stim. Am. St. Law, § 3277 B. And see *Christopher v. Christopher*, 92 Tenn. 408, 21 S. W. 890.

⁷⁰ *White v. Story*, 2 Hill (N. Y.) 543; *Stewart v. Smith*, 39 Barb. (N. Y.) 167; *Patch v. Keeler*, 27 Vt. 252; *Symmes v. Drew*, 21 Pick. (Mass.) 278; *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325.

⁷¹ *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325.

⁷² *Stoughton v. Leigh*, 1 Taunt. 402, 11 Rev. Rep. 810; *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; *Billings v. Taylor*, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; *Smith's Heirs v. Smith*, 5 Dana (Ky.) 179; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *McGowen v. Bailey*, 179 Pa. 470, 36 Atl. 325.

⁷³ *Co. Litt.* 32a; *Park, Dower*, 252; *Stevens v. Stevens*, 3 Dana (Ky.) 371; *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277. And see *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

⁷⁴ See the statutes in the several states, and cases in the notes following; *Post v. Post*, 65 Barb. (N. Y.) 192; *Card v. Pudney*, 42 App. Div. 405, 59 N. Y. Supp. 278. See 1 Stim. Am. St. Law, § 3276.

⁷⁵ *Higbie v. Westlake*, 14 N. Y. 281; *Tabele v. Tabele*, 1 Johns. Ch. (N. Y.) 45; *Bonner v. Peterson*, 44 Ill. 253.

⁷⁶ *Hogg v. Hensley*, 100 Ky. 719, 39 S. W. 247, 19 Ky. Law Rep. 44; *Herbert v. Wren*, 7 Cranch (U. S.) 370, 3 L. Ed. 374; *Banks v. Banks*, 2 Thomp. & C. (N. Y.) 483; *Williams' Case*, 3 Bland (Md.) 186, 221; *Eagle v. Emmet*, 4 Bradf. Sur. (N. Y.) 117; *Sherard v. Sherard's Adm'r*, 33 Ala. 488. For the

Without the widow's consent, however, a gross sum cannot be allotted to her in lieu of dower, unless the statute so provides.⁷⁷ In many cases, where the land cannot be practically allotted by metes and bounds, the widow is given a third of the rents and profits of the property.⁷⁸

Valuation of Property

In the assignment of dower, the widow's interest should be determined by the value of the rents and profits of the land, so that she may receive one-third of such valuation.⁷⁹ Both the quality and the quantity of the land should be taken into consideration.⁸⁰ Against the husband's heirs the value is estimated as of the time of assignment,⁸¹ and, if the heir improves the land before assignment the widow has dower in the increased value.⁸² If the husband has alienated the land, without a release of dower, the widow is entitled to her dower, measured in value at the time of the alienation.⁸³ Although, in this country, improvements made by an alienee of the husband are not subject to dower,⁸⁴ in some states, however, the

calculation of this (and the use of life tables), see 2 Scrib. Dower (2d Ed.) 678; *Brown v. Bronson*, 35 Mich. 415; 70 Ga. Append. 843-848; *Stein v. Stein*, 80 Md. 306, 30 Atl. 703.

⁷⁷ *Martin v. Wharton*, 38 Ala. 637; *Herbert v. Wren*, 7 Cranch (U. S.) 370, 3 L. Ed. 374; *Atkin v. Merrell*, 39 Ill. 62.

⁷⁸ *Washburn*, Real Prop. (6th Ed.) § 473; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Scammon v. Campbell*, 75 Ill. 223.

⁷⁹ *Conner v. Shepherd*, 15 Mass. 164; *Miller v. Miller*, 12 Mass. 454; *Helser's Appeal*, 116 Pa. 534, 8 Atl. 790.

⁸⁰ *Russell v. Russell*, 48 Ind. 456; *Conner v. Shepherd*, 15 Mass. 164; *Strickler v. Tracy*, 66 Mo. 465; *In re Watkins*, 9 Johns. (N. Y.) 245.

⁸¹ Co. Litt. 32a; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 497; *McGehee v. McGehee*, 42 Miss. 747; *McClanahan v. Porter*, 10 Mo. 746. It is so provided in some states by statute. 1 Stim. Am. St. Law, § 3279; 2 Scrib. Dower (2d Ed.) 634. And see *Verlander v. Harvey*, 36 W. Va. 374, 15 S. E. 54.

⁸² *Walsh v. Wilson*, 131 Mass. 535; *Humphrey v. Phinney*, 2 Johns. (N. Y.) 484; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Jefferies v. Allen*, 34 S. C. 189, 13 S. E. 365; *Powell v. Monson*, etc., Mfg. Co., Fed. Cas. No. 11,356, 3 Mason, 347; *Larrowe v. Beam*, 10 Ohio, 498; *Price v. Hobbs*, 47 Md. 359. It is otherwise by statute in some states. 2 Scrib. Dower (2d Ed.) 597.

⁸³ *Stearns v. Swift*, 8 Pick. (Mass.) 532; *Sidway v. Sidway*, 52 Hun, 222, 4 N. Y. Supp. 920; *Shirtz v. Shirtz*, 5 Watts (Pa.) 255; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480; *Guerin v. Moore*, 25 Minn. 462; *Tod v. Baylor*, 4 Leigh (Va.) 498.

⁸⁴ *Stearns v. Swift*, 8 Pick. (Mass.) 532; *Young v. Thrasher*, 115 Mo. 222, 21 S. W. 1104; *Brown v. Brown*, 4 Rob. (N. Y.) 688; *Barney v. Frowner*, 9 Ala. 901; *Stookey v. Stookey*, 89 Ill. 40; *Scammon v. Campbell*, 75 Ill. 223; *Wilson v. Oatman*, 2 Blackf. (Ind.) 223; *Price v. Hobbs*, 47 Md. 359; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358; *Young v. Thrasher*, 115 Mo. 222, 21 S. W. 1104; *Morgan v. Hendrew*, 102 Ala. 245, 14 South. 540; *Shirtz v. Shirtz*, 5 Watts (Pa.) 255; *Peirce v. O'Brien*, 29 Fed. 402.

widow is dowerable, as against an alienee, of any increased value of the land, between the time of the alienation and the assignment.⁸⁵

Actions to Compel Assignment

If dower is not assigned by the heir, devisee, or other person whose duty it is to assign it, or by the probate court in states where such jurisdiction is given, the widow may resort to the courts to compel an assignment.⁸⁶ The procedure varies in the several states. It may be (1) by a proceeding at common law; (2) in equity; (3) by ejectment; or (4) by a summary proceeding provided by statute. It is not generally necessary to make a demand before bringing suit for dower,⁸⁷ except as to damages;⁸⁸ but, in jurisdictions where a demand is required,⁸⁹ it must be of the tenant of the freehold,⁹⁰ and should contain a general description of the premises out of which dower is demanded.⁹¹ The common-law remedies for the recovery of dower are the writ of dower unde nihil habet and the writ of right of dower.⁹² These old writs of dower were abolished, however, in England, by the Procedure Act of 1860,⁹³ and they are but little known in the procedure of this country. Courts of equity have, in general, concurrent jurisdiction in the assignment of dower.

⁸⁵ *Summers v. Babb*, 13 Ill. 483; *Throp v. Johnson*, 3 Ind. 343; *Thornburn v. Doscher*, 32 Fed. 810; *Fritz v. Tudor*, 1 Bush (Ky.) 28; *McClanahan v. Porter*, 10 Mo. 746; *Dunseth v. Bank*, 6 Ohio, 76; *Walker v. Schuyler*, 10 Wend. (N. Y.) 480. And conversely she must bear any depreciation in value. *Westcott v. Campbell*, 11 R. I. 378; *McClanahan v. Porter*, 10 Mo. 746; *Braxton v. Coleman*, 5 Call (Va.) 433, 2 Am. Dec. 592; *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 18 L. R. A. 425, 39 Am. St. Rep. 19.

⁸⁶ *Brooks v. Woods*, 40 Ala. 538; *Palmer v. Casperson*, 17 N. J. Eq. 204. The action must be brought where the land is situated. *Lamar v. Scott*, 3 Strob. (S. C.) 562. The rule is not uniform as to when the action may be commenced. See 1 Stim. Am. St. Law, § 3271; 2 Scrib. Dower (2d Ed.) 109.

⁸⁷ Scrib. Dower, c. 6, § 1; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Jackson ex dem. Loucks v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; *Hopper v. Hopper*, 22 N. J. Law, 715.

⁸⁸ *Hopper v. Hopper*, 22 N. J. Law, 715; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Cowan v. Lindsay*, 30 Wis. 586.

⁸⁹ 2 Scrib. Dower (2d Ed.) 109.

⁹⁰ *Page v. Page*, 6 Cush. (Mass.) 196; *Strawn v. Strawn*, 50 Ill. 256; *Davis v. Walker*, 42 N. H. 482. Cf. *Young v. Tarbell*, 37 Me. 509.

⁹¹ *Sloan v. Whitman*, 5 Cush. (Mass.) 532; *Haynes v. Powers*, 22 N. H. 590; *Davis v. Walker*, 42 N. H. 482; *Ford v. Erskine*, 45 Me. 484; *Atwood v. Atwood*, 22 Pick. (Mass.) 283. And see *Falls v. Wright*, 55 Ark. 562, 18 S. W. 1044, 29 Am. St. Rep. 74.

⁹² 4 Kent, Comm. 33; Park, Dower, 283. See Ship. Com. Law Pl. (2d Ed.) p. 6; 2 Scrib. Dower (2d Ed.) 91; *Williams, Real Prop.* (17th Am. Ed.) p. 380, note. And see *Hurd v. Grant*, 3 Wend. (N. Y.) 340; *Miller v. Beverly*, 1 Hen. & M. (Va.) 368.

⁹³ 23 & 24 Vict. c. 126.

er,⁹⁴ and, in England, actions for the recovery of dower are usually brought in the Chancery Division of the King's Bench, as being better adapted for the conduct of the proceedings.⁹⁵ In some jurisdictions, the statutes provide for the recovery of dower by an action in ejectment.⁹⁶ In most states, however, a statutory proceeding, in addition to the remedy offered by equity, is expressly provided.⁹⁷

SAME—INCIDENTS OF DOWER

58. The widow has, in the land assigned as her dower, the usual rights of a tenant for life.

Dower is a legal life estate,⁹⁸ and therefore a freehold.⁹⁹ Being a life estate, it is subject to the usual incidents of such estates.¹ For example, the tenant in dower cannot commit waste.² She may work mines already opened,³ but she cannot open new ones.⁴ She is not bound to continue in possession of the lands, since her estate is not dependent upon her continued occupancy.⁵ She may sell or lease the whole or any part of her interest.⁶ She has the

⁹⁴ See *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Bee-man v. Kitzman*, 124 Iowa, 86, 99 N. W. 171. The equitable remedy is sometimes exclusive. *McMahan v. Kimball*, 3 Blackf. (Ind.) 1; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Davis v. Davis*, 5 Mo. 183; *Smart v. Waterhouse*, 10 Yerg. (Tenn.) 94.

⁹⁵ Laws of Eng. vol. 24, p. 197.

⁹⁶ *Galbraith v. Fleming*, 60 Mich. 408, 27 N. W. 583; *Gourley v. Kinley*, 66 Pa. 270; *Ellicott v. Mosier*, 11 Barb. (N. Y.) 574. But not in some states before assignment. 2 Scrib. Dower (2d Ed.) 115.

⁹⁷ *Johnson v. Johnson*, 84 Ark. 307, 105 S. W. 869; *Diefenderfer v. Eshleman*, 113 Pa. 305, 6 Atl. 568; *Thomas v. Thomas*, 73 Iowa, 657, 35 N. W. 693; 1 Stim. Am. St. Law, § 3274.

⁹⁸ *Rowley v. Poppenhager*, 203 Ill. 434, 67 N. E. 975; *Sell v. McAnaw*, 158 Mo. 466, 59 S. W. 1003; *Kunselman v. Stine*, 183 Pa. 1, 38 Atl. 414; *Whitmore v. Sloat*, 9 How. Prac. (N. Y.) 317.

⁹⁹ *Park, Dower*, 339.

¹ *Whyte v. Mayor, etc., of Nashville*, 2 Swan (Tenn.) 364.

² *Co. Litt.* 53, 54; *Noyes v. Stone*, 163 Mass. 490, 40 N. E. 856; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19; *Parker v. Chambliss*, 12 Ga. 235. See *Stetson v. Day*, 51 Me. 434; *Dicken v. Hamer*, 1 Drew. & Sm. 284.

³ *Stoughton v. Leigh*, 1 Taunt. 402; *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

⁴ *Dicken v. Hamer*, 1 Drew. & Sm. 284.

⁵ *Rowley v. Poppenhager*, 203 Ill. 434, 67 N. E. 975.

⁶ *Blake v. Ashbrook*, 91 Ill. App. 45; *Summers v. Babb*, 13 Ill. 483. Cf. *Matlock v. Lee*, 9 Ind. 298; *Stockwell v. Sargent*, 37 Vt. 16. A lease is terminated, however, by her death. *Stockwell v. Sargent*, 37 Vt. 16.

usual right to emblements,⁷ and she has also the crops sown on the dower land by her husband,⁸ or by the heir before assignment.⁹ She may take reasonable estovers,¹⁰ and, when the land assigned consists of several parcels, she may take wood from one parcel for use in another.¹¹ It is her duty, at least, in some states, to keep fences and buildings in repair,¹² and this duty is specified by statute in several states.¹³ She must keep down her proportionate share of the interest on incumbrances,¹⁴ and pay the taxes.¹⁵ There can be no claim for improvements made by the widow or by her assignee.¹⁶ If she has leased the premises, her personal representative is entitled to the rent due at her death.¹⁷ The reversion or remainder of the estate in fee simple, after her life estate terminates, descends to the husband's heirs, or goes to his devisees, as the case may be. If the land was aliened by the husband by a conveyance not good against the wife, the grantee's estate is by the assignment of dower defeated during the life of the widow. On

⁷ Co. Litt. 55. See *Talbot v. Hill*, 68 Ill. 106; *Fisher v. Forbes*, 9 Vin. Abr. 373, pl. 82. Any doubt as to this was removed by the statute of Merton (20 Hen. III, c. 2), A. D. 1235, which has been generally recognized or re-enacted in this country. 2 *Scrib. Dower* (2d Ed.) 779; 1 *Stim. Am. St. Law*, § 3233.

⁸ *Parker v. Parker*, 17 Pick. (Mass.) 236; *Ralston v. Ralston*, 3 G. Greene (Iowa) 533. Cf. *Kain v. Fisher*, 6 N. Y. 597; *Street v. Saunders*, 27 Ark. 554; *Budd v. Hiler*, 27 N. J. Law, 43. But see *Davis v. Brown*, 2 Ohio Dec. (Reprint) 644.

⁹ *Parker v. Parker*, 17 Pick. (Mass.) 236.

¹⁰ *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351, 13 Ky. Law Rep. 107, 34 Am. St. Rep. 240; *Garnett Smelting & Development Co. v. Watts*, 140 Ala. 449, 37 South. 201; *White v. Cutler*, 17 Pick. (Mass.) 248. See *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

¹¹ *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261. And see *Lunn v. Oslin*, 96 Tenn. 28, 33 S. W. 561; *Childs v. Smith*, 1 Md. Ch. 483. But cf. *Cook v. Cook*, 11 Gray (Mass.) 123; *Noyes v. Stone*, 163 Mass. 490, 40 N. E. 856. Woodlands may be cleared, in part, when necessary for the reasonable enjoyment of the estate. *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19; *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

¹² *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351, 13 Ky. Law Rep. 107, 34 Am. St. Rep. 240; *Padelford v. Padelford*, 7 Pick. (Mass.) 152.

¹³ 1 *Stim. Am. St. Law*, § 3232.

¹⁴ *Hodges v. Phinney*, 106 Mich. 537, 64 N. W. 477; *House v. House*, 10 Paige (N. Y.) 158; *Zinn v. Hazlett*, 67 Ill. App. 410.

¹⁵ *Austel v. Swann*, 74 Ga. 278. And see, *Graves v. Cochran*, 68 Mo. 74; *Harrison v. Peck*, 56 Barb. (N. Y.) 251; *Durkee v. Felton*, 44 Wis. 467; *Linden v. Graham*, 34 Barb. (N. Y.) 316. So of assessments for street improvements. *Whyte v. Mayor, etc.*, of Nashville, 2 Swan (Tenn.) 364. By the old common law, the tenant in dower was subject to no tolls or taxes. 2 *Blk. Comm.* 138.

¹⁶ *Maddocks v. Jellison*, 11 Me. 482; *Bent v. Weeks*, 44 Me. 45; *Cannon v. Hare*, 1 Tenn. Ch. 22.

¹⁷ 2 *Scrib. Dower* (2d Ed.) 781.

her death, the reversioner, remainderman, or grantee is at once entitled to possession of the land, subject to her right of emblements, if any exists.¹⁸

SAME—HOW BARRED

59. The right to dower may be barred or forfeited by:

- (a) Alienage of husband or wife, in some states.
- (b) Elopement and living in adultery by the wife, in most states.
- (c) Annulment of marriage.
- (d) Divorce, in many states.
- (e) Loss of husband's seisin.
- (f) Conveyance by husband:
 - (1) Before marriage.
 - (2) After marriage, in some states.
- (g) Release by wife.
- (h) Jointure.
- (i) Settlement or agreement.
- (j) Widow's election to take a testamentary or statutory provision in lieu of dower.
- (k) Estoppel.
- (l) Statute of limitations, in a number of states.
- (m) Laches in equity.
- (n) Waste after assignment, causing a forfeiture in some states.
- (o) Dedication to public use, or by exercise of eminent domain.
- (p) Declarations barring dower.

In General

The right to dower may be barred, released, or forfeited in various ways, as hereinafter set forth. In general, however, the wife's inchoate dower cannot be defeated after it has attached, except by some act of her own, in accord with the provisions of the statutes regulating dower.¹⁹ After the death of the husband, and before the assignment of dower, the widow may likewise, by her voluntary acts or conduct, be barred from asserting her rights, as by estoppel or waiver, or by her election between dower and other provisions made for her.²⁰ Moreover, after the assignment of dower, her estate may possibly be forfeited for waste committed by her.²¹

¹⁸ 2 Scrib. Dower (2d Ed.) 785. Her personal representatives are entitled to emblements not disposed of by her. Keil, 125, pl. 84.

¹⁹ Gove v. Cather, 23 Ill. 634, 76 Am. Dec. 711; Hart v. McCollum, 28 Ga. 478; Scott v. Howard, 3 Barb. (N. Y.) 319.

²⁰ *Infra*.

²¹ *Infra*.

Alienage

At common law, dower could not attach when either husband or wife was an alien.²² The statutes of many states have, however, changed the rule;²³ but their effect is not retroactive, so as to give dower in lands sold before the enactment.²⁴

Elopement and Adultery

By the English statute of Westminster II,²⁵ which has been re-enacted,²⁶ or recognized as a part of our common law,²⁷ in a number of states, a wife forfeits her dower if she elope and live in adultery,²⁸ unless there be a subsequent reconciliation.²⁹ In some states, however, the courts have refused to recognize these provisions of the English statute with reference to dower.³⁰ The wife's desertion of her husband does not, in itself, bar her dower,³¹ although in a few states there are statutes to the contrary.³² It has

²² 2 Blk. Comm. 131; Co. Litt. 31b; Calvin's Case, 7 Coke, 25a; Wightman v. Laborde, Speer (S. C.) 525.

²³ 1 Stim. Am. St. Law, §§ 102, 6013; 1 Scrib. Dower (2d Ed.) 156; 1 Washb. Real Prop. (5th Ed.) 80, note. In some states, by statute, lands conveyed by a nonresident owner are not subject to dower. See *Ligare v. Semple*, 32 Mich. 438. Cf. *Bear v. Stahl*, 61 Mich. 203, 28 N. W. 69; *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222.

²⁴ *Priest v. Cummings*, 20 Wend. (N. Y.) 338. Cf. *White v. White*, 2 Metc. (Ky.) 185.

²⁵ 13 Edw. I, c. 34 (1285, A. D.).

²⁶ *Owen v. Owen*, 57 Ind. 291; *Payne v. Dotson*, 81 Mo. 145, 51 Am. Rep. 225; *McAllister v. Novenger*, 54 Mo. 251; 1 Stim. Am. St. Law, § 3246 A (1); 2 Scrib. Dower (2d Ed.) 535.

²⁷ 4 Kent, Comm. 53. And see *Heslop v. Heslop*, 82 Pa. 537; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414.

²⁸ Adultery without elopement does not bar. *Cogswell v. Tibbetts*, 3 N. H. 41; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414. *Ondis v. Banto*, 7 Kulp (Pa.) 309. If, however, there has been a separation for any cause whatever, a subsequent adultery will be a bar. *Woodward v. Dowse*, 10 C. B. (N. S.) 722; *Hethrington v. Graham*, 6 Bing. 135. Cf. *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102; *Walters v. Jordan*, 35 N. C. 361, 57 Am. Dec. 558. If the husband drives the wife away, or deserts her, dower is not lost by adultery committed afterwards. *Heslop v. Heslop*, 82 Pa. 537; *Rawlins v. Buttel*, 1 Houst. (Del.) 224. And see *Reynolds v. Reynolds*, 24 Wend. (N. Y.) 193; *Heslop v. Heslop*, 82 Pa. 557; *Stegall v. Stegall*, Fed. Cas. No. 13,351, 2 Brock. 256. See, contra, *Woodward v. Dowse* (1861) 10 C. B. (N. S.) 722.

²⁹ Co. Litt. 32b; *Sidney v. Sidney*, 3 P. Wms. 269, 276. See 2 Scrib. Dower (2d Ed.) 539.

³⁰ *Lakin v. Lakin*, 2 Allen (Mass.) 45; *Bryan v. Batcheller*, 6 R. I. 543, 78 Am. Dec. 454; *Smith v. Woolworth*, 22 Fed. Cas. 704, No. 13,130, 4 Dill. 584; *Pitts v. Pitts*, 52 N. Y. 593.

³¹ *Potier v. Barclay*, 15 Ala. 439; *Wiseman v. Wiseman*, 73 Ind. 112, 38 Am. Rep. 115; *Nye's Appeal*, 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873.

³² *Thornburg v. Thornburg*, 18 W. Va. 522; *Stuart v. Neely*, 50 W. Va. 508, 40 S. E. 441, 1 Stim. Am. St. Law, § 3246 B.

been held in North Carolina that a wife who murders her husband does not thereby lose her right of dower.⁸³

Annulment of Marriage

Since a valid marriage is a requisite of dower,⁸⁴ when a marriage is terminated by a decree of nullity, dower is barred.⁸⁵ It has already been pointed out, however, that a voidable marriage which is not annulled during coverture does not deprive the wife of her dower.⁸⁶

Divorce

In many jurisdictions, an absolute divorce, whether obtained by the husband for the wife's misconduct,⁸⁷ or obtained by the wife for the husband's misconduct,⁸⁸ extinguishes the right to dower.⁸⁹ A judicial separation, however, or, in other words, a divorce a mensa et thoro, otherwise known as a limited divorce, does not affect a widow's dower rights,⁹⁰ unless so provided by statute.⁹¹ In some states, divorce is no bar to dower,⁹² and in some other states, by statute, a divorce obtained by the wife for the husband's misconduct entitled her to dower at once, the same as if he were dead;⁹³ dower being barred, however, by divorce obtained by the husband for the wife's misconduct.⁹⁴

⁸³ *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794.

⁸⁴ *Supra*.

⁸⁵ *Price v. Price*, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359. See, also, cases in following note.

⁸⁶ *Supra*. And see the following cases: *Bonham v. Badgley*, 7 Ill. 622; *Toppert's Ex'rs v. Toppert*, 13 Bush (Ky.) 326, 26 Am. Rep. 197; *Price v. Price*, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359 [reversing 54 Hun, 349, 7 N. Y. Supp. 474].

⁸⁷ *Lash v. Lash*, 58 Ind. 526; *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. Dec. 702; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298. In England, also, for wife's misconduct. *Frampton v. Stephens*, 21 Ch. D. 164. See *VAN CLEAF v. BURNS*, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782, *Burdick Cas. Real Property*.

⁸⁸ *Fletcher v. Monroe*, 145 Ind. 56, 43 N. E. 1053; *Calame v. Calame*, 24 N. J. Eq. 440; *Day v. West*, 2 Edw. Ch. (N. Y.) 592; *Burdick v. Briggs*, 11 Wis. 126. Compare, however, *Wait v. Wait*, 4 N. Y. 95.

⁸⁹ *Kent v. McCann*, 52 Ill. App. 305; *Winch v. Bolton*, 94 Iowa, 573, 63 N. W. 330; *Price v. Price*, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359; *Miltimore v. Miltimore*, 40 Pa. 151; *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505.

⁹⁰ *Rich v. Rich*, 7 Bush, 53; *Crain v. Cavana*, 62 Barb. (N. Y.) 109; *Taylor v. Taylor*, 93 N. C. 418, 53 Am. Rep. 460.

⁹¹ *Gallagher v. Gallagher*, 101 Wis. 202, 77 N. W. 145.

⁹² 1 Stim. Am. St. Law, §§ 3246 C, 6251. And see *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505.

⁹³ *Cunningham v. Cunningham*, 2 Ind. 233; *Tatro v. Tatro*, 18 Neb. 395, 25 N. W. 571, 53 Am. Rep. 820; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267.

⁹⁴ *Rendleman v. Rendleman*, 118 Ill. 257, 8 N. E. 773; *Price v. Price*, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359; *Mansfield v. McIntyre*, 10 Ohio, 27.

Loss of Husband's Seisin

When the husband loses his estate by the enforcement of a paramount title, the wife has no dower.⁴⁵ Likewise, debts which had become charges on the land before marriage defeat dower when enforced, as in case of judicial sale,⁴⁶ leaving to the wife, however, her right of dower in the surplus over and above the amount of the liens.

Conveyance by Husband—Before Marriage

A conveyance or alienation by the husband, before marriage, if made in good faith, will prevent dower from attaching.⁴⁷ Likewise where, before marriage, the husband has made a contract for the sale of land, the actual conveyance being made after marriage, the equitable doctrine of conversion will operate to defeat dower.⁴⁸ Conveyances, however, by a man before his marriage, for the purpose of depriving his intended wife of her interest in the lands so conveyed, are a fraud upon her, and upon marriage her dower rights will attach.⁴⁹ In case, however, a man before his

⁴⁵ *Toomey v. McLean*, 105 Mass. 122; *Stirbling v. Ross*, 16 Ill. 122; *McClure v. Fairfield*, 153 Pa. 411, 26 Atl. 446; *Vickers v. Henry*, 110 N. C. 371, 15 S. E. 115; *Waller v. Waller's Adm'r*, 33 Grat. (Va.) 83.

⁴⁶ *Cheek v. Waldrum*, 25 Ala. 152; *Armstrong v. McLaughlin*, 49 Ind. 370; *Gross v. Lange*, 70 Mo. 45; *Holden v. Boggess*, 20 W. Va. 62; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Robbins v. Robbins*, 8 Blackf. (Ind.) 174; *Griffin v. Reece*, 1 Har. (Del.) 508. But see *House v. Fowle*, 22 Or. 303, 29 Pac. 890; *Whiteaker v. Belt*, 25 Or. 490, 36 Pac. 534; *Dayton v. Corser*, 51 Minn. 406, 58 N. W. 717, 18 L. R. A. 80. Bankruptcy of the husband during coverture is no bar. *Porter v. Lazear*, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; *Lazear v. Porter*, 87 Pa. 513, 30 Am. Rep. 380; *In re Bartenbach*, 11 N. B. R. 61, Fed. Cas. No. 1,068; *In re Lawrence*, 49 Conn. 411. Cf. *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668. The wife is, in some states, allowed dower on bankruptcy of husband as in case of death. *Warford v. Noble* (C. C.) 9 Biss. 320, 2 Fed. 202; *Rhea v. Meridith*, 6 Lea (Tenn.) 605. Where, however, the property is sold by judicial sale for debts during coverture, the purchaser takes subject to the wife's dower. *BUTLER v. FITZGERALD*, 43 Neb. 192, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. Rep. 741, *Burdick Cas. Real Property*.

⁴⁷ *Daniher v. Daniher*, 201 Ill. 489, 66 N. E. 239; *Beckwith v. Beckwith*, 61 Mich. 315, 28 N. W. 116; *Brown v. Bronson*, 35 Mich. 415; *Oakley v. Oakley*, 69 Hun (N. Y.) 121, 23 N. Y. Supp. 267; *Rawlings v. Adams*, 7 Md. 26; *Richardson v. Skolfield*, 45 Me. 386; *Kintner v. McRae*, 2 Ind. 453; *Gaines v. Gaines' Ex'r*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *Firestone v. Firestone*, 2 Ohio St. 415. But see *In re Pulling's Estate*, 97 Mich. 375, 56 N. W. 765.

⁴⁸ *Chesnut v. Chesnut*, 15 Ill. App. 442; *In re Pulling*, 97 Mich. 375, 56 N. W. 765; *Chapman v. Chapman*, 92 Va. 537, 24 S. E. 225, 53 Am. St. Rep. 823; *Madigan v. Walsh*, 22 Wis. 501; *Rawlings v. Adams*, 7 Md. 26; *Hunkins v. Hunkins*, 65 N. H. 95, 18 Atl. 655.

⁴⁹ *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86, 109 Am. St. Rep. 316; *Wai-*

marriage conveys land in fraud of his creditors, dower will not subsequently attach, since if the conveyance is set aside the rights of the creditor have priority.⁵⁰

Same—After Marriage

At common law, no alienation or incumbrance made by the husband alone during the coverture is good against the wife,⁵¹ nor is a bona fide purchaser, ignorant of her dower right, protected.⁵² By statute, however, in some states, the husband's alienations are made effectual against the wife, in connection with the doctrine that dower attaches only to lands of which the husband died seised.⁵³ In several states, if the husband make an exchange, during coverture, of one tract of land for another, his widow cannot have dower in both tracts. She must elect out of which she will claim.⁵⁴

lace v. Wallace, 137 Iowa, 169, 114 N. W. 913; Jones v. Jones, 213 Ill. 228, 72 N. E. 695. Such as a secret conveyance on the day before marriage. Stewart's Lessee v. Stewart, 3 J. J. Marsh. (Ky.) 48; Cranson v. Cranson, 4 Mich. 230, 66 Am. Dec. 534; Pomeroy v. Pomeroy, 54 How. Prac. (N. Y.) 228; Brewer v. Connell, 11 Humph. (Tenn.) 500; Brooks v. McMeekin, 37 S. C. 285, 15 S. E. 1019.

⁵⁰ King v. King, 61 Ala. 479; Whitehed v. Mallory, 4 Cush. (Mass.) 138; Adkins v. Adkins (Tenn. Ch. App. 1899) 52 S. W. 728; Gross v. Lange, 70 Mo. 45.

⁵¹ Haller v. Hawkins, 245 Ill. 492, 92 N. E. 299; Hyatt v. O'Connell, 130 Iowa, 567, 107 N. W. 599, 3 L. R. A. (N. S.) 971; Rank v. Hanna, 6 Ind. 20; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; Graves v. Fligor, 140 Ind. 25, 38 N. E. 853; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Venable v. Railway Co. (Mo.) 19 S. W. 45; Deans v. Pate, 114 N. C. 194, 19 S. E. 146; Stein v. Stein, 80 Md. 306, 30 Atl. 703; 1 Stim. Am. St. Law, § 3249. The grantee of the husband is estopped to deny the husband's title, Browne v. Potter, 17 Wend. (N. Y.) 164; but not when the conveyance is a quitclaim. Sparrow v. Kingman, 1 N. Y. 242. And see Coakley v. Perry, 3 Ohio St. 344; Gardner v. Greene, 5 R. I. 104; Delany v. Manshum, 146 Mich. 525, 109 N. W. 1051. Compare Coberly v. Coberly, 189 Mo. 1, 87 S. W. 957.

⁵² Dick v. Doughten, 1 Del. Ch. 320. The purchaser's estate is defeated only as to one-third during the life of the dowress. Id.

⁵³ Stewart v. Stewart, 5 Conn. 317; Hopkins v. Bryant, 85 Tenn. 520, 3 S. W. 827. And see McRae v. McRae, 78 Md. 270, 27 Atl. 1038. A voluntary conveyance, however, for the purpose of defeating dower will be ineffectual. Jiggitts v. Jiggitts, 40 Miss. 718; McIntosh v. Ladd, 1 Humph. (Tenn.) 458; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211. Contra, Flowers v. Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75. And see Brandon v. Dawson, 51 Mo. App. 237. And cf. Jenny v. Jenny, 24 Vt. 324; McGee v. McGee's Heirs, 26 N. C. 105. In England, a widow is not entitled to dower out of any lands which have been absolutely disposed of by her husband during coverture, or by his will. Dower Act 1833, 3 & 4 Wm. IV, c. 105.

⁵⁴ Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Mahoney v. Young, 3 Dana (Ky.) 588, 28 Am. Dec. 114. And so by statute. 1 Stim. Am. St. Law, § 3218. But cf. Wilcox v. Randall, 7 Barb. (N. Y.) 633; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

Release by Wife

In those states in which a conveyance by the husband alone is not effective against the wife,⁵⁵ the wife may, by her own voluntary act, release her inchoate right of dower,⁵⁶ by joining with her husband in a valid deed.⁵⁷ The form of the deed and the sufficiency of the wife's release of her dower are governed by the provisions of the local statutes,⁵⁸ with which there must be a substantial compliance.⁵⁹ The method of acknowledgment specified by statute must also be followed,⁶⁰ a separate acknowledgment of the wife apart from her husband being required under some statutes.⁶¹ Although there are some cases holding that the mere signature and acknowledgment of the wife to the deed of the husband will be sufficient to release her dower,⁶² the great weight of authority is to the effect that the deed must also contain appropriate words of release.⁶³ It is not necessary, however, that the wife's name appear in the body of the deed as a grantor.⁶⁴ The wife releases her dower by

⁵⁵ *Supra*.

⁵⁶ *Stokes v. Stokes*, 240 Ill. 330, 88 N. E. 829; *Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266.

⁵⁷ *Dooley v. Greening*, 201 Mo. 343, 100 S. W. 43. See *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998; *Taylor v. Lawrence*, 148 Ill. 388, 36 N. E. 74; *HINCHLIFFE v. SHEA*, 103 N. Y. 153, 8 N. E. 477, *Burdick Cas. Real Property*; *Warner v. Macknett*, 3 Phila. (Pa.) 325; *Bottomly v. Spencer* (C. C.) 36 Fed. 732.

⁵⁸ For the statutory provisions in general, see 1 *Stim. Am. St. Law*, §§ 3245, 6504. And see *Coburn v. Herrington*, 114 Ill. 104, 29 N. E. 478.

⁵⁹ *Bush v. Piersol*, 183 Mo. 500, 81 S. W. 1224. See *Radley v. Radley*, 70 N. J. Eq. 248, 62 Atl. 195; *Atkin v. Merrell*, 39 Ill. 62; *Bottomly v. Spencer* (C. C.) 36 Fed. 732.

⁶⁰ *Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203; *Owen v. Robbins*, 19 Ill. 545; *Maynard v. Davis*, 127 Mich. 571, 86 N. W. 1051; *Kirk v. Dean*, 2 Bin. (Pa.) 341. See *Genoway v. Maize*, 163 Mo. 224, 63 S. W. 698.

⁶¹ 1 *Stim. Am. St. Law*, § 6501 (1); 2 *Scrib. Dower* (2d Ed.) 321; *Sibley v. Johnson*, 1 Mich. 380; *Kirk v. Dean*, 2 Bin. (Pa.) 341.

⁶² *Perley v. Woodbury*, 76 N. H. 23, 78 Atl. 1073; *Johnson v. Montgomery*, 51 Ill. 185; *Burge v. Smith*, 27 N. H. 332; *Dustin v. Steele*, 27 N. H. 431; *Smith v. Handy*, 16 Ohio, 192; *Daly v. Willis*, 5 Lea (Tenn.) 100.

⁶³ *Powell v. Manufacturing Co.*, 3 Mason, 347, 459, *Fed. Cas. Nos.* 11,356 and 11,357; *Hall v. Savage*, 4 Mason, 273, *Fed. Cas. No.* 5,944; *Lufkin v. Curtis*, 13 Mass. 223; *McFarland v. Febiger's Heirs*, 7 Ohio, pt. 1, p. 194, 28 Am. Dec. 632; *Carter v. Goodin*, 3 Ohio St. 75; *Stevens v. Owen*, 25 Me. 94; *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685. Cf. *Gray v. McCune*, 23 Pa. 447; *Bartlett v. Bartlett*, 4 Allen (Mass.) 440; *Davis v. Bartholomew*, 3 Ind. 485; *Carter v. Goodin*, 3 Ohio St. 75; *Dundas v. Hitchcock*, 12 How. (U. S.) 256, 13 L. Ed. 978. Contra, *Johnson v. Montgomery*, 51 Ill. 185; *Goodheart v. Goodheart*, 63 N. J. Eq. 746, 53 Atl. 135; *Gillilan v. Swift*, 14 Hun (N. Y.) 574.

⁶⁴ *Stearns v. Swift*, 8 Pick. (Mass.) 532; *Atkinson v. Taylor*, 34 Mo. App. 442.

joining in her husband's conveyance, and she cannot, without the sanction of a statute, release her right by a 'separately executed deed.'⁶⁵ Moreover, she releases to her husband's alienee;⁶⁶ a release by her to a stranger to the fee being of no effect.⁶⁷ At common law, she cannot bar her dower by a release executed to her husband,⁶⁸ although this has been changed by statute in some states.⁶⁹ The statutes may also authorize a release by an infant wife,⁷⁰ as, likewise, by the guardian of an insane wife.⁷¹

Jointure.

Strictly speaking, a jointure signifies a joint estate limited to both husband and wife; but in common acceptation it extends also

⁶⁵ *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903; *Knox v. Brady*, 74 Ill. 746; *Page v. Page*, 6 Cush. (Mass.) 196; *Brown v. Brown*, 47 Mo. 130, 4 Am. Rep. 320; *Armstrong v. Armstrong*, 1 N. Y. St. 529; *Ulp v. Campbell*, 19 Pa. 361; *Powell v. Monson, etc.*, Mfg. Co., Fed. Cas. No. 11,356, 3 Mason, 347.

⁶⁶ *Fowler v. Shearer*, 7 Mass. 14; *Kirk v. Dean*, 2 Bin. (Pa.) 341; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313; *Ortman v. Chute*, 57 Minn. 452, 59 N. W. 533; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319; *Shinkle's Assignees v. Bristow*, 95 Ky. 84, 23 S. W. 670. Cf. *Stull v. Graham*, 60 Ark. 461, 31 S. W. 46. If the husband's deed is avoided, her dower is restored. *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Woodworth v. Paige*, 5 Ohio St. 71; *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7. But see *Den v. Johnson*, 18 N. J. Law, 87.

⁶⁷ *Geisendorff v. Cobbs*, 47 Ind. App. 573, 94 N. E. 236. See *Williams v. Merriam*, 32 Kan. 312, 83 Pac. 976; *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Harriman v. Gray*, 49 Me. 537; *Reiff v. Horst*, 55 Md. 42; *Marvin v. Smith*, 46 N. Y. 571; *Bethune v. McDonald*, 35 S. C. 88, 14 S. E. 674. But cf. *Robbins v. Kinzie*, 45 Ill. 354; *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427; *Elmendorf v. Lockwood*, 57 N. Y. 322.

⁶⁸ *Crain v. Cavana*, 36 Barb. (N. Y.) 410; *Walsh v. Kelly*, 34 Pa. 84; *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427; *Carson v. Murray*, 3 Paige (N. Y.) 483; *Martin's Heirs v. Martin*, 22 Ala. 86; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 531; *Wightman v. Schleifer*, 63 Hun, 633, 18 N. Y. Supp. 551; *In re Rausch*, 35 Minn. 291, 28 N. W. 920; *House v. Fowle*, 22 Or. 303, 29 Pac. 890. See, however, *Doremus v. Doremus*, 66 Hun, 111, 21 N. Y. Supp. 13; *Chittock v. Chittock*, 101 Mich. 367, 59 N. W. 655. But the husband may be her attorney in fact to release. *Andrews, J.*, in *Wronkow v. Oakley*, 133 N. Y. 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661.

⁶⁹ *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551; *Rhoades v. Davis*, 51 Mich. 306, 16 N. W. 659.

⁷⁰ Otherwise, not at common law. *Oldham v. Sale*, 1 B. Mon. (Ky.) 76; *McIntyre v. Costella*, 47 Hun (N. Y.) 289; *Schrader v. Decker*, 9 Pa. 14, 49 Am. Dec. 538.

⁷¹ *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Ex parte McElwain*, 29 Ill. 442; *Matter of Dunn*, 64 Hun, 18, 18 N. Y. Supp. 723. See the statutes in the several states.

to a sole estate limited to the wife only.⁷² Blackstone, after enumerating various methods by which dower may be barred or prevented, says: ⁷³ "The most usual method of barring dowers is by jointures, as regulated by the statute of 27 Hen. VIII, c. 10." Before the passage of this statute,⁷⁴ known as the "statute of uses,"⁷⁵ the largest part of the lands of England were conveyed to uses; that is, conveyed to one person for the use of the other. Although a husband had the use of lands in fee simple, yet the wife was not entitled to dower in this equitable estate.⁷⁶ Accordingly, to provide for the wife, in case she survived her husband, there arose a custom of settling by express deed some estate upon the wife.⁷⁷ Such an estate was called a "jointure." The statute of uses changed the equitable estates of uses into legal estates,⁷⁸ but expressly provided⁷⁹ that, in case a jointure before marriage had been settled on the wife, she should be forever barred of her dower in the legal estates thus created by the statute.⁸⁰ The substance of this statute has been re-enacted in many of our American states.⁸¹ Four requisites of jointure were prescribed by the statute of uses: (1) It must take effect immediately on her husband's death;⁸² (2), it must be an estate for at least her own life;⁸³ (3) it must be to herself, and not in trust for her;⁸⁴ and (4) it must be expressed in the deed to be in satisfaction of the whole dower.⁸⁵ Jointure is

⁷² 2 Blk. Comm. 137.

⁷³ 2 Blk. Comm. 137.

⁷⁴ A. D. 1535.

⁷⁵ See, post, chapter XIV, § 120.

⁸⁰ 2 Blk. Comm. 138.

⁸¹ *McGee v. McGee*, 91 Ill. 548; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Martien v. Norris*, 91 Mo. 465, 3 S. W. 849; *Graham v. Graham*, 67 Hun, 329, 22 N. Y. Supp. 299; *Whitehead v. Middleton*, 2 How. (Miss.) 692. The former method of jointure, as a bar to dower, is now, however, obsolete in England, by force of the provisions of the Dower Act of 1833. See *Laws of Eng. vol. 24*, § 366, note.

⁸² *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Crain v. Cavana*, 36 Barb. (N. Y.) 410; *McCartee v. Teller*, 2 Paige (N. Y.) 511; *Vance v. Vance*, 21 Me. 364; *Grogan v. Garrison*, 27 Ohio St. 50; *Caruthers v. Caruthers*, 4 Brown, Ch. 500.

⁸³ *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Vance v. Vance*, 21 Me. 364; *In re Pulling*, 93 Mich. 274, 52 N. W. 1116; *Gelzer v. Gelzer*, Bailey, Eq. (S. C.) 387, 23 Am. Dec. 180; *Vernon's Case*, 4 Coke, 1. A term of years, or an estate *pur autre vie*, will not suffice. *McCartee v. Teller*, 8 Wend. (N. Y.) 267. And see 1 Stim. Am. St. Law, § 3241.

⁸⁴ *Co. Litt.* 36b; *Hervey v. Hervey*, 1 Atk. 561. But now otherwise by statute in many states. 1 Stim. Am. St. Law, § 3241.

⁸⁵ 2 Blk. Comm. 138; *Vernon's Case*, 4 Coke, 1; *Bryan v. Bryan*, 62 Ark. 79, 34 S. W. 260; *Perry v. Perryman*, 19 Mo. 469; *Pepper v. Thomas*, 85 Ky. 539, 4 S. W. 297.

⁷⁶ 2 Blk. Comm. 137.

⁷⁷ *Id.*

⁷⁸ See, post, chapter XIV.

⁷⁹ Section 6.

said to be either legal or equitable. Legal jointure is a provision⁸⁶ consisting of land exclusively.⁸⁷ This provision may be made by a third person, since it is not necessary that it be made by the husband.⁸⁸ Legal jointure is a bar to dower, if made before marriage, whether the wife assent or not;⁸⁹ but if made during coverture, she can elect to take the jointure or her dower.⁹⁰ In equity any reasonable provision,⁹¹ or contract for her provision,⁹² is good as a jointure, if the intended wife assents.⁹³ When made after marriage, there is the same right of election as in legal jointure.⁹⁴ If the widow be evicted from her jointure lands, she is let to her dower in proportion to the amount lost.⁹⁵

⁸⁶ Coke says it must be a competent livelihood, but the law gives no test. Co. Litt. 36b; *McCartee v. Teller*, 2 Paige (N. Y.) 511; *Graham v. Graham*, 67 Hun, 329, 22 N. Y. Supp. 299; *Taylor v. Taylor*, 144 Ill. 436, 33 N. E. 532. And see *Brandon v. Dawson*, 51 Mo. App. 237.

⁸⁷ An annuity, unless charged on lands, would not be good as a jointure. *Vance v. Vance*, 21 Me. 364; *Gibson v. Gibson*, 15 Mass. 106, 8 Am. Dec. 94; *Caruthers v. Caruthers*, 4 Brown, Ch. 500; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *McCartee v. Teller*, 2 Paige (N. Y.) 511. But see *Drury v. Drury*, 2 Eden, 38; *Earl of Buckinghamshire v. Drury*, Id. 60. But by statute in many states a settlement of personalty is a good jointure. 1 Stim. Am. St. Law, § 3242. *Williams*, Real Prop. (17th Am. Ed.) note 378.

⁸⁸ 2 Scrib. Dower (2d Ed.) 404; *Ashton's Case*, Dyer, 228a. Contra in Maryland, by statute, 2 Code Pub. Gen. Laws 1888, p. 1411, art. 93, § 296; 1 Stim. Am. St. Law, § 3241.

⁸⁹ 2 Scrib. Dower (2d Ed.) 403; *McCartee v. Teller*, 2 Paige (N. Y.) 511. Cf. *Taft v. Taft*, 163 Mass. 467, 40 N. E. 860. In some states her assent is made necessary by statute. 1 Stim. Am. St. Law, § 3241.

⁹⁰ *McCartee v. Teller*, 2 Paige (N. Y.) 511; *Fraser v. Stokes*, 112 Va. 335, 71 S. E. 545; *Bottomly v. Spencer* (C. C.) 36 Fed. 732; *Vance v. Vance*, 21 Me. 364; *Townsend v. Townsend*, 2 Sandf. (N. Y.) 711; *Rowe v. Hamilton*, 3 Greenl. (Me.) 63. For the general principle of equitable election, see *Fetter*, Eq. 50; *Bisp. Eq.* (4th Ed.) 361.

⁹¹ *McCartee v. Teller*, 2 Paige (N. Y.) 511; *Grogan v. Garrison*, 27 Ohio St. 50; *Dyke v. Rindall*, 2 De G., M. & G. 209; *Thompson v. Watts*, 2 John. & H. 291; *Tinney v. Tinney*, 3 Atk. 7; *Andrews v. Andrews*, 8 Conn. 79. But see *Caruthers v. Caruthers*, 4 Brown, Ch. 500; *Blackmon v. Blackmon*, 16 Ala. 633; *Charles v. Andrews*, 2 Eq. Cas. Abr. 388.

⁹² *Vincent v. Spooner*, 2 Cush. (Mass.) 467; *Dyke v. Rindall*, 2 De Gex, M. & G. 209.

⁹³ *Tisdale v. Jones*, 38 Barb. (N. Y.) 523; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673; *Logan v. Philipps*, 18 Mo. 22.

⁹⁴ *Garrard v. Garrard*, 7 Bush (Ky.) 436.

⁹⁵ *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec. 34; *Ward v. Wilson*, 1 Desaus. (S. C.) 401; 2 Scrib. Dower (2d Ed.) 432; *Gervoyes' Case*, Moore, 717. But see *Beard v. Nutthall*, 1 Vern. 427. But not for elopement and adultery, except as changed by statute. *Sidney v. Sidney*, 3 P. Wms. 269; *Buchanan v. Buchanan*, 1 Ball & B. 203. Jointure is now rare. It is in some states forfeited for the same causes as dower. See 1 Stim. Am. St. Law, § 3247 A.

Settlement or Agreement

Dower may also be barred by an antenuptial contract, whereby in lieu of dower a portion of the husband's estate is settled upon the wife, or whereby the intended wife, in consideration of marriage, surrenders her prospective right of dower.⁹⁶ Although some cases have held that dower cannot, at common law, be barred in this manner,⁹⁷ on the ground that a right cannot be barred before it accrues,⁹⁸ yet such antenuptial contracts, if reasonable and bona fide, are upheld in equity,⁹⁹ and many states have provided by express statute that dower may be barred by a voluntary agreement entered into by the intended wife.¹ Postnuptial agreements between husband and wife for the purpose of barring dower are invalid at common law, owing to the wife's incapacity.² In equity, however, such agreements, if fair,³ reasonable, voluntary,⁴ and executed, may be enforced, unless the wife surrenders the benefits received by her under such an agreement,⁵ and under modern statutes, giving married women contractual powers, such postnuptial contracts are generally upheld.⁶

⁹⁶ *Culberson v. Culberson*, 37 Ga. 296; *Forwood v. Forwood*, 86 Ky. 114, 5 S. W. 361, 9 Ky. Law Rep. 415; *Naill v. Maurer*, 25 Md. 532.

⁹⁷ *Rieger v. Schaible*, 81 Neb. 33, 37, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700; *Blackmon v. Blackmon*, 16 Ala. 633; *Gibson v. Gibson*, 15 Mass. 106, 8 Am. Dec. 94. And see *In re Pulling*, 93 Mich. 274, 52 N. W. 1116.

⁹⁸ *Blackmon v. Blackmon*, 16 Ala. 633; *Logan v. Phillipps*, 18 Mo. 22. And see *In re Pulling*, 93 Mich. 274, 52 N. W. 1116.

⁹⁹ *Brown v. Brown*, 117 App. Div. 199, 102 N. Y. Supp. 291; *Cummings v. Cummings*, 25 R. I. 528, 57 Atl. 302; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673; *Freeland v. Freeland*, 128 Mass. 509; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Shoch v. Shoch*, 19 Pa. 252; *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605; *Graham v. Graham*, 143 N. Y. 573, 38 N. E. 722; *Taylor v. Taylor*, 144 Ill. 436, 33 N. E. 532; *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S. E. 993.

¹ See the statutes in the several states. And see *Wentworth v. Wentworth*, 69 Me. 247; *Dudley v. Davenport*, 85 Mo. 462; *Graham v. Graham*, 67 Hun, 329, 22 N. Y. Supp. 299.

² *Martin v. Martin*, 22 Ala. 86; *Emery v. Neighbour*, 7 N. J. Law, 142, 11 Am. Dec. 541; *Crain v. Cavana*, 36 Barb. (N. Y.) 410; *Kreiser's Appeal*, 69 Pa. 194; *Bottomly v. Spencer* (C. C.) 36 Fed. 732.

³ *Kreiser's Appeal*, 69 Pa. 194.

⁴ *Mitchell v. Mitchell*, 8 Ala. 414; *Bubier v. Roberts*, 49 Me. 460; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.

⁵ *Lively v. Paschal*, 35 Ga. 218, 89 Am. Dec. 282; *Kreiser's Appeal*, 69 Pa. 194; *Chaney v. Bryan*, 15 Lea (Tenn.) 589. See, also, *Wood v. Seely*, 32 N. Y. 105; *Roberts v. Walker*, 82 Mo. 200.

⁶ *In re Fennell*, 207 Pa. 309, 56 Atl. 875; *Chittock v. Chittock*, 101 Mich. 367, 59 N. W. 655. But see, *Pinkham v. Pinkham*, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392; *Ireland v. Ireland*, 43 N. J. Eq. 311, 12 Atl. 184; *Garner v. Fry*, 104 Iowa, 515, 73 N. W. 1079; *Randles v. Randles*, 63 Ind. 93; *Woods v.*

Widow's Election

It frequently happens that a husband leaves by will property to his wife, thereby raising the question whether the widow may have both dower and the provision made for her by the will, or whether she is put to her election. In case the will expressly declares that the testamentary provision is in lieu of dower, it is the rule generally that she must elect which she will take.⁷ She must likewise elect if the devise is necessarily inconsistent with dower.⁸ If, on the other hand, the testamentary provision does not expressly show that it was intended to be given in place of dower, it is the prevailing rule that the widow may take both,⁹ although in some states she is put to her election unless the will affirmatively shows that she is to have both; a devise to her being presumed to be in lieu of

Woods, 77 Me. 434, 1 Atl. 193; *Roberts v. Walker*, 82 Mo. 200; *Jones v. Fleming*, 104 N. Y. 418, 10 N. E. 693 [reversing 37 Hun (N. Y.) 227].

⁷ In *re Johnson's Estate*, 10 Pa. Co. Ct. R. 461; *WARREN v. WARREN*, 148 Ill. 641, 36 N. E. 611, *Burdick Cas. Real Property*; *Pellizzarro v. Reppert*, 83 Iowa, 497, 50 N. W. 19; *Newman v. Newman*, 1 Brown, Ch. 186. But see *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67. By some statutes she is presumed to elect dower; by others, the will. 1 *Stim. Am. St. Law*, § 3264. And see *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150. So there may be a presumption of election from lapse of time. In *re Gunyon's Estate*, 85 Wis. 122, 55 N. W. 152; *Pratt v. Felton*, 4 Cush. (Mass.) 174; *Hastings v. Clifford*, 32 Me. 132; *Thompson v. Egbert*, 17 N. J. Law, 459; *Collins v. Carman*, 5 Md. 503; *Malone v. Majors*, 8 Humph. (Tenn.) 577; *Allen v. Hartnett*, 116 Mo. 278, 22 S. W. 717. Cf. *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150; *Duffy v. Duffy*, 70 Hun, 135, 24 N. Y. Supp. 408; *Zimmerman v. Lebo*, 151 Pa. 345, 24 Atl. 1082, 17 L. R. A. 536. In order that her election be binding, she must have knowledge of the values of the two estates. *Hender v. Rose*, 3 P. Wms. 124, note; *U. S. v. Duncan*, 4 McLean, 99, Fed. Cas. No. 15,002; *Goodrum v. Goodrum*, 56 Ark. 532, 20 S. W. 353. As to effect of election to take under the will, see *Kuydendall v. Devecmon*, 78 Md. 537, 28 Atl. 412; *Swihart v. Swihart*, 7 Ohio Cir. Ct. R. 338; *Schwatken v. Daudt*, 53 Mo. App. 1; *Truett v. Funderburk*, 93 Ga. 686, 20 S. E. 260. The election must be by the widow herself, *Boone's Representatives v. Boone*, 3 Har. & McH. (Md.) 95; *Sherman v. Newton*, 6 Gray (Mass.) 307; *Welch v. Anderson*, 28 Mo. 293; unless she is insane, when her guardian may elect for her, *Young v. Boardman*, 97 Mo. 181, 10 S. W. 48. Contra, *Lewis v. Lewis*, 29 N. C. 72. If she elects to take under the will, lands aliened by the husband alone are freed from dower. *Allen v. Pray*, 12 Me. 138; *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; In *re Machemer's Estate*, 140 Pa. 544, 21 Atl. 441; *Spalding v. Hershfield*, 15 Mont. 253, 39 Pac. 88.

⁸ *McCullough v. Allen*, 3 Yeates (Pa.) 10; *Turner v. Scheiber*, 89 Wis. 1, 61 N. W. 280; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Church v. Bull*, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; *Jackson v. Churchill*, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; *Savage v. Burnham*, 17 N. Y. 561; *Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355; *Cain v. Cain*, 23 Iowa, 31; *Tooke v. Hardeman*, 7 Ga. 20; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333; *Stewart v. Stewart*, 81 N. J. Eq. 398; *Bannister v. Bannister*, 37 S. C. 529, 16 S. E. 612.

⁹ *Stehlin v. Stehlin*, 67 Hun, 110, 22 N. Y. Supp. 40; *Sanford v. Jackson*, 10

dower.¹⁰ In some states, a widow must elect between dower and an intestate share given her by statute,¹¹ or between dower and homestead.¹²

Estoppel

A widow may be estopped to claim dower by covenants of warranty,¹³ or by her conduct, as in inducing a purchaser to take the land, fraudulently representing it free from dower.¹⁴ Her mere silence, however, when lands in which she claims dower are sold,¹⁵ or her acquiescence in an adverse possession of her husband's lands,¹⁶ will not operate as an estoppel. She may, however, be es-

Paige (N. Y.) 266; *Brown v. Caldwell*, Speers, Eq. (S. C.) 322; *Cunningham v. Shannon*, 4 Rich. Eq. (S. C.) 135; *Tooke v. Hardeman*, 7 Ga. 20; *Lord v. Lord*, 23 Conn. 327; *Corriell v. Ham*, 2 Iowa, 552; *Tobias v. Ketchum*, 32 N. Y. 319; *Lasher v. Lasher*, 13 Barb. (N. Y.) 106; *In re Blaney's Estate*, 73 Iowa, 113, 34 N. W. 768; *McGowen v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621; *Sumerel v. Sumerel*, 34 S. C. 85, 12 S. E. 932; *Carper v. Crawl*, 149 Ill. 465, 36 N. E. 1040; *Richards v. Richards*, 90 Iowa, 606, 58 N. W. 926; *Parker v. Hayden*, 84 Iowa, 493, 51 N. W. 248; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; *Schorr v. Etling*, 124 Mo. 42, 27 S. W. 395.

¹⁰ *Crenshaw v. Carpenter*, 69 Ala. 572, 44 Am. Rep. 539; *WARREN v. WARREN*, 148 Ill. 641, 36 N. E. 611, *Burdick Cas. Real Property*; *Stearns v. Perrin*, 130 Mich. 456, 90 N. W. 297; *Cooper v. Cooper*, 56 N. J. Eq. 48, 38 Atl. 198.

¹¹ 1 Stim. Am. St. Law, § 3264. Cf. *Andrews v. Bassett*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296; *Payne v. Payne*, 119 Mo. 174, 24 S. W. 781; *Ford v. Ford*, 88 Wis. 122, 59 N. W. 464; *Draper v. Morris*, 137 Ind. 169, 36 N. E. 714; *Wilcox v. Wilcox*, 89 Iowa, 388, 56 N. W. 517.

¹² *Venable v. Railway Co. (Mo.)* 19 S. W. 45. Cf. *Whited v. Pearson*, 90 Iowa, 488, 58 N. W. 32. But see *Godwin v. King*, 31 Fla. 525, 13 South. 108.

¹³ This may be by her own covenants, 2 *Scrib. Dower* (2d Ed.) 261; *Elmendorf v. Lockwood*, 57 N. Y. 322; *McKee v. Brown*, 43 Ill. 130; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; or by those of her ancestor, 2 *Scrib. Dower* (2d Ed.) 264; *Torrey v. Minor*, *Smedes & M. Ch. (Miss.)* 489; *Russ v. Perry*, 49 N. H. 547.

¹⁴ *Deshler v. Beery*, 4 Dall. (Pa.) 300, 1 L. Ed. 842; *Dongrey v. Topping*, 4 Paige (N. Y.) 94; *Smiley v. Wright*, 2 Ohio, 506; *Sweaney v. Mallory*, 62 Mo. 485; *Magee v. Mellon*, 23 Miss. 585; Cf. *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; *Boorum v. Tucker*, 51 N. J. Eq. 135, 26 Atl. 456; *McCreary v. Lewis*, 114 Mo. 582, 21 S. W. 855; *Whiteaker v. Belt*, 25 Or. 490, 36 Pac. 534. But see *McCreary v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; *Ellis v. Diddy*, 1 Ind. 561; *Wood v. Seely*, 32 N. Y. 105; *Reed v. Morrison*, 12 Serg. & R. (Pa.) 18; *Foley v. Boulware*, 86 Mo. App. 674; *Allen v. Allen*, 112 Ill. 323; *Dougrey v. Topping*, 4 Paige (N. Y.) 94. Compare *Whiteaker v. Belt*, 25 Or. 490, 36 Pac. 534.

¹⁵ *Beeman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171. Compare *H. W. Wright Lumber Co. v. McCord*, 145 Wis. 93, 128 N. W. 873, 34 L. R. A. (N. S.) 762, *Ann. Cas.* 1912B, 92; *Foley v. Boulware*, 86 Mo. App. 674; *Motley v. Motley*, 53 Neb. 375, 73 N. W. 738, 68 Am. St. Rep. 608.

¹⁶ *Rockwell v. Rockwell*, 81 Mich. 493, 46 N. W. 8; *Hunt v. Reilly*, 24 R. I. 68, 52 Atl. 681, 59 L. R. A. 206, 96 Am. St. Rep. 707.

topped from claiming dower, when she has, with full knowledge of her rights, accepted arrangements in settling her husband's estate.¹⁷

Statute of Limitations

In a number of states it is provided by statute that the widow must bring action for her dower within a certain time, if at all;¹⁸ also, by weight of authority, the general statutes of limitation are held to apply to dower, even though it is not expressly included.¹⁹ In other states, however, the contrary is held.²⁰ Statutes governing the time in which actions for the recovery of real property must be brought are usually applied to actions for dower, in absence of special statutes regulating the recovery of dower.²¹ Adverse possession, however, before the husband's death, has no effect upon dower right.²²

¹⁷ Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031; Gilmore v. Gilmore, 109 Ill. 277; Wilson v. Woodward, 41 S. C. 363, 19 S. E. 685. Compare Brown v. Brookhart, 146 Iowa, 79, 124 N. W. 882.

¹⁸ See the statutes of the several states. And see Elyton Land Co. v. Denny, 96 Ala. 336, 11 South. 218; Hastings v. Mace, 157 Mass. 499, 32 N. E. 668; O'Gara v. Neylon, 161 Mass. 140, 36 N. E. 743.

¹⁹ See Poole v. French, 83 Kan. 281, 111 Pac. 488; Jones v. Powell, 6 Johns. Ch. (N. Y.) 194; Owen v. Peacock, 38 Ill. 33; Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Proctor v. Bigelow, 38 Mich. 282; Care v. Keller, 77 Pa. 487; Tuttle v. Willson, 10 Ohio, 24; Moody v. Harper, 38 Miss. 599; Torrey v. Minor, Smedes & M. Ch. (Miss.) 489; Carmichael v. Carmichael, 5 Humph. (Tenn.) 96; Kinsolving v. Pierce, 18 B. Mon. (Ky.) 782; Null v. Howell, 111 Mo. 273, 20 S. W. 24; Conover v. Wright, 6 N. J. Eq. 613, 47 Am. Dec. 213; Berrien v. Conover, 16 N. J. Law, 107. The statute has been held not to begin to run until there is a denial of the widow's right. Rice v. Nelson, 27 Iowa, 148. And see Hart v. Randolph, 142 Ill. 521, 32 N. E. 517. The general rule, however, is that the statute begins to run from the husband's death. Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; Lucas v. White, 120 Iowa, 735, 95 N. W. 209, 98 Am. St. Rep. 380; Winters v. De Turk, 133 Pa. 359, 19 Atl. 354, 7 L. R. A. 658.

²⁰ Fourche River Lumber Co. v. Walker, 96 Ark. 540, 132 S. W. 451; Sellman v. Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; May v. Rumney, 1 Mich. 1; Owen v. Campbell, 32 Ala. 521; Jones v. Powell, 6 Johns. Ch. (N. Y.) 194; Burt v. Sheep Co., 10 Mont. 571, 27 Pac. 399; Campbell v. Murphy, 55 N. C. 357; Spencer v. Weston, 18 N. C. 213; Ralls v. Hughes, 1 Dana (Ky.) 407; Chapman v. Schroeder, 10 Ga. 321; Chew v. Farmers' Bank, 2 Md. Ch. 231.

²¹ Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319, 11 Ann. Cas. 407; Harrison v. McReynolds, 183 Mo. 533, 82 S. W. 120; Owen v. Peacock, 38 Ill. 33; Moross v. Moross, 132 Mich. 208, 93 N. W. 247; Choteau v. Harvey (C. C.) 36 Fed. 541.

²² Poole v. French, 83 Kan. 281, 111 Pac. 488; Durham v. Angier, 20 Me. 242; Hart v. McCollum, 28 Ga. 478; Moore v. Frost, 3 N. H. 126; Taylor v. Lawrence, 148 Ill. 388, 36 N. E. 74; Boling v. Clark, 83 Iowa, 481, 50 N. W. 57. Compare Long v. Kansas City Stockyards Co., 107 Mo. 298, 17 S. W. 356, 28 Am. St. Rep. 413.

Laches

Where an action for the recovery of dower is brought in a court of equity, the statute of limitations may be held, in some jurisdictions, to apply.²³ Moreover, where such a statute is not applied in an equity suit, nevertheless laches on the widow's part will bar her right.²⁴

Waste

It has already been pointed out that the widow, after dower assigned, cannot commit waste.²⁵ An early English statute²⁶ provided that dower should be forfeited for waste, and although this statute has been held to be no part of our common law,²⁷ yet statutes containing a similar provision have been passed in a number of our states.²⁸

Dedication—Eminent Domain

A dedication of land to public uses bars dower.²⁹ Likewise, by weight of authority, land taken during coverture, under the right of eminent domain, by a municipal or quasi public corporation, deprives the wife of her dower rights therein.³⁰ After dower assigned, the widow is entitled, upon condemnation proceedings, to her share in the proceeds of the land so taken,³¹ and even in the

²³ *Shawhan v. Smith*, 4 Ky. Law Rep. 440; *Larrowe v. Beam*, 10 Ohio, 498. But see *Starry v. Starry*, 21 Iowa, 254; *Johns v. Fenton*, 88 Mo. 64.

²⁴ *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 South. 561. See, also, *Jones v. Powell*, 6 Johns. Ch. (N. Y.) 194; *Tuttle v. Willson*, 10 Ohio, 24; *Barksdale v. Garrett*, 64 Ala. 277, 38 Am. Rep. 6; *Ralls v. Hughes*, 1 Dana (Ky.) 407; *Chew v. Farmers' Bank*, 9 Gill (Md.) 361. In England there is no statutory limitation on the widow's action for the assignment of dower. Where, however, a widow makes no claim, for twelve years, it is held she may be barred of her dower. *Williams v. Thomas*, [1909] 1 Ch. 713, C. A.

²⁵ *Supra*.

²⁶ Statute of Gloucester, 6 Edw. I, c. 5.

²⁷ See *Stetson v. Day*, 51 Me. 434.

²⁸ *Stetson v. Day*, 51 Me. 434. See 1 *Stim. Am. St. Law*, § 3231 B. C. But see *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436.

²⁹ *Benton v. St. Louis*, 217 Mo. 687, 699, 118 S. W. 418, 129 Am. St. Rep. 561; *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Orrick v. Ft. Worth* (Tex. Civ. App. 1895) 32 S. W. 443. A dedication of land to public uses bars dower. *Gwynne v. City of Cincinnati*, 3 Ohio, 24, 17 Am. Dec. 576; *Steel v. Board of Education*, 31 Wkly. Civ. Law Bul. 84; *Duncan v. City of Terre Haute*, 85 Ind. 105; *Venable v. Railway Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68. And see *Chouteau v. Railway Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

³⁰ *Arnold v. R. Co.*, 32 Pa. Super. Ct. 452; *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427; *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Baker v. Railway Co.*, 122 Mo. 396, 30 S. W. 301; *French v. Lord*, 69 Me. 537. But see *Nye v. Railroad Co.*, 113 Mass. 277.

³¹ *Lavery v. Hutchinson*, 249 Ill. 86, 94 N. E. 6, Ann. Cas. 1912A, 74; 1n

case of inchoate dower it is held that the wife's interest in the award for compensation will be protected.³²

Declarations Barring Dower

In England, prior to the Dower Act of 1833, the usual method of barring dower was to convey land to a purchaser to uses to bar dower; that is, to such uses as the purchaser should appoint by deed, in default of such appointment, to himself for life, with remainder to a trustee and his heirs in trust for him during his life, in the event of the determination of the estate by any means during his life, with an ultimate remainder to the purchaser, his heirs and assigns. Under such limitations the purchaser had at no time during his life an estate of inheritance in possession to which the right of dower could attach.³³ Lands may also be disposed of by will for the benefit of a designated person, with a declaration that such person's wife shall have no dower therein.³⁴

SAME—STATUTORY CHANGES

60. Dower, as it exists at common law, has been abolished in some states, and in others largely modified by statute.

In some states, dower has been expressly abolished by statute, and a specific part³⁵ of the husband's real property given in fee simple to the wife.³⁶ In other states, the doctrine of community property obtains.³⁷ In still other states, the common-law estate has been modified in many particulars.³⁸ The rights of a widow in

re William St., 19 Wend. (N. Y.) 678; In re Hall, L. R. 9 Eq. 179, 39 L. J. Ch. 392. The dower right attaches to the proceeds. Bonner v. Peterson, 44 Ill. 253.

³² Matter of New York, etc., Bridge, 75 Hun, 558, 27 N. Y. Supp. 597; Wheeler v. Kirtland, 27 N. J. Eq. 534. See, also, In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817.

³³ Laws of Eng. vol. 24, p. 193, note. Williams, Real Prop. (21st Ed.) p. 390. For examples, see 2 Minor, Inst. 146; Ray v. Pung, 5 Barn. & Ald. 561.

³⁴ Thompson v. Vance, 1 Metc. (Ky.) 669; Germond v. Jones, 2 Hill (N. Y.) 569.

³⁵ One-half in several states. 1 Stim. Am. St. Law, §§ 3105, 3202 F. And see Pearson v. Pearson, 135 Ind. 377, 35 N. E. 288; Zachry v. Lockard, 98 Ala. 371, 13 South. 514; Wadsworth v. Miller, 103 Ala. 130, 15 South. 520.

³⁶ Leavitt v. Tasker, 107 Me. 33, 76 Atl. 953; Graves v. Fligor, 140 Ind. 25, 38 N. E. 853; Hatch v. Small, 61 Kan. 242, 59 Pac. 262; Morrison v. Rice, 35 Minn. 436, 29 N. W. 168; Peirce v. O'Brien (C. C.) 29 Fed. 402.

³⁷ Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Hamilton v. Hirsch, 2 Wash. T. 223, 5 Pac. 215. See, post, Community Property, Ch. XII.

³⁸ 1 Stim. Am. St. Law, § 3202 B; Williams, Real Prop. (17th Ed. Am. note) 377; 1 Washb. Real Prop. (5th Ed.) 196, note 2. For the constitutionality

her deceased husband's real property are in all cases governed by the law of the place where the land is situated. For example, dower may have been abolished in the state of the domicile of the husband and wife, and yet the widow may have dower in lands owned by him in a state where dower still exists.³⁹

of laws changing the dower right, see Black, Const. Law, 431; Glenn v. Glenn, 41 Ala. 571; Shoot v. Galbreath, 128 Ill. 214, 21 N. E. 217; Sears v. Sears, 121 Mass. 267; Seager v. McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; Moore v. New York, 8 N. Y. 110, 59 Am. Dec. 473; Vensel's Appeal, 77 Pa. 71; Mayburry v. Brien, 15 Pet. (U. S.) 21, 10 L. Ed. 646.

³⁹ Lamar v. Scott, 3 Strob. (S. C.) 562; Barnes v. Cunningham, 9 Rich. Eq. (S. C.) 475; Duncan v. Dick, Walk. (Miss.) 281; Jones v. Gerock, 59 N. C. 190.

CHAPTER IX

HOMESTEADS

61. A Statutory Exemption.
62. Duration of Exemption.
63. Who Entitled to Homestead.
64. How Acquired.
65. In What Estates or Interests.
66. Amount, Extent, and Value of Exemption.
67. Selection of Homestead.
68. Change of Homestead.
69. Alienation or Mortgage of Homestead.
70. Loss of Homestead.
71. Enforceable Debts.
72. Federal Homestead.

A STATUTORY EXEMPTION

61. In most states it is provided by statute that the family residence, or home, owned and occupied as the law prescribes, shall be exempt from liability for certain debts.

DURATION OF EXEMPTION

62. The homestead right is an exemption:
- (a) To the owner for life.
 - (b) To the surviving spouse for life, in most states.
 - (c) To the children during their minority, in some states.

Homestead laws are strictly of American origin.¹ They are unknown to the common law,² but nearly every state now provides, either by its constitution or its statutes, that the family residence, or home, owned and occupied as the law prescribes, shall be exempt

¹ See *Barney v. Leeds*, 51 N. H. 253, 261.

² *Sayers v. Childers*, 112 Iowa, 677, 98 N. W. 938. Under the early English common law no real property was subject to sale to satisfy the claims of creditors. 3 Blk. Comm. 418; *Lindley v. Davis*, 7 Mont. 206, 213, 14 Pac. 717. The first statute which gave a judgment creditor a claim against a debtor's lands was passed in the reign of Edward I (13 Edw. I, c. 18, called the "Statute of Westminster II"), shortly before the statute of *quia emptores* (18 Edw. I, c. 1). Under this statute, however, only one-half of the debtor's land could be levied upon. *Williams, Real Prop.* (17th Ed.) p. 308.

from execution sale for certain debts.³ The homestead laws of the several states, while agreeing somewhat in their general nature and plan, differ much in wording and detail. Moreover, there is not much harmony in the interpretations which have been given by the courts of the different states to similar provisions of these acts. In every case the statutes and decisions of the state in question must be consulted. Although some states call the homestead interest a life estate,⁴ others a freehold estate,⁵ or even a fee,⁶ the prevailing view is that it is not an estate at all, but only an exemption.⁷ It is an exemption, on grounds of public policy, of a home to a debtor and his family.⁸ The exemption continues in general for the life of the owner and of the surviving spouse, and until the minor children, if any, reach majority;⁹ that is, during a life or lives. The interest is therefore closely allied to legal life estates, and possesses many of the incidents of such estates.¹⁰

³ The earliest statute was enacted by the republic of Texas, January 26, 1839. The constitution of Texas, in 1845, guaranteed a homestead right, followed by Vermont, in 1849. Since then, every state, excepting Delaware, Indiana, Maryland, Pennsylvania, and Rhode Island, have adopted similar laws. *Cyc. Homestead*, vol. 21, p. 459, note.

⁴ *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 260, 36 L. R. A. (N. S.) 1029; *Helm v. Kaddatz*, 107 Ill. App. 413; *Sayers v. Childers*, 112 Iowa, 677, 84 N. W. 938; *Silloway v. Brown*, 12 Allen (Mass.) 30.

⁵ *Gillespie v. Gas Co.*, 236 Ill. 188, 86 N. E. 219; *Snodgrass v. Copple*, 203 Mo. 480, 493, 101 S. W. 1090; *Swan v. Stephens*, 99 Mass. 7; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526.

⁶ *Hirsch v. Prescott* (C. C.) 89 Fed. 52; *Jones v. De Graffenreid*, 60 Ala. 145.

⁷ *Abbott v. Heald*, 128 La. 718, 55 South. 28, 34; *Ellinger v. Thomas*, 64 Kan. 189, 67 Pac. 529; *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635; *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178.

⁸ *Hannon v. Railroad Co.*, 12 Cal. App. 350, 107 Pac. 335; *Richardson v. Woodward*, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94; *Cook v. McChristian*, 4 Cal. 24; *Eagle v. Smylie*, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562; *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292.

⁹ See *infra*.

¹⁰ *Kerley v. Kerley*, 13 Allen (Mass.) 286; *Hunter v. Law*, 68 Ala. 365; *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830. It is also an estate upon condition, namely, that it continue to be occupied as a homestead. *Locke v. Rowell*, 47 N. H. 46. Homestead also under some statutes resembles the common-law tenancy in entirety, since the estate goes to the survivor, and both husband and wife must join in a conveyance. See, *post*, chapter XII.

WHO ENTITLED TO HOMESTEAD

63. The homestead exemption can in most states be claimed only by the "head of a family." Some states secure the right to "householders," or to a "housekeeper with a family."

Protection of the family home being the underlying principle of the homestead acts,¹¹ most of the statutes secure the exemption to the "head of a family."¹² Some statutes, however, employ the term "householder,"¹³ or a "housekeeper with a family."¹⁴ A number of cases hold that the test to determine whether one claiming a homestead is the head of a family is the existence of a legal or moral duty to support dependent persons living with him.¹⁵ A husband and wife are such a family, although they have no children;¹⁶ likewise a father or grandfather and his children or grandchildren.¹⁷ A family does not consist, however, of

¹¹ *Eastern Kentucky Asylum for Insane v. Cottle*, 143 Ky. 719, 137 S. W. 235; *Carroll v. Jeffries*, 39 Tex. Civ. App. 126, 87 S. W. 1050; *Stodgell v. Jackson*, 111 Ill. App. 256. And see *supra*.

¹² *Thomp. Homest. & Exemp.* 39. Alienage does not exclude one from the benefit of homestead exemptions. *Cobbs v. Coleman*, 14 Tex. 594; *People ex rel. Dobson v. McClay*, 2 Neb. 7; *Dawley v. Ayers*, 23 Cal. 108; *Sproul v. McCoy*, 26 Ohio St. 577.

¹³ *Stodgell v. Jackson*, 111 Ill. App. 256.

¹⁴ *Kitchell v. Burgwin*, 21 Ill. 40; *Myers v. Ford*, 22 Wis. 139; *Rock v. Haas*, 110 Ill. 528; *Holburn v. Pfannmiller's Adm'r*, 114 Ky. 831, 71 S. W. 940, 24 Ky. Law Rep. 1613; *Pierce v. Kusic*, 56 Vt. 418; *Wike v. Garner*, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102.

¹⁵ *In re Taylor*, Fed. Cas. No. 13,775; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394; *Sykes v. Speer* (Tex. Civ. App.) 112 S. W. 422; *Thomp. Homest. & Exemp.* 46; *Connaughton v. Sands*, 32 Wis. 387; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Blackwell v. Broughton*, 56 Ga. 390; *Mullins v. Looke*, 8 Tex. Civ. App. 138, 27 S. W. 926; *Whalen v. Cadman*, 11 Iowa, 226; *Marsh v. Lazenby*, 41 Ga. 153; *Sanderlin v. Sanderlin's Adm'r*, 1 Swan (Tenn.) 441. See *SHEEHY v. SCOTT*, 128 Iowa, 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365, *Burdick Cas. Real Property*. Instances are: A single man supporting his mother and dependent brothers and sisters, *Marsh v. Lazenby*, 41 Ga. 153; or dependent minor brothers and sisters, *Greenwood v. Maddox*, 27 Ark. 649; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; or widowed sister with her dependent children, *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; a widower supporting his widowed daughter and her children, *Blackwell v. Broughton*, 56 Ga. 390; or a grown-up daughter, *Cox v. Stafford*, 14 How. Prac. (N. Y.) 519; single woman supporting her illegitimate child, *Ellis v. White*, 47 Cal. 73.

¹⁶ *Kitchell v. Burgwin*, 21 Ill. 40; *Wilson v. Cochran*, 31 Tex. 680, 98 Am. Dec. 553.

¹⁷ *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Ragsdale*,

one person living alone,¹⁸ or of a person and his mere servants.¹⁹ Upon the death of the husband owning a homestead, the right survives to the widow,²⁰ and, usually, to the minor children.²¹ Some statutes give the widow a fee simple title;²² others a life estate.²³ In some states, she loses the homestead by a subsequent marriage.²⁴ In most states, the rights of the surviving children terminate at the respective majority of each.²⁵ In many states,

Cooper & Co. v. Watkins, 76 S. W. 45, 25 Ky. Law Rep. 506; Dorrington v. Myers, 11 Neb. 388, 9 N. W. 555.

¹⁸ Rock v. Haas, 110 Ill. 528; Keiffer v. Barney, 31 Ala. 192; Lomax v. Comstock, 50 Tex. Civ. App. 340, 110 S. W. 762. Contra, Bradley v. Rodelsperger, 3 S. C. 226.

¹⁹ Calhoun v. McLendon, 42 Ga. 405; Ellis v. Davis, 90 Ky. 183, 14 S. W. 74, 11 Ky. Law Rep. 983; Murdock v. Dalby, 13 Mo. App. 41; In re Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes, 233.

²⁰ Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312; Garwood v. Garwood, 244 Ill. 580, 91 N. E. 672. See Weaver v. Bank, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155; Fleetwood v. Lord, 87 Ga. 592, 13 S. E. 574; Fore v. Fore, 2 N. D. 260, 50 N. W. 712. But see Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862; White's Adm'r v. White, 63 Vt. 577, 22 Atl. 602. But not in Georgia, unless there are minor children. Kidd v. Lester, 46 Ga. 231. Some cases hold that the widow must elect between her dower and homestead, Butterfield v. Wicks, 44 Iowa, 310; or between her distributive share and homestead. Egbert v. Egbert, 85 Iowa, 525, 52 N. W. 478. And she may be compelled to choose between homestead and a devise, in a will which clearly requires such election. Meech v. Meech's Estate, 37 Vt. 414. And see Cowdrey v. Hitchcock, 103 Ill. 262.

²¹ In re Still's Estate, 117 Cal. 509, 49 Pac. 463; Zoellner v. Zoellner, 53 Mich. 620, 19 N. W. 556; Chapman v. McGrath, 163 Mo. 292, 63 S. W. 832; Walker v. Walker, 181 Ill. 260, 54 N. E. 956; Bättey v. Barker, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33.

UNDER THE FLORIDA STATUTES, providing that the homestead exemption shall pass to his "heirs," it is held that the term "heirs" includes an adult son and an adult grandson. Miller v. Finegan, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813.

²² Dickinson v. Champion, 167 Ala. 613, 52 South. 445; In re Fath's Estate, 132 Cal. 609, 64 Pac. 995; Murphy v. Richmond, 111 Va. 459, 466, 69 S. E. 442.

²³ Brewington v. Brewington, 211 Mo. 48, 109 S. W. 723; Roberson v. Tipple, 209 Ill. 38, 70 N. E. 584, 101 Am. St. Rep. 217; Holbrook v. Wightman, 31 Minn. 168, 17 N. W. 280; Carver v. Maxwell, 110 Tenn. 75, 71 S. W. 752.

²⁴ In re Emmons' Estate, 142 Mich. 299, 105 N. W. 758; Anderson v. Coburn, 27 Wis. 558; Mitchell v. Mitchell, 69 Kan. 441, 77 Pac. 98; Dei v. Habel, 41 Mich. 88, 1 N. W. 964. And see Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228. Contra, Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

²⁵ Kyle v. Wills, 166 Ill. 501, 46 N. E. 1121; Louden v. Martindale, 109 Mich. 235, 67 N. W. 133; Brewington v. Brewington, 211 Mo. 48, 109 S. W. 723; Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894; Hall v. Fields, 81 Tex. 553, 17 S. W. 82; Tate v. Goff, 89 Ga. 184, 15 S. E. 30; Vornberg v. Owens, 88 Ga. 237, 14 S. E. 562; Lewis v. Lichty, 3 Wash. 213, 28 Pac. 356, 28 Am. St. Rep. 25. But see Haynes v. Schaefer, 96 Ga. 743, 22 S. E. 327; Moore v. Peacock, 94 Ga. 523, 21 S. E. 144.

the surviving husband is entitled to the homestead right,²⁶ even though there are no children.²⁷ A husband, moreover, does not lose his homestead when his wife withdraws from the family under a decree of divorce.²⁸ Children, during the life of the parent who owns the homestead property, have no rights against such parent,²⁹ although against a surviving parent, who does not own the property, they have.³⁰ Nonresidents are not, as a rule, within the privilege of the homestead laws,³¹ and in some states a widow who is a nonresident is not entitled to the homestead upon the death of the husband.³² It is not necessary, however, that a resident should be a citizen of the state.³³

HOW ACQUIRED

64. The homestead exemption is usually acquired by actual occupancy, in good faith, of the premises as a home. In some states there must also be a recorded declaration that the premises are claimed as a homestead.

²⁶ *Payne v. Cummings*, 146 Cal. 426, 80 Pac. 620, 106 Am. St. Rep. 47; *Powell v. Powell*, 247 Ill. 432, 93 N. E. 432; *Silloway v. Brown*, 12 Allen (Mass.) 30; *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53.

²⁷ *Burns v. Keas*, 21 Iowa, 257; *Gray v. Patterson*, 65 Ark. 373, 46 S. W. 730, 1119, 67 Am. St. Rep. 937; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74, 11 Ky. Law Rep. 893; *In re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568; *Stults v. Sale*, 92 Ky. 5, 17 S. W. 148, 13 L. R. A. 743, 36 Am. St. Rep. 575.

²⁸ *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82. But see *Arp v. Jacobs*, 3 Wyo. 489, 27 Pac. 800. See, however, *Cooper v. Cooper*, 24 Ohio St. 489. Where the wife withdraws from the family, she loses her homestead right, if her withdrawal was not justified, *Trawick v. Harris*, 8 Tex. 312; *Cockrell v. Curtis*, 83 Tex. 105, 18 S. W. 436; but not when the husband's conduct has forced her to withdraw, *Meader v. Place*, 43 N. H. 307; *Atkinson v. Atkinson*, 40 N. H. 249, 77 Am. Dec. 712; *Curtis v. Cockrell*, 9 Tex. Civ. App. 51, 28 S. W. 129. A divorced wife cannot claim her "widow's exemption." *Dobson's Adm'r v. Butler's Adm'r*, 17 Mo. 87. But see *Alexander v. Alexander*, 52 Ill. App. 195.

²⁹ *Thomp. Homest. & Exemp.* 476; *Bateman v. Pool*, 84 Tex. 405, 19 S. W. 552.

³⁰ *Thomp. Homest. & Exemp.* 475; *Miller v. Marckle*, 27 Ill. 405; *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924; *Hoppe v. Hoppe*, 104 Cal. 94, 37 Pac. 894.

³¹ *Lyons v. Adams*, 30 Ky. Law Rep. 870, 99 S. W. 900; *Leonard v. Ingraham*, 58 Iowa, 406, 10 N. W. 804; *Rock v. Haas*, 110 Ill. 528; *Farlin v. Sook*, 26 Kan. 397; *Black v. Singley*, 91 Mich. 50, 51 N. W. 704.

³² *Succession of Norton*, 18 La. Ann. 36; *Allen v. Manasse*, 4 Ala. 554; *Meyer v. Claus*, 15 Tex. 516; *Black v. Singley*, 91 Mich. 50, 51 N. W. 704.

³³ *McKenzie v. Murphy*, 24 Ark. 155 (aliens); *Williams v. Young*, 17 Cal. 403 (mulattoes). Alienage does not exclude one from the benefit of homestead

The statutes generally prescribe the way in which a homestead can be acquired, and the mode thus set forth must be observed.³⁴ In most states there must be an actual occupancy of the premises as a home when the question of the exemption arises.³⁵ A mere intent to occupy the premises is not sufficient; the occupancy must be actual,³⁶ although a well-established, bona fide intent to occupy the premises within a reasonable time,³⁷ particularly, in some states, when coupled with acts of preparation, as, for example, improvements upon the premises,³⁸ may be sufficient. Actual occupancy does not mean a constant habitation, with no temporary interruptions of personal presence.³⁹ It does mean, however, a

exemptions. *Cobbs v. Coleman*, 14 Tex. 594; *People ex rel. Dobson v. McClay*, 2 Neb. 7; *Dawley v. Ayers*, 23 Cal. 108; *Sproul v. McCoy*, 26 Ohio St. 577.

³⁴ *Rosenthal v. Bank*, 110 Cal. 198, 42 Pac. 640; *Motley v. Jones*, 98 Ala. 443, 13 South. 782; *Burbank v. Kirby*, 6 Idaho, 210, 55 Pac. 295, 96 Am. St. Rep. 260; *Security Loan & Trust Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467.

³⁵ *Thomp. Homest. & Exemp.* § 198; *Floyd County v. Wolfe*, 138 Iowa, 749, 117 N. W. 32; *Kennedy's Adm'r v. Duncan*, 157 Mo. App. 212, 137 S. W. 299; *Ancker v. McCoy*, 56 Cal. 524; *Fisher v. Cornell*, 70 Ill. 216; *INGELS v. INGELS*, 50 Kan. 755, 32 Pac. 387, *Burdick Cas. Real Property*; *Wisner v. Farnham*, 2 Mich. 472; *Cook v. Newman*, 8 How. Prac. (N. Y.) 523; *In re Buelow (D. C.)* 98 Fed. 86; *Villa v. Pico*, 41 Cal. 469; *Lee v. Miller*, 11 Allen (Mass.) 37; *Titman v. Moore*, 43 Ill. 174; *McCormick v. Wilcox*, 25 Ill. 274; *Reinbach v. Walter*, 27 Ill. 393.

³⁶ *Thomp. Homest. & Exemp.* 199; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Kitchell v. Burgwin*, 21 Ill. 40; *Walters v. People*, 21 Ill. 178; *Tourville v. Piepson*, 39 Ill. 446; *True v. Morrill's Estate*, 28 Vt. 672; *McMonegle v. Wilson*, 103 Mich. 264, 61 N. W. 495; *Cahill v. Wilson*, 62 Ill. 137; *Campbell v. Ayres*, 18 Iowa, 252; *Coolidge v. Wells*, 20 Mich. 79; *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; *Petty v. Barrett*, 37 Tex. 84; *Campbell v. Adair*, 45 Miss. 170. For cases where the facts did not show sufficient occupancy, see *Evans v. Calman*, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; *Tromans v. Mahlman*, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579. The requirement of actual occupancy is relaxed in the case of a widow or minor children surviving the owner. *Titman v. Moore*, 43 Ill. 169; *Locke v. Rowell*, 47 N. H. 46; *Phipps v. Acton*, 12 Bush (Ky.) 375; *Brettun v. Fox*, 100 Mass. 234; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Booth v. Goodwin*, 29 Ark. 633; *Johnston v. Turner*, 29 Ark. 280.

³⁷ *In re Malloy (D. C.)* 179 Fed. 942; *White v. Danforth*, 122 Iowa, 403, 98 N. W. 136; *McCrie v. Lumber Co.*, 7 Kan. App. 39, 51 Pac. 966; *Evans v. Calman*, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576; *INGELS v. INGELS*, 50 Kan. 755, 32 Pac. 387, *Burdick Cas. Real Property*.

³⁸ *Webb v. Hollenbeck*, 48 Ill. App. 514; *Dewille v. Widoe*, 64 Mich. 593, 31 N. W. 533, 8 Am. St. Rep. 852; *Gallagher v. Keller*, 87 Tex. 472, 29 S. W. 647; *Id. (Tex. Civ. App.)* 30 S. W. 248. *Contra*, *First Nat. Bank of Stewart v. Hollinsworth*, 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92.

³⁹ *In re Malloy*, 188 Fed. 788, 110 C. C. A. 494; *Clark v. Dewey*, 71 Minn.

bona fide occupancy of the premises as a home.⁴⁰ That, however, the motive or intent in acquiring a homestead was to secure a home that should be exempt from present debts does not prevent the homestead right from attaching.⁴¹ The occupancy must be personal, and not by a tenant.⁴² There is, however, no stated length of time that the premises must be occupied before the exemption attaches. If actually occupied when the creditor seeks to enforce his claim against the property, it is sufficient.⁴³ The premises must be occupied, however, by the family as a home.⁴⁴ In some states, the use of a portion of the property for business purposes, provided the residence is established upon the premises, is permissible.⁴⁵ In other states, however, the contrary is held.⁴⁶

108, 73 N. W. 639; *Bartle v. Bartle*, 132 Wis. 392, 112 N. W. 471; *Zukoski v. McIntyre*, 93 Miss. 806, 47 South. 435; *Kitchell v. Burgwin*, 21 Ill. 40; *Walters v. People*, 21 Ill. 178; *Potts v. Davenport*, 79 Ill. 455; *Herrick v. Graves*, 16 Wis. 157; *Jarvais v. Moe*, 38 Wis. 440; *Wetz v. Beard*, 12 Ohio St. 431; *Bunker v. Paquette*, 37 Mich. 79.

⁴⁰ *Hostetler v. Eddy*, 128 Iowa, 401, 104 N. W. 485; *Tromans v. Mahlman*, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394; *Bowles v. Hoard*, 71 Mich. 150, 39 N. W. 24; *Lawrence v. Morse*, 122 Mich. 269, 80 N. W. 1087; *Lee v. Miller*, 11 Allen (Mass.) 37; *In re Lammer*, Fed. Cas. No. 8,031, 7 Biss. 269.

⁴¹ *Dowling v. Horne*, 117 Ala. 242, 23 South. 74; *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87; *McPhee v. O'Rourke*, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

⁴² *Maloney v. Hefer*, 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Schoffen v. Landauer*, 60 Wis. 334, 19 N. W. 95; *Hoitt v. Webb*, 36 N. H. 158; *True v. Morrill's Estate*, 28 Vt. 672. See, also, *Kaster v. McWilliams*, 41 Ala. 302; *Elmore v. Elmore*, 10 Cal. 224.

⁴³ *In re Malloy (D. C.)* 179 Fed. 942; *Nichols v. Sennitt*, 78 Ky. 630; *Jackson v. Bowles*, 67 Mo. 609; *Villa v. Pico*, 41 Cal. 469; *Lee v. Miller*, 11 Allen (Mass.) 37; *Titman v. Moore*, 43 Ill. 174; *McCormick v. Wilcox*, 25 Ill. 274; *Reinbach v. Walter*, 27 Ill. 393.

⁴⁴ *Spaulding v. Crane*, 46 Vt. 298; *McClary v. Bixby*, 36 Vt. 254, 84 Am. Dec. 684; *Dyson v. Sheley*, 11 Mich. 527; *Moerlein v. Investment Co.*, 9 Tex. Civ. App. 415, 29 S. W. 162, 948; *Bente v. Lange*, 9 Tex. Civ. App. 328, 29 S. W. 813.

⁴⁵ *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266; *Cowan v. Burchfield (D. C.)* 180 Fed. 614; *In re Lockey*, 112 Minn. 512, 128 N. W. 833; *Stevens v. Hollingsworth*, 74 Ill. 202; *Hoffman v. Hill*, 47 Kan. 611, 28 Pac. 623; *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *Woodward v. Till*, 1 Mich. N. P. 210.

ADJACENT LOTS may constitute parts of the business homestead, if used in connection with the principal business, but not otherwise. *Waggener v. Haskell*, 89 Tex. 435, 35 S. W. 1.

⁴⁶ *True v. Morrill's Estate*, 28 Vt. 672; *Philleo v. Smalley*, 23 Tex. 498; *In re Allen*, 78 Cal. 293, 20 Pac. 679; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106.

In some states, one may claim a homestead in hotel property,⁴⁷ while in other jurisdictions this right is denied.⁴⁸

Declaration of Homestead

The acquisition of a homestead by occupancy is based upon the theory that the use of the premises as a home is notice to the world of the existence of the exemption.⁴⁹ In some states, however, occupancy alone is not sufficient to create a homestead exemption. It is required, in addition, that there be a written declaration or certificate that the premises are claimed as a homestead,⁵⁰ or the word "homestead" must be entered in the margin of the record of the title to the premises.⁵¹ The declaration must be acknowledged and recorded in some states.⁵² It is, of course, necessary that the homestead continue to be occupied as such after the declaration or recording of the notice, or the exemption will be lost.⁵³

IN WHAT ESTATES OR INTERESTS

65. As a rule, any estate in possession, legal or equitable, will support a homestead. In some states, however, a homestead cannot be claimed in joint estates.

It is not necessary that the head of a family, or other person entitled to a homestead, should be the absolute owner of the prop-

⁴⁷ *Bartle v. Bartle*, 132 Wis. 392, 112 N. W. 471; *Lazell v. Lazell*, 8 Allen (Mass.) 575; *Lamont v. Le Fevre*, 96 Mich. 175, 55 N. W. 687; *McKAY v. GESFORD*, 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253, *Burdick Cas. Real Property*.

⁴⁸ *Turner v. Turner*, 107 Ala. 465, 18 South. 210, 54 Am. St. Rep. 110; *McDowell v. His Creditors*, 103 Cal. 264, 35 Pac. 1031, 37 Pac. 203, 42 Am. St. Rep. 114; *Laughlin v. Wright*, 63 Cal. 113.

⁴⁹ *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Williams v. Dorris*, 31 Ark. 466; *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749. See, also, *Grosholz v. Newman*, 21 Wall. (U. S.) 481, 22 L. Ed. 471.

⁵⁰ *Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212; *Welch v. Spragins*, 98 Ky. 279, 32 S. W. 943, 17 Ky. Law Rep. 884; *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534, 125 Am. St. Rep. 937. Compare *Morris v. Pratt*, 53 Tex. Civ. App. 181, 116 S. W. 646.

⁵¹ *Leppel v. Kus*, 38 Colo. 292, 88 Pac. 448; *Goodwin v. Investment Co.*, 110 U. S. 1, 3 Sup. Ct. 473, 28 L. Ed. 47; *Drake v. Root*, 2 Colo. 685.

⁵² *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266; *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153; *Burbank v. Kirby*, 6 Idaho, 210, 55 Pac. 295, 96 Am. St. Rep. 260; *Noble v. Hook*, 24 Cal. 638. Compare, under an earlier statute, *Clements v. Stanton*, 47 Cal. 60; *Nevada Bank of San Francisco v. Treadway (C. C.)* 17 Fed. 887, 8 Sawy. 456.

⁵³ *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Cole v. Gill*, 14 Iowa, 527; *Alley v. Bay*, 9 Iowa, 509.

erty in which a homestead is claimed,⁵⁴ since the title or interest which the one claiming a homestead has in the land is not material to his creditors.⁵⁵ Some cases hold that possession coupled with a claim of homestead entitles one to exemption against creditors,⁵⁶ although the weight of authority is against such a view, it being held that there must be some interest in the land.⁵⁷ This interest, however, may be either legal or equitable.⁵⁸ Accordingly, an equity of redemption,⁵⁹ or a contract to purchase,⁶⁰ will support a claim of homestead. So, also, will a life estate,⁶¹ or a leasehold.⁶² As to estates in joint tenancy or tenancy in common, the cases are in conflict, many jurisdictions holding that a cotenant may acquire a homestead in such property,⁶³ although some states hold

⁵⁴ *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669; *Steiner v. Berney*, 130 Ala. 289, 30 South. 570; *Fitzgerald v. Fernandez*, 71 Cal. 504, 12 Pac. 562; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350.

⁵⁵ *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484; *Atkinson v. Atkinson*, 40 N. H. 249, 77 Am. Dec. 712; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378.

⁵⁶ *Turner v. Browning's Adm'r*, 128 Ky. 79, 85, 107 S. W. 318, 32 Ky. Law Rep. 891; *Winston v. Hodges*, 102 Ala. 304, 15 South. 528; *Brooks v. Hyde*, 37 Cal. 366; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248.

⁵⁷ *Kitchell v. Burgwin*, 21 Ill. 40; *Johnston v. McPherran*, 81 Iowa, 230, 47 N. W. 60; *Wisner v. Farnham*, 2 Mich. 472; *Stamm v. Stamm*, 11 Mo. App. 598.

⁵⁸ *Tracy v. Harbin*, 40 Tex. Civ. App. 395, 89 S. W. 999; *Bailey v. Mercantile Co.*, 138 Ala. 415, 35 South. 451; *Johnson v. May*, Fed. Cas. No. 7,397.

⁵⁹ *White v. Horton*, 154 Cal. 103, 97 Pac. 70, 18 L. R. A. (N. S.) 490; *State v. Mason*, 88 Mo. 222; *Fellows v. Dow*, 58 N. H. 21; *Cheatham v. Jones*, 68 N. C. 153; *Doane's Ex'r v. Doane*, 46 Vt. 485. Contra, *Raber v. Gund*, 110 Ill. 581.

⁶⁰ *Alexander v. Jackson*, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 153; *Stafford v. Woods*, 144 Ill. 203, 33 N. E. 539; *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; *Fyffe v. Beers*, 18 Iowa, 11, 85 Am. Dec. 577; *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *Lee v. Welborne*, 71 Tex. 500, 9 S. W. 471; *Chopin v. Runte*, 75 Wis. 361, 44 N. W. 258.

⁶¹ *Steiner v. Berney*, 130 Ala. 289, 30 South. 570; *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814; *Donahue v. Insurance Co.*, 103 Ky. 755, 46 S. W. 211, 20 Ky. Law Rep. 357; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Potts v. Davenport*, 79 Ill. 455. But that the widow cannot have a homestead in such estate, see *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

⁶² *Beranek v. Beranek*, 113 Wis. 272, 89 N. W. 146; *Thomas v. McKay*, 143 Wis. 524, 128 N. W. 59; *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199; *Pelan v. De Bevard*, 13 Iowa, 53; *Conklin v. Foster*, 57 Ill. 104; *Johnson v. Richardson*, 33 Miss. 462; *Maatta v. Kippola*, 102 Mich. 116, 60 N. W. 300; *In re Emerson's Homestead*, 58 Minn. 450, 60 N. W. 23. But a tenancy at will is not sufficient. *Berry v. Dobson*, 68 Miss. 483, 10 South. 45. And see *Colwell v. Carper*, 15 Ohio St. 279.

⁶³ *McLaughlin v. Collins*, 75 N. H. 557, 78 Atl. 623; *Griffin v. Harris*, 39 Tex. Civ. App. 586, 88 S. W. 493; *Bartle v. Bartle*, 132 Wis. 392, 397, 112 N. W. 471; *Wike v. Garner*, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102;

to the contrary.⁶⁴ Homestead rights in partnership realty are denied in most states, as against other partners or partnership creditors, until the firm debts are paid.⁶⁵ In order to acquire a homestead, the estate or interest must be in possession, since future estates are not sufficient.⁶⁶ For this reason, a widow cannot have a homestead in lands to which the husband was entitled in remainder.⁶⁷ In many states, title in the wife will give a homestead, though the husband be living,⁶⁸ although other cases hold the contrary.⁶⁹ Both, however, cannot claim a homestead.⁷⁰

AMOUNT, EXTENT, AND VALUE OF EXEMPTION

66. The amount, extent, and value of the homestead are limited by the statutes, which greatly vary. The statutes also distinguish between rural homesteads and urban homesteads.

King v. Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; *Johnson v. May*, 13 Fed. Cas. No. 7,397.

⁶⁴ *Rosenthal v. Bank*, 110 Cal. 198, 42 Pac. 640; *Bank of Jeanerette v. Stansbury*, 110 La. 301, 34 South. 452; *Holmes v. Winchester*, 138 Mass. 542; *Cornish v. Frees*, 74 Wis. 490, 43 N. W. 507.

⁶⁵ *In re McCrary Bros. (D. C.)* 169 Fed. 485; *Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. 347; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; *Kingsley v. Kingsley*, 39 Cal. 665; *Rhodes v. Williams*, 12 Nev. 20; *Drake v. Moore*, 66 Iowa, 58, 23 N. W. 263; *Hoyt v. Hoyt*, 69 Iowa, 174, 28 N. W. 500; *Chalfant v. Grant*, 3 Lea (Tenn.) 118. Contra, *Hewitt v. Rankin*, 41 Iowa, 35; *West v. Ward*, 26 Wis. 579; *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764.

⁶⁶ *Reeves & Co. v. Saxton*, 145 Wis. 10, 129 N. W. 784; *Murchison v. Plyler*, 87 N. C. 79; *Davis v. Brown* (Tenn. Ch. App. 1901) 62 S. W. 381; *Loessin v. Washington*, 23 Tex. Civ. App. 515, 57 S. W. 990.

⁶⁷ *Howell v. Jones*, 91 Tenn. 402, 19 S. W. 757. And see *Roach v. Dance*, 80 S. W. 1097, 26 Ky. Law Rep. 157. See, however, *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814.

⁶⁸ *Brichacek v. Brichacek*, 75 Neb. 417, 106 N. W. 473; *Ehreck v. Ehreck*, 106 Iowa, 614, 76 N. W. 793, 68 Am. St. Rep. 330; *Orr v. Shraft*, 22 Mich. 260; *Crane v. Waggoner*, 33 Ind. 83; *Tourville v. Pierson*, 39 Ill. 446; *Partee v. Stewart*, 50 Miss. 717; *Murray v. Sells*, 53 Ga. 257; *Herdman v. Cooper*, 39 Ill. App. 330.

⁶⁹ *Jackson v. Williams*, 129 Ga. 716, 59 S. E. 776; *Squire v. Mudgett*, 61 N. H. 149; *McClenaghan v. McEachern*, 56 S. C. 350, 34 S. E. 627; *Producers' Nat. Bank v. Lumber Co.*, 100 Tenn. 389, 45 S. W. 981.

⁷⁰ *Tourville v. Pierson*, 39 Ill. 447; *Gambette v. Brock*, 41 Cal. 84; *McAdoo, J.*, in *Holliman v. Smith*, 39 Tex. 362.

SELECTION OF HOMESTEAD

67. In some states, the homestead may be selected by the one claiming the exemption, or otherwise set off for him by order of court.

In all the states the amount of which the homestead may consist is limited, either as to the number of acres, or the value of the premises, or both.⁷¹ Under limitations of value, the value of improvements is added to the bare value of the land in estimating the exemption,⁷² unless the statute excludes improvements from the stated amount.⁷³ If the place occupied as a homestead exceeds the value fixed by statute, the excess will be liable for the owner's debts.⁷⁴ The same is true where a greater quantity of land than is allowed by law is claimed as a homestead.⁷⁵ The amount of the homestead exemption depends, under most statutes, on whether the homestead is urban or rural; the former meaning a home in a town or city, and the latter a home in the country, with land used in agricultural pursuits. The fact, however, that the land is brought within the corporate limits of a town or city by the later extension of the limits does not make it an urban homestead, if it is used for agricultural purposes.⁷⁶ It may become changed, however, into an urban homestead by a change in its character, as, for example, being platted into town lots.⁷⁷ In

⁷¹ The amount fixed by statute cannot be exceeded. *Holley v. Horton*, 164 Mich. 31, 129 N. W. 6; *Pickett v. Gleed*, 39 Tex. Civ. App. 71, 86 S. W. 946; *Powe v. McLeod*, 76 Ala. 418; *Acreback v. Myer*, 165 Mo. 685, 65 S. W. 1015.

⁷² *Ray v. Thornton*, 95 N. C. 571; *Richards v. Nelms*, 38 Tex. 445; *Williams v. Jenkins*, 25 Tex. 306; *Vanstory v. Thornton*, 110 N. C. 10, 14 S. E. 637.

⁷³ *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

⁷⁴ *Tibbetts v. Terrill*, 44 Colo. 94, 96 Pac. 978, 104 Pac. 605; *Reilly v. Johnston*, 119 La. 119, 43 South. 977. See *Scott v. Keeth*, 152 Mich. 547, 116 N. W. 183; *Moriarty v. Galt*, 112 Ill. 373; *Kerr v. Park Com'rs*, Fed. Cas. No. 7,733, 8 Biss. 276.

⁷⁵ *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Ferguson v. Kumler*, 27 Minn. 156, 6 N. W. 618. Compare *Crow v. Whitworth*, 20 Ga. 38.

⁷⁶ *Topeka Water Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Barber v. Rorabeck*, 36 Mich. 399; *In re Young*, Fed. Cas. No. 18,149.

⁷⁷ *Jolly v. Diehl*, 38 Tex. Civ. App. 549, 86 S. W. 965; *Foster v. Rice*, 126 Iowa, 190, 101 N. W. 771; *Kiewert v. Anderson*, 65 Minn. 491, 67 N. W. 1031, 60 Am. St. Rep. 487; *In re Young*, Fed. Cas. No. 18,149. The husband cannot, however, without the wife's consent, change a rural into an urban homestead by dividing it into town lots. *Bassett v. Messner*, 30 Tex. 604. Cf. *Allen v. Whitaker* (Tex. Sup.) 18 S. W. 160.

some states, the homestead may consist of parcels or tracts of land not contiguous, provided they are so connected as to make them practically a part of the homestead.⁷⁸ Other cases, however, hold that the tracts must be contiguous.⁷⁹ An urban homestead may consist of adjoining lots, provided they do not exceed the amount or value specified by the statute.⁸⁰ Such adjoining lots must be used as a part of the homestead, however, since, if otherwise, they cannot be included.⁸¹

Selection of Homestead

In most states, no formal selection of a homestead is necessary. The fact that the premises are occupied as a home is usually sufficient.⁸² In some jurisdictions, however, a claimant is given the privilege of selecting a homestead,⁸³ or, in case of a waiver on his part, an allotment may be made by order of court.⁸⁴ In any case, however, the selection of a homestead, if made by a claimant, must

⁷⁸ *Gaar, Scott & Co. v. Reesor*, 91 S. W. 717, 28 Ky. Law Rep. 1308; *Lyon v. Hardin*, 129 Ala. 643, 29 South. 777; *In re Hunsecker's Estate*, 6 Pa. Dist. R. 202, 19 Pa. Co. Ct. R. 14; *Mayho v. Cotton*, 69 N. C. 289; *Martin v. Hughes*, 67 N. C. 293; *Williams v. Hall*, 33 Tex. 212; *Perkins v. Quigley*, 62 Mo. 498; *West River Bank v. Gale*, 42 Vt. 27; *Hodges v. Winston*, 95 Ala. 514, 11 South. 200, 36 Am. St. Rep. 241; *Webb v. Hayner* (D. C.) 49 Fed. 601; *Id.* 605; *Griswold v. Huffaker*, 47 Kan. 690, 28 Pac. 696.

⁷⁹ *Equitable Mortg. Co. v. Lowry* (C. C.) 55 Fed. 165; *In re Forbes*, 186 Fed. 79, 108 C. C. A. 191; *Hornby v. Sykes*, 56 Wis. 382, 14 N. W. 278; *Reynolds v. Hull*, 36 Iowa, 394; *Bunker v. Locke*, 15 Wis. 635; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *True v. Morrill's Estate*, 28 Vt. 672; *Adams v. Jenkins*, 16 Gray (Mass.) 146; *Linn County Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309; *McCrosky v. Walker*, 55 Ark. 303, 18 S. W. 169; *Williams v. Willis*, 84 Tex. 398, 19 S. W. 683; *Allen v. Whitaker* (Tex. Sup.) 18 S. W. 160.

⁸⁰ *Marx v. Threet*, 131 Ala. 340, 30 South. 831; *Englebrecht v. Shade*, 47 Cal. 627; *King v. Welborn*, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803. A lot used by the owner for raising garden vegetables and fruits for the exclusive use of his family is part of the homestead, although located in a different part of the city from the owner's residence lot. *Anderson v. Sessions*, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873.

⁸¹ *Blair v. Trust Co.* (Tex. Civ. App.) 130 S. W. 718; *Sever v. Lyons*, 170 Ill. 395, 48 N. E. 926.

⁸² *Hobson v. Huxtable*, 79 Neb. 334, 112 N. W. 658; *Moss v. Warner*, 10 Cal. 296; *Pollak v. McNeil*, 100 Ala. 203, 13 South. 937; *Evans v. Railroad Co.*, 68 Mich. 602, 36 N. W. 687; *Wilson v. Proctor*, 23 Minn. 13, 8 N. W. 830; *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

⁸³ *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285; *Watkins Land Co. v. Temple* (Tex. Civ. App.) 135 S. W. 1063. And see *MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932.

⁸⁴ *Fischer v. Schultz*, 98 Wis. 462, 74 N. W. 222.

be reasonable and in good faith, and must conform to the statutory requirements.⁸⁵ A claimant cannot make an arbitrary selection.⁸⁶ When the premises occupied as a home by a debtor exceed in area or value the exemption allowed by statute, the debtor may select the part which he will claim as his homestead. He may do so after an execution has been issued against him, provided he has not made a selection previously.⁸⁷ If the debtor fails to make a selection, the court will direct the sheriff or a board of appraisers to make one for him.⁸⁸ In case division of the premises is impossible or inexpedient,⁸⁹ in some states, the premises may be sold, and the amount which is exempt paid over to the debtor.⁹⁰

CHANGE OF HOMESTEAD

68. A change of homestead is permitted under the laws of some states. Also, in some jurisdictions, the proceeds of sale of a homestead are exempt, provided they are to be reinvested in another homestead. The proceeds of insurance upon homestead property are generally exempt.

⁸⁵ *Hardin v. Hancock*, 96 Ark. 579, 132 S. W. 910; *Slappy v. Hanners*, 137 Ala. 199, 33 South. 900; *Williams v. Meyer* (Tex. Civ. App. 1901) 64 S. W. 66; *First Nat. Bank of Shakopee v. How*, 61 Minn. 238, 63 N. W. 632.

⁸⁶ *Marx v. Threet*, 131 Ala. 340, 30 South. 831; *Englebrecht v. Shade*, 47 Cal. 627; *King v. Welborn*, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; *Clements v. Bank*, 64 Ark. 7, 10, 40 S. W. 132, 62 Am. St. Rep. 149.

⁸⁷ *Mackey v. Wallace*, 26 Tex. 526; *Davenport v. Alston*, 14 Ga. 271; *Kent v. Agard*, 22 Wis. 150. Cf. *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341. And see *Thomp. Homest. & Exemp.* 533. For the debtor's right to select in states where there is a limitation on area, but not on value, see *Thomp. Homest. & Exemp.* § 533; *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Houston & G. N. R. Co. v. Winter*, 44 Tex. 597.

⁸⁸ *Holden v. Pinney*, 6 Cal. 234; *Fogg v. Fogg*, 40 N. H. 282, 77 Am. Dec. 715; *Gary v. Eastabrook*, 6 Cal. 457; *Myers v. Ford*, 22 Wis. 139; *Hartwell v. McDonald*, 69 Ill. 293; *Lute v. Reilly*, 65 N. C. 21; *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423. And see *Pinkerton v. Tumlin*, 22 Ga. 165. For procedure in such cases, see *Dillman v. Bank*, 139 Ill. 269, 28 N. E. 946; *Ducote v. Rachal*, 44 La. Ann. 580, 10 South. 933.

⁸⁹ Where the lower floor of a building occupied by a debtor as his home is rented for a store, partition may be made horizontally, and the part used for the store sold on execution. *Amphlett v. Hibbard*, 29 Mich. 208; *Rhodes v. McCormick*, 4 Iowa, 368, 68 Am. Dec. 663; *Mayfield v. Maasden*, 59 Iowa, 517, 13 N. W. 652. But see *Wright v. Ditzler*, 54 Iowa, 620, 7 N. W. 98.

⁹⁰ *Dearing v. Thomas*, 25 Ga. 223; *Appeal of Miller*, 16 Pa. 300; *Appeal of Dodson*, 25 Pa. 232; *Chaplin v. Sawyer*, 35 Vt. 286.

In some states, the statutes permit a change of homestead,⁹¹ and the owner of property occupied as a homestead may sell the same, and reinvest the proceeds in another homestead.⁹² As a general rule, the proceeds of insurance upon homestead property are exempt, since they represent the property itself.⁹³

ALIENATION OR MORTGAGE OF HOMESTEAD

69. Unless the local statutes forbid, a homestead may be sold or mortgaged. In most states, however, husband and wife must join in the conveyance.

In most jurisdictions, homestead premises may be sold or mortgaged, and the grantees or mortgagees can hold them against the grantor's creditors.⁹⁴ In most states, however, the husband and wife must both execute the conveyance,⁹⁵ and in such states the

⁹¹ *Holliman v. Smith*, 39 Tex. 357; *Thompson v. Pickel*, 20 Iowa, 490. And see *Tohermes v. Beiser*, 93 Ky. 415, 20 S. W. 379, 14 Ky. Law Rep. 440; *La Plant v. Lester*, 150 Mich. 336, 113 N. W. 1115; *Hair v. Davenport*, 74 Neb. 117, 103 N. W. 1042; *In re Baker*, 182 Fed. 392, 104 C. C. A. 602; *Oppenheimer v. Howell*, 76 Va. 218. See *ROUSE v. CATON*, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456, *Burdick Cas. Real Property*.

⁹² *Lutz v. Ristine & Ruml*, 136 Iowa, 684, 112 N. W. 818; *Snodgrass v. Cople*, 131 Mo. App. 346, 111 S. W. 845; *In re Baker*, 182 Fed. 392, 104 C. C. A. 602; *Brandenburgh v. Rose*, 110 S. W. 376, 33 Ky. Law Rep. 585; *Macavenny v. Ralph*, 107 Ill. App. 542; *Green v. Root* (D. C.) 62 Fed. 191.

⁹³ *Houghton v. Lee*, 50 Cal. 101; *Alvord Nat. Bank v. Ferguson* (Tex. Civ. App.) 126 S. W. 622; *Reynolds v. Haines*, 83 Iowa, 342, 49 N. W. 851. 13 L. R. A. 719, 32 Am. St. Rep. 311; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524. *Contra*, *Smith v. Ratcliff*, 66 Miss. 683, 6 South. 460, 14 Am. St. Rep. 606.

⁹⁴ *Soper v. Galloway*, 129 Iowa, 145, 105 N. W. 399; *Melton v. Beasley*, 56 Tex. Civ. App. 537, 121 S. W. 574; *Gee v. Moore*, 14 Cal. 472; *Dawson v. Hayden*, 67 Ill. 52; *Hannon v. Sommer* (C. C.) 10 Fed. 601, 3 McCrary, 126; *Green v. Marks*, 25 Ill. 225; *Fishback v. Lane*, 36 Ill. 437; *Lamb v. Shays*, 14 Iowa, 567; *Morris v. Ward*, 5 Kan. 239; *C. Aultman & Co. v. Salinas*, 44 S. C. 299, 22 S. E. 465. This is the rule in states where judgments against the owner are not liens upon the homestead, but in other states such judgments are liens which remain in abeyance while the homestead right exists. The latter rule prevents a sale of the homestead, except subject to such judgment liens. *Folsom v. Carl*, 5 Minn. 333 (Gil. 264), 80 Am. Dec. 429; *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112. See, also, *Hoyt v. Howe*, 3 Wis. 752, 62 Am. Dec. 705; *Allen v. Cook*, 26 Barb. (N. Y.) 374; *Jackson v. Allen*, 30 Ark. 110.

⁹⁵ *Davis v. Lumber Co.*, 151 Ala. 580, 44 South. 639; *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194; *Coon v. Wilson*, 222 Ill. 633, 78 N. E. 900, 113 Am. St. Rep. 441; *Lott v. Lott*, 146 Mich. 580, 109 N. W. 1126, 8 L. R. A. (N. S.) 748; *Grace v. Grace*, 96 Minn. 294, 104 N. W. 969, 4 L. R. A. (N. S.) 786, 113 Am. St. Rep. 625, 6 Ann. Cas. 952; *Wilburr*

husband's sole deed is void, and estops neither to claim a homestead.⁹⁶ Where, however, the conveyance is to secure an enforceable debt;⁹⁷ or if the homestead has not been selected, the conveyance is good, because in such cases there is no homestead exemption.⁹⁸ Upon the abandonment of the premises as a homestead, the husband may, as a rule, convey without the consent or joinder of the wife.⁹⁹ The homestead interest itself cannot, however, be sold separately from the premises out of which the right is claimed.¹ If the wife is under duress when she signed,² or if either hus-

v. Land, 138 Wis. 36, 119 N. W. 803; Mundy v. Shellabarger, 161 Fed. 503, 88 C. C. A. 445; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200; Wallace v. Insurance Co., 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288. So a contract to convey must be signed by the wife. Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200. The rule does not apply to conveyances to the wife and children. Riehl v. Bingenheimer, 28 Wis. 84. See, also, Castle v. Palmer, 6 Allen (Mass.) 401; Malony v. Horan, 12 Abb. Prac. N. S. (N. Y.) 289; Turner v. Bernheimer, 95 Ala. 241, 10 South. 750, 36 Am. St. Rep. 207. Cf., however, Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983. The statutes sometimes provide for acknowledgment by the wife separate and apart from the husband. Cross v. Everts, 28 Tex. 523-532; Lambert v. Kinnery, 74 N. C. 348.

⁹⁶ Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298; Richards v. Chace, 2 Gray (Mass.) 383; Williams v. Starr, 5 Wis. 534; Barton v. Drake, 21 Minn. 299; Wea Gas, Coal & Oil Co. v. Land Co., 54 Kan. 533, 38 Pac. 790, 45 Am. St. Rep. 297. It is void even as to the husband. Beecher v. Baldy, 7 Mich. 488; Phillips v. Stauch, 20 Mich. 369; Myers v. Evans, 81 Tex. 317, 16 S. W. 1060. Such a conveyance is valid as to any excess over the amount of the homestead. Hait v. Houle, 19 Wis. 472; Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200; Wallace v. Harris, 32 Mich. 398; Boyd v. Cuddeback, 31 Ill. 113; Smith v. Miller, 31 Ill. 157; Black v. Lusk, 69 Ill. 70. See, also, Smith v. Provin, 4 Allen (Mass.) 516.

⁹⁷ Thacker v. Booth, 6 S. W. 460, 9 Ky. Law Rep. 745; Clements v. Lacy, 51 Tex. 150; Van Sandt v. Alvis, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25; Kimble v. Esworthy, 6 Ill. App. 517; Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; Burnside v. Terry, 51 Ga. 186. In some states, the husband may convey the reversionary interest in his homestead. Gilbert v. Cowan, 3 Lea (Tenn.) 203.

⁹⁸ People v. Plumsted, 2 Mich. 465; Homestead Building & Loan Ass'n v. Enslow, 7 S. C. 1. And see Wynne v. Hudson, 66 Tex. 1, 17 S. W. 110; Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

⁹⁹ Woodstock Iron Co. v. Richardson, 94 Ala. 629, 10 South. 144; Guidé v. Guidé, 14 Cal. 506, 76 Am. Dec. 440; Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146; Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Vasey v. Trustees, 59 Ill. 188; Jordan v. Godman, 19 Tex. 273.

¹ McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Chamberlain v. Lyell, 3 Mich. 458; Hewitt v. Templeton, 48 Ill. 367; Appeal of Bowyer, 21 Pa. 210.

² Anderson v. Anderson, 9 Kan. 112; Blumer v. Albright, 64 Neb. 249, 89

band or wife was insane at the time of the execution of the conveyance,³ the transfer will be invalid. Where, however, the wife is fraudulently induced by the husband to sign, the grantee or mortgagee not being a party to the fraud, the conveyance may be upheld.⁴ A fraudulent conveyance, however, set aside by the husband's creditors, does not, according to some decisions, estop the husband or the wife, although she joined in the deed, to claim a homestead in the premises.⁵ The contrary is held, however, by some courts.⁶

LOSS OF HOMESTEAD

70. The homestead right may be lost:

- (a) By abandonment.
- (b) By waiver.
- (c) By estoppel.
- (d) By divorce, in some states.

Abandonment

Homestead laws, being created as a matter of public policy,⁷ are liberally construed in favor of the debtor.⁸ Moreover, the

N. W. 809; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Dec. 623; *Hill v. Hite* (C. C.) 79 Fed. 826.

³ *Thompson v. Mortgage Security Co.*, 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; *Alexander v. Vennum*, 61 Iowa, 160, 16 N. W. 80; *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456; *Heidenheimer v. Thomas*, 63 Tex. 287. See *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S. W. 219.

⁴ *Stewart v. Whitlock*, 58 Cal. 2; *Miller v. Wolbert*, 71 Iowa, 539, 29 N. W. 620, 32 N. W. 402; *Peake v. Thomas*, 39 Mich. 584; *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361.

EFFECT OF CURATIVE LEGISLATION.—Fraud in procuring a wife's signature to a conveyance of the husband's land might be purged by a subsequent healing act, rendering all such deeds valid. *Hill v. Yarbrough*, 62 Ark. 320, 35 S. W. 433.

⁵ *Thomp. Homest. & Exemp.* 352; *Cox v. Wilder*, 2 Dill. 45, Fed. Cas. No. 3,308; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378; *Castle v. Palmer*, 6 Allen (Mass.) 401; *Smith v. Rumsey*, 33 Mich. 183; *Murphy v. Crouch*, 24 Wis. 365; *Muller v. Inderreiden*, 79 Ill. 382.

⁶ *Piper v. Johnston*, 12 Minn. 60 (Gil. 27); *Getzler v. Saroni*, 18 Ill. 511; *Appeal of Huey*, 29 Pa. 219.

⁷ *Richardson v. Woodward*, 104 Fed. 873, 44 C. C. A. 235.

⁸ *Donnelly v. Tregaskis*, 154 Cal. 261, 97 Pac. 421; *Floyd County v. Wolfe*, 138 Iowa, 749, 117 N. W. 32; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Jaenicke v. Drill Co.*, 106 Minn. 442, 119 N. W. 60; *In re Baker*, 182 Fed. 392, 104 C. C. A. 602. *Contra*, *Todd v. Gordy*, 28 La. Ann. 666.

loss of homestead is not favored by the courts.⁹ Where, however, there is a clear abandonment of the homestead, the right will be extinguished.¹⁰ Loss by abandonment is in all cases a question of fact,¹¹ the question of intent being vital in determining the fact.¹² The intent to abandon may, however, be established by the acts and circumstances of the particular case.¹³ Temporary absences,¹⁴ occasioned by necessity,¹⁵ business,¹⁶ ill health,¹⁷ or plans for

⁹ *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, 12 Ann. Cas. 715; *Hubbell v. Canady*, 58 Ill. 425; *Barrett v. Wilson*, 102 Ill. 302; *Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98.

¹⁰ *Ungers v. Chapman*, 146 Mich. 643, 109 N. W. 1124; *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Fisher v. Cornell*, 70 Ill. 216; *Blackburn v. Traffic Co.*, 90 Wis. 362, 63 N. W. 289; *Kellerman v. Aultman* (C. C.) 30 Fed. 888; *Carr v. Rising*, 62 Ill. 14.

¹¹ *Thomp. Homest. & Exemp.* § 218; *Feldes v. Duncan*, 30 Ill. App. 469; *Loveless v. Thomas*, 152 Ill. 479, 38 N. E. 907; *Stewart v. Brand*, 23 Iowa, 477; *Orman v. Orman*, 26 Iowa, 361; *Potts v. Davenport*, 79 Ill. 459; *Brennan v. Wallace*, 25 Cal. 108; *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372; *Bradford v. Trust Co.*, 47 Kan. 587, 28 Pac. 702; *Robinson v. Swearingen*, 55 Ark. 55, 17 S. W. 365; *Metcalf v. Smith*, 106 Ala. 301, 17 South. 537; *Blackman v. Hardware Co.*, 106 Ala. 458, 17 South. 629.

¹² *Cushman v. Davis*, 79 Vt. 111, 64 Atl. 456; *Sykes v. Spur* (Tex. Civ. App.) 112 S. W. 422; *Kennedy's Adm'r v. Duncan*, 157 Mo. App. 212, 137 S. W. 299; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; *McMillan v. Warner*, 38 Tex. 410; *Shepherd v. Cassiday*, 20 Tex. 24, 70 Am. Dec. 372; *Gouhenant v. Cockrell*, 20 Tex. 97; *Potts v. Davenport*, 79 Ill. 455; *Lazell v. Lazell*, 8 Allen (Mass.) 575; *Kitchell v. Burgwin*, 21 Ill. 40; *Buck v. Conlogue*, 49 Ill. 391; *Titman v. Moore*, 43 Ill. 169; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Campbell v. Potter* (Ky.) 29 S. W. 139; *D. M. Osborne & Co. v. Schoonmaker*, 47 Kan. 667, 28 Pac. 711; *Gregory v. Oates*, 92 Ky. 532, 18 S. W. 231.

¹³ *Embry v. Bank*, 125 La. 116, 51 South. 87; *Drought & Co. v. Stallworth*, 45 Tex. Civ. App. 159, 100 S. W. 188; *Gadsby v. Monroe*, 115 Mich. 282, 73 N. W. 367; *In re Mayer*, 108 Fed. 599, 47 C. C. A. 512.

¹⁴ *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Lynn v. Sentel*, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110; *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616; *Sloss v. Sullard*, 63 Kan. 884, 65 Pac. 658; *Lazell v. Lazell*, 8 Allen (Mass.) 575; *Hitchcock v. Misner*, 111 Mich. 180, 69 N. W. 226; *Duffey v. Willis*, 99 Mo. 132, 12 S. W. 520; *Rollins v. O'Farrel*, 77 Tex. 90, 13 S. W. 1021; *In re Harrington* (D. C.) 99 Fed. 390.

¹⁵ *Lawson v. Hammond*, 119 Mo. App. 480, 94 S. W. 313; *Speer & Goodnight v. Sykes*, 102 Tex. 451, 119 S. W. 86, 132 Am. St. Rep. 896; *Herrick v. Graves*, 16 Wis. 157; *Pierson v. Truax*, 15 Colo. 223, 25 Pac. 183.

¹⁶ *Jaenicke v. Drill Co.*, 106 Minn. 442, 119 N. W. 60; *McComas v. Curtis* (Tex. Civ. App.) 130 S. W. 594; *Bunker v. Paquette*, 37 Mich. 79; *Carroll v. Dawson*, 103 Ky. 736, 46 S. W. 222, 20 Ky. Law Rep. 349.

¹⁷ *Weatherington v. Smith*, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394; *Ayres v. Patton*, 51 Tex. Civ. App. 186, 111 S. W. 1079; *Hughes v. Newton*, 89 Fed. 213, 32 C. C. A. 193.

the education of children,¹⁸ will not be construed as abandonment where there is an intention to return. On the other hand, long-continued absence may amount to an abandonment, particularly if there is no evidence of an intent to return.¹⁹ Leasing the homestead to a tenant is not conclusive evidence of an abandonment,²⁰ but the acquisition of another homestead is.²¹ Some statutes provide that only certain named acts, or a written declaration of purpose, shall be evidence of abandonment.²² Although no premises can be a homestead unless they are used as such,²³ yet the use of part of the premises for business purposes does not take away the exemption.²⁴ In most states it is held, however, that separate

¹⁸ *Brandenburgh v. Rose* (Ky.) 110 S. W. 376; *Campbell v. Adair*, 45 Miss. 170; *Phillips v. Root*, 68 Wis. 128, 31 N. W. 712.

¹⁹ *Gist v. Lucas*, 122 Ala. 557, 25 South. 41; *Lyons v. Andry*, 106 La. 356, 31 South. 38, 55 L. R. A. 724, 87 Am. St. Rep. 299; *Fyffe v. Beers*, 18 Iowa, 7, 85 Am. Dec. 577; *Dunton v. Woodbury*, 24 Iowa, 74; *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *William Deering & Co. v. Beard*, 48 Kan. 16, 28 Pac. 981.

²⁰ *Herrick v. Graves*, 16 Wis. 163; *Austin v. Stanley*, 46 N. H. 51; *Campbell v. Adair*, 45 Miss. 170; *Wetz v. Beard*, 12 Ohio St. 431; *Pardo v. Bittorf*, 48 Mich. 275, 12 N. W. 164; *Wiggins v. Chance*, 54 Ill. 175; *Buck v. Conlogue*, 49 Ill. 391; *Myers v. Ford*, 22 Wis. 139; *Eckman v. Scott*, 34 Neb. 817, 52 N. W. 822. But see *In re Phelan's Estate*, 16 Wis. 76; *Fisher v. Cornell*, 70 Ill. 216; *Davis v. Andrews*, 30 Vt. 678; *Warren v. Peterson*, 32 Neb. 727, 49 N. W. 703; *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110; *Malone v. Kornrumpf*, 84 Tex. 454, 19 S. W. 607.

²¹ *Randolph v. Wilhite*, 78 Kan. 355, 96 Pac. 492; *Smith v. Knerr*, 203 Ill. 264, 67 N. E. 780; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731; *Blackburn v. Traffic Co.*, 90 Wis. 362, 63 N. W. 289; *Wolf v. Hawkins*, 60 Ark. 262, 29 S. W. 892. Cf. *Davis v. Kelley*, 14 Iowa, 523; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Titman v. Moore*, 43 Ill. 169. But see *Ross v. Porter*, 72 Miss. 361, 16 South. 906; *McMillan v. Warner*, 38 Tex. 410. And see *ROUSE v. CATON*, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456, *Burdick, Cas. Real Property*.

²² Civ. Code Cal. §§ 1243, 1244. And see *In re Winslow's Estate*, 121 Cal. 92, 53 Pac. 362; *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244; *Kennedy v. Gloster*, 93 Cal. 143, 32 Pac. 941; *Waggle v. Worthy*, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; *Dulanty v. Pynchon*, 6 Allen (Mass.) 510; *Locke v. Rowell*, 47 N. H. 46; *Cross v. Everts*, 28 Tex. 533; *Jarvais v. Moe*, 38 Wis. 445.

²³ *Hoitt v. Webb*, 36 N. H. 158; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Philleo v. Smalley*, 23 Tex. 499; *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; *Grosholz v. Newman*, 21 Wall. (U. S.) 481, 22 L. Ed. 471. A man can have only one homestead. *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257. In Texas there may be an exemption of a "business homestead," also. *Lavell v. Lapowski*, 85 Tex. 168, 19 S. W. 1004; *Webb v. Hayner* (D. C.) 49 Fed. 601; *Id.*, 605. But see *Houston v. Newsome*, 82 Tex. 75, 17 S. W. 603.

²⁴ *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Orr v. Shraft*, 22 Mich. 260; *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *In re Ogburn's Estate*, 105 Cal. 95, 38 Pac. 498; *Groneweg v. Beck*,

buildings rented to tenants will not be exempt, although they are on the homestead lot.²⁵

Waiver

When supported by an adequate consideration,²⁶ the homestead exemption may be expressly waived, at the time a debt is created; the waiver being made by the persons competent to sell the homestead.²⁷ The wife must, however, join in the waiver to make it effectual,²⁸ and in some states the waiver must be acknowledged and recorded.²⁹ It is, moreover, held, in some jurisdictions, that an express waiver of the homestead right is necessary in order to make a valid mortgage of such property.³⁰

Estoppel

In a number of states,³¹ although not in all,³² there must be a positive claim or notice of a homestead exemption in connection with judicial sales, or, otherwise, a purchaser at such sales will

93 Iowa, 717, 62 N. W. 31. But see *Rhodes v. McCormack*, 4 Iowa, 368, 68 Am. Dec. 663; *Garrett v. Jones*, 95 Ala. 96, 10 South. 702.

²⁵ *Thomp. Homest. & Exemp.* 113; *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710; *McDonald v. Clark* (Tex. Sup.) 19 S. W. 1023. Cf. *Martin Clothing Co. v. Henly*, 83 Tex. 592, 19 S. W. 167. But see *Milford Sav. Bank v. Ayers*, 48 Kan. 602, 29 Pac. 1149; *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585.

²⁶ *Hubbard v. Improvement Co.*, 81 Miss. 616, 33 South. 413.

²⁷ *Zeno v. Adoue*, 54 Tex. Civ. App. 36, 117 S. W. 1039; *Jones v. Dillard*, 70 Ark. 69, 66 S. W. 202; *Chamberlain v. Lyell*, 3 Mich. 448; *Bunker v. Coons*, 21 Utah, 164, 60 Pac. 549, 81 Am. St. Rep. 680; *Beecher v. Baldy*, 7 Mich. 488; *Hutchings v. Huggins*, 59 Ill. 29; *Ayers v. Hawks*, 1 Ill. App. 600; *Ferguson v. Kumler*, 25 Minn. 183; *Moore v. Reaves*, 15 Kan. 150; *Webster v. Trust Co.*, 93 Ga. 278, 20 S. E. 310. The proceeds of sale are not exempt. *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775.

²⁸ *Allen v. Crane*, 152 Mich. 380, 116 N. W. 392, 16 L. R. A. (N. S.) 947; *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534; *Ayers v. Hawks*, 1 Ill. App. 600; *Beavan v. Speed*, 74 N. C. 544; *Beecher v. Baldy*, 7 Mich. 488.

²⁹ *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534; *Crout v. Sauter*, 13 Bush (Ky.) 442.

³⁰ *Neal v. Perkerson*, 61 Ga. 345; *Ives v. Mills*, 37 Ill. 73, 87 Am. Dec. 238; *Wing v. Cropper*, 35 Ill. 256. Compare *Franks v. Lucas*, 14 Bush (Ky.) 395, holding that, if the owner of a homestead right embracing two tracts of land executes a mortgage on the tract on which his dwelling house is situated, he does not thereby waive his homestead right in the other.

³¹ *Ard v. Pratt*, 61 Kan. 775, 60 Pac. 1048; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Herschfeldt v. George*, 6 Mich. 456; *Miller v. Sherry*, 2 Wall. (U. S.) 237, 17 L. Ed. 827; *Rogers v. Lackland*, 117 Ala. 599, 23 South. 489; *Sears v. Hanks*, 14 Ohio St. 293, 84 Am. Dec. 378; *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349.

³² *Castle v. Palmer*, 6 Allen (Mass.) 401; *Ferguson v. Kumler*, 25 Minn. 183; *Hoppe v. Goldberg*, 82 Wis. 660, 53 N. W. 17; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63.

take the property freed from the right. Likewise one may be estopped to claim subsequently a homestead, where in a suit he might have pleaded a right of homestead, but failed to do so.³³ In other instances, the conduct of the owner of a homestead, whereby he has caused another to understand that the property was not a homestead, may operate as an estoppel.³⁴ The doctrine of estoppel by deed also applies to homestead rights.³⁵

Divorce

Upon the dissolution of the marriage by divorce, it is held, in a number of cases, that the wife, since she ceases to be a member of the husband's family, loses her rights to the homestead.³⁶ The decree may, however, in the distribution of the property, reserve to her the right,³⁷ and, if she is the owner of the homestead, she may continue to occupy it as such.³⁸ The mere desertion of the husband,³⁹ or wife,⁴⁰ by the other spouse, will not, in itself, destroy the character of the homestead, although an entire dissolution of the family will do so.⁴¹

³³ *Stanley v. Ehrman*, 83 Ala. 215, 3 South. 527; *Wright v. Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Bemis v. Conley*, 95 Mich. 617, 55 N. W. 387; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Miller v. Sherry*, 2 Wall. (U. S.) 237, 17 L. Ed. 827.

³⁴ *Ward v. Baker* (Tex. Civ. App.) 135 S. W. 620; *Osman v. Wisted*, 78 Minn. 295, 80 N. W. 1127; *Andruss v. Saving Ass'n*, 94 Fed. 575, 36 C. C. A. 336; *In re Haake*, 11 Fed. Cas. No. 5,883, 2 Sawy. 231; *Linn v. Ziegler*, 68 Kan. 528, 75 Pac. 489; *Thompson Sav. Bank v. Gregory*, 36 Tex. Civ. App. 578, 82 S. W. 802.

³⁵ *Scottish-American Mortg. Co. v. Scripture* (Tex. Civ. App. 1897), 40 S. W. 210; *Leslie v. Elliott*, 26 Tex. Civ. App. 578, 64 S. W. 1037; *Foss v. Strachn*, 42 N. H. 40; *Watkins v. Little*, 80 Fed. 821, 25 C. C. A. 438.

³⁶ *Rendleman v. Rendleman*, 118 Ill. 257, 8 N. E. 773; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771. See *Burns v. Lewis*, 86 Ga. 591, 13 S. E. 123.

³⁷ *Holland v. Zilliox*, 38 Tex. Civ. App. 416, 86 S. W. 36; *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. 142, 12 L. R. A. 514.

³⁸ *City Store v. Cofer*, 111 Cal. 482, 44 Pac. 168; *Kern v. Field*, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58.

³⁹ *Weatherington v. Smith*, 77 Neb. 369, 112 N. W. 566; *New England Trust Co. v. Nash*, 5 Kan. App. 739, 46 Pac. 987; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63. Compare *Buckingham v. Buckingham*, 81 Mich. 89, 45 N. W. 504.

⁴⁰ *Winkles v. Powell*, 173 Ala. 46, 55 South. 536; *Metz v. Schneider*, 120 Mo. App. 453, 97 S. W. 187; *Lynn v. Sentel*, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110; *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *Keyes v. Scanlan*, 63 Wis. 345, 23 N. W. 570. Contra, *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516.

⁴¹ *Santa Cruz Bank of Savings v. Cooper*, 56 Cal. 339; *Matthews v. Jeacle*.

ENFORCEABLE DEBTS

71. The homestead is exempt from liability for most debts. There are certain debts, however, that are enforceable against it. They are, generally, as follows:
- (a) Public debts, in most cases.
 - (b) Liabilities for torts, in some states.
 - (c) Debts contracted before the passage of the homestead laws.
 - (d) Debts contracted and liens attaching before the acquisition of the homestead, in many states.
 - (e) Debts contracted in removing incumbrances, in a few states.
 - (f) Liens for the improvement, or preservation of the property, in many states.

From liability for most debts of the owner a homestead is exempt.⁴² Some debts, however, are privileged, and these are enforceable against the homestead. Generally the homestead is not exempt from taxes,⁴³ but it is held, on the other hand, that a homestead is exempt from debts due the state or the United States, unless the statute makes an express exception as to such debts.⁴⁴ As to fines for public offenses,⁴⁵ or liability on official bonds,⁴⁶ the decisions are not uniform. Some states make the home-

61 Fla. 686, 55 South. 865; *Gaar, Scott & Co. v. Wilson* (Iowa, 1901) 88 N. W. 332; *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529.

⁴² *Clarke v. Sherman*, 128 Iowa, 353, 103 N. W. 982; *Sweet v. Lyon*, 39 Tex. Civ. App. 450, 88 S. W. 384; *Frier v. Lowe*, 232 Ill. 622, 83 N. E. 1083; *In re Mussey* (D. C.) 179 Fed. 1007; *Ayres v. Grill*, 85 Iowa, 720, 51 N. W. 14; *Perry v. Ross*, 104 Cal. 15, 37 Pac. 757, 43 Am. St. Rep. 66; *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423; *Webb v. Hayner* (D. C.) 49 Fed. 601; *Id.*, 605; *Walters v. Association*, 8 Tex. Civ. App. 500, 29 S. W. 51; *Hofman v. Demple*, 53 Kan. 792, 37 Pac. 976.

⁴³ *Davis v. State*, 60 Ga. 76; *Hubbell v. Canady*, 58 Ill. 426; *Morris v. Ward*, 5 Kan. 239; *Commonwealth v. Lay*, 12 Bush (Ky.) 284, 23 Am. Rep. 718. But see *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770.

⁴⁴ *Loomis v. Gerson*, 62 Ill. 11; *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196.

IN GEORGIA AND TEXAS TAXES are expressly excepted from the operation of the homestead law (*Colquitt v. Brown*, 63 Ga. 440; *Davis v. State*, 60 Ga. 76; *Hayes v. Taylor*, 17 Tex. Civ. App. 449, 43 S. W. 314); but if the homestead land is sold for taxes illegally assessed against it, the sale is void (*Hayes v. Taylor*, 17 Tex. Civ. App. 449, 43 S. W. 314).

⁴⁵ Exempt: *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; *Loomis v. Gerson*, 62 Ill. 11; *Clark v. Allen* (D. C.) 114 Fed. 374. Not exempt: *Williams v. Bowden*, 69 Ala. 433; *McClure v. Braniff*, 75 Iowa, 38, 39 N. W. 171.

⁴⁶ Holding that there is no exemption: *McWatty v. Jefferson County*, 76

stead subject to liability for torts and for the costs of such actions.⁴⁷ Debts contracted before the passage of a homestead act are privileged in all cases, since otherwise the constitutional prohibition against impairing the obligation of contracts would be infringed.⁴⁸ Debts contracted prior to the acquisition of the homestead and pre-existing liens are, however, in most states, enforceable against the homestead.⁴⁹ They include debts for unpaid purchase money,⁵⁰ and vendors' liens for the same.⁵¹ Some statutes give a privilege to debts contracted in removing incumbrances from the homestead property.⁵² Debts are generally privileged when contracted in improving⁵³ or preserving the home-

Ga. 352; *Hudson's Adm'rs v. Combs*, 110 Ky. 762, 62 S. W. 709, 23 Ky. Law Rep. 231; *Schuessler v. Dudley*, 80 Ala. 547, 2 South. 526, 60 Am. Rep. 124. Holding that an exemption exists: *Trustees of Schools v. Hovey*, 94 Ill. 394; *Ren v. Driskell*, 11 Lea (Tenn.) 642.

⁴⁷ *Gunn v. Hardy*, 130 Ala. 642, 31 South. 443; *Robinson v. Wiley*, 15 N. Y. 489; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *McLaren v. Anderson*, 81 Ala. 106, 8 South. 188; *Dunagan v. Webster*, 93 Ga. 540, 21 S. E. 65. Contra, *Conroy v. Sullivan*, 44 Ill. 451, 452; *Mertz v. Berry*, 101 Mich. 32, 59 N. W. 445, 24 L. R. A. 789, 45 Am. St. Rep. 379; *In re Radway*, Fed. Cas. No. 11,523, 3 Hughes, 609.

⁴⁸ *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. Ed. 212; *Tally v. Thompson*, 20 Mo. 277.

⁴⁹ *Hall v. Glass*, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77; *Chappell v. Spire*, 106 Ill. 472; *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529; *Hensey v. Hensey's Adm'r*, 92 Ky. 164, 17 S. W. 333; *Titus v. Warren*, 67 Vt. 242, 31 Atl. 297; *Robinson v. Leach*, 67 Vt. 128, 31 Atl. 32, 27 L. R. A. 303, 48 Am. St. Rep. 807. But see *Ontario State Bank v. Gerry*, 91 Cal. 94, 27 Pac. 531; *First Bank of San Luis Obispo v. Bruce*, 94 Cal. 77, 29 Pac. 488.

⁵⁰ See, in general, the constitutional and statutory provisions of the various states. And see *Harris v. Glenn*, 56 Ga. 94; *Skinner v. Beatty*, 16 Cal. 156; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390; *Farmer v. Simpson*, 6 Tex. 303; *Stone v. Darnell*, 20 Tex. 11; *Barnes v. Gay*, 7 Iowa, 26; *Skinner v. Beatty*, 16 Cal. 156; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493. But see *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Lone Star Brewing Co. v. Felder* (Tex. Civ. App.) 31 S. W. 524. As to what is purchase money, see *Thomp. Homest. & Exemp.* § 285; *Allen v. Hawley*, 66 Ill. 164; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18.

⁵¹ *White v. Simpson*, 107 Ala. 386, 18 South. 151; *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791; *Bush v. Scott*, 76 Ill. 524. But see *Schmidt v. Schmidt's Estate*, 123 Wis. 295, 101 N. W. 678.

⁵² *Newbold v. Smart*, 67 Ala. 326; *Shinn v. Macpherson*, 58 Cal. 596; *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270. See *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; *Griffin v. Treutlen*, 48 Ga. 148; *Shroeder v. Bauer*, 140 Ill. 135, 29 N. E. 560; *Hensel v. Association*, 85 Tex. 215, 20 S. W. 116; *Watkins v. Spoull*, 8 Tex. Civ. App. 427, 28 S. W. 356.

⁵³ *Hurd v. Hixon*, 27 Kan. 722; *Converse v. Barnard*, 114 Mich. 622, 72 N. W. 611; *Nickerson v. Crawford*, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354; *Commercial & Sav. Bank v. Corbett*, Fed. Cas. Nos. 3,057, 3,058, 5 Sawy.

stead. They include, in general, materials furnished; also the wages of clerks, servants, laborers, and mechanics.⁵⁴ Homesteads are exempt from liability on judgments for alimony as in case of other judgments,⁵⁵ but the decree may make the award a lien upon the premises.⁵⁶

Liability upon Termination of Homestead

Upon the termination of the homestead, either by abandonment,⁵⁷ or by the death of the surviving spouse and the attaining of majority by all the children,⁵⁸ some cases hold that the property reverts to the estate of the deceased owner, charged with liability for his debts.⁵⁹

FEDERAL HOMESTEAD

72. A homestead under the federal law is quite different from a homestead under a state law. The federal homestead act merely provides for the acquisition of title to public lands by actual settlers, and exempts the land from liability for debts contracted before the patent is issued.

172; *United States Inv. Co. v. Phelps & Bigelow Windmill Co.*, 54 Kan. 144, 37 Pac. 982; *Building & Loan Ass'n of Dakota v. Logan*, 14 C. C. A. 133, 66 Fed. 827. Under the Georgia constitution and code, the homestead is subject to a lien only for purchase-money and taxes, and cannot be sold for improvements made upon it. *Wilcox v. Cowart*, 110 Ga. 320, 35 S. E. 283.

⁵⁴ *Tyler v. Jewett*, 82 Ala. 93, 2 South. 905; *Bagley v. Pennington*, 76 Minn. 226, 78 N. W. 1113, 77 Am. St. Rep. 637. See *Chopin v. Runte*, 75 Wis. 361, 44 N. W. 258; *Tyler v. Johnson*, 47 Kan. 410, 28 Pac. 198; *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953.

⁵⁵ *Whitcomb v. Whitcomb*, 52 Iowa, 715, 2 N. W. 1000; *Biffle v. Pullam*, 114 Mo. 50, 21 S. W. 450; *Stanley v. Sullivan*, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245. And see *Rogers v. Day*, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593.

⁵⁶ *Johnson v. Johnson*, 66 Kan. 546, 72 Pac. 267; *Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W. 245, 97 Am. St. Rep. 650; *Stanley v. Sullivan*, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245.

⁵⁷ *Garibaldi v. Jones*, 48 Ark. 230, 2 S. W. 844; *Gardner v. Baker*, 25 Iowa, 343; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622.

⁵⁸ *McAndrew v. Hollingsworth*, 72 Ark. 446, 81 S. W. 610; *Barrett v. Durham*, 80 Ga. 336, 5 S. E. 102; *Lewis v. McGraw*, 19 Ill. App. 313. And see *Wolf v. Ogden*, 66 Ill. 224.

⁵⁹ *Miller v. Marx*, 55 Ala. 322; *McAndrew v. Hollingsworth*, 72 Ark. 446, 81 S. W. 610; *Fleetwood v. Lord*, 87 Ga. 592, 13 S. E. 574; *Robinson v. McDowell*, 133 N. C. 182, 45 S. E. 545, 98 Am. St. Rep. 704; *Groover, Stubbs & Co. v. Brown*, 118 Ga. 491, 45 S. E. 310. In some states, however, the homestead descends to the widow or children free from all claims of creditors, and so is not a life estate, but embraces the whole interest of the owner. *Parker v. Dean*, 45 Miss. 408; *Fletcher v. Bank*, 37 N. H. 369; *Plate v. Koehler*, 8 Mo. App. 396; *Schneider v. Hoffmann*, 9 Mo. App. 280; *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916.

The object of the federal homestead act is very different from the state homestead laws. The state laws provide that the home of the family shall be exempt from certain debts. The federal law provides for the acquisition of title to the public lands by actual, bona fide settlers, in order that such lands may be cultivated and improved.⁶⁰ Incidentally, the federal law also provides for certain exemptions during the acquisition.

Under certain acts of Congress,⁶¹ every head of a family, or a person twenty-one years old and a citizen of the United States, or who has filed his declaration of intended citizenship, is, if not the owner elsewhere in the United States of one hundred and sixty acres of land, and if he has not previously obtained a federal homestead, entitled to a quarter section, or less, of the public land.⁶²

Three things are necessary:⁶³ (1) An affidavit showing that the applicant comes under the law;⁶⁴ (2) a formal application; and (3) payment of the land office charges.⁶⁵ These requisites being performed, and the certificate of entry delivered to the applicant, the entry is made.⁶⁶ Thereupon actual residence upon⁶⁷

⁶⁰ *United States v. Richards* (D. C.) 149 Fed. 443.

⁶¹ Rev. St. §§ 2289, 2309 (U. S. Comp. St. 1901, pp. 1388, 1418). And see *infra*.

⁶² The federal act of 1909 (Act Feb. 19, 1909, c. 160, 35 Stat. 639 [U. S. Comp. St. Supp. 1911, p. 601]), amended 1912 (Act June 13, 1912, c. 166, 37 Stat. 132), provides that a qualified entryman may enter upon 320 acres of land in certain states, providing such lands are susceptible of successful irrigation.

⁶³ *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363.

⁶⁴ A homestead entry may be made by the presentation, to the land office of the district in which the desired lands are situated, of an application properly prepared on blank forms prescribed for that purpose, and sworn to before either the register or the receiver, or before a United States commissioner, or a judge, or a clerk of a court of record, in the county or parish in which the land lies. The application must recite, among other things, that it is made honestly and in good faith to obtain a home for the applicant, and not for the benefit of any other person or corporation. Circular No. 224, General Land Office, 1913.

⁶⁵ These charges are five dollars for entry upon 80 acres or less, or ten dollars for more than 80 acres. In addition to this entry fee, commission of one dollar for each 40-acre tract entered outside the limits of a railroad grant, and two dollars for each 40-acre tract entered within such limits. This commission is charged both at time of application and at final proof. On all final proofs, the register and receiver are entitled to 15 cents for each 100 words reduced to writing. Circular No. 224, par. 41, General Land Office, 1913; Rev. St. § 2290, as amended 1891 (U. S. Comp. St. 1901, p. 1389).

⁶⁶ *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363.

⁶⁷ Entryman must establish residence upon the land within six months after date of entry. Circular No. 224, General Land Office, 1913.

and cultivation⁶⁸ of the land for a period of three years⁶⁹ entitles the entryman to a patent.⁷⁰ The lands so acquired are not liable for any debts "contracted prior to the issuing of a patent therefor."⁷¹ Such a homestead may, however, be mortgaged as soon as the right to a patent is complete, although the patent has not been issued; and exemption from state taxation terminates at the same time.⁷²

⁶⁸ Not less than one-sixteenth of the area beginning with the second year, and not less than one-eighth beginning with the third year. The Secretary of the Interior may reduce the required area of cultivation. Act June 6, 1912, c. 153, 37 Stat. 123.

⁶⁹ Act June 6, 1912, c. 153, 37 Stat. 123. Entryman is entitled to a continuous leave of absence for a period not exceeding five months in each year. *Id.*

⁷⁰ See section 2291, Rev. St. U. S., as amended June 6, 1912, 37 Stat. 123. Or he may obtain title after fourteen months from date of entry by electing to pay the minimum price of the land. Rev. St. § 2301, amendment of 1891 (U. S. Comp. St. 1901, p. 1406). The ordinary price is \$1.25 per acre, or \$2.50 per acre if within the limits of certain railroad grants. Price of certain ceded Indian lands varies according to location. *Clark v. Bayley*, 5 Or. 343. In case of his death, the widow may thus commute. *Perry v. Ashby*, 5 Neb. 291; *Jarvis v. Hoffman*, 43 Cal. 314. See Rev. St. § 2307 (U. S. Comp. St. 1901, p. 1417). There are also certain exceptions as to the time required in case of persons having served in the army or navy. See Rev. St. §§ 2304, 2305, amended 1901 (U. S. Comp. St. 1901, p. 1413).

⁷¹ Rev. St. U. S. 1878, § 2296. And see *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Miller v. Little*, 47 Cal. 348. Both a state and a federal homestead cannot be held exempt at the same time. *Hesnard v. Plunkett*, 6 S. D. 73, 60 N. W. 159.

⁷² *Nycum v. McAllister*, 33 Iowa, 374; *Bellinger v. White*, 5 Neb. 399; *Axtell v. Warden*, 7 Neb. 182; *Carroll v. Safford*, 3 How. (U. S.) 441, 11 L. Ed. 671. And see *Weare v. Johnson*, 20 Colo. 363, 38 Pac. 374.

CHAPTER X

ESTATES LESS THAN FREEHOLD—ESTATES FOR YEARS

- 73. Estates for Years.
- 74. Creation of Estates for Years.
- 75. Relation of Landlord and Tenant.
- 76. Commencement and Duration.
- 77. Leases.
- 78. Rights and Liabilities of Landlord and Tenant.
- 79. Under Implied Covenants.
- 80. Independent of Covenants.
- 81. Transfer of Estates for Years.
- 82. Termination of Estates for Years.

ESTATES FOR YEARS

73. An estate for years is an estate created for a definite time, measured by one or more years or fractions of a year. The grantor of an estate for years is called the "lessor," or "landlord"; the grantee is called the "lessee" or "tenant." A contract creating an estate for years is called a "lease."

Estates in land less than freeholds have long been classified as of three sorts: (1) Estates for years; (2) estates at will; (3) and estates by sufferance.¹ Under the feudal system, the only interest in land that could be created was a freehold; that is, an estate at least for life.² In time, however, there grew up a custom of granting the use of land to tenants for stipulated periods or terms. These terms were originally of but short duration, only a few years in length, and anciently a lease for a longer term than forty years was held to be void.³ They gradually increased in length, however, until in modern times leases for ninety-nine years are not uncommon. In fact, leases for nine hundred and ninety-nine years,⁴ and even for ten thousand years, are not unknown.⁵ At common law, estates for years, no matter how long,

¹ 2 Blk. Comm. 139.

² *Supra*.

³ Co. Litt. 45b, 46a; *Theobalds v. Duffoy*, 9 Mod. 101.

⁴ *Illinois Starch Co. v. Hydraulic Co.*, 125 Ill. 237, 17 N. E. 486.

⁵ *Cadwalader v. App*, 81 Pa. 194. The statute may limit the length of leases (see, for example, Code Ala. 1907, § 3418, limiting the period to twenty years); but in absence of such a statute there is no limitation to the extent of a term of years for which a lease may be made. See *Tayl. Landl. & Ten.* (9th Ed.) §§ 73, 74.

are but chattel interests, and not real property.⁶ By force of statute, however, in some states, terms exceeding a certain number of years, usually three, are treated as real property for some purposes, as, for example, under the laws regulating the attachment and descent and distribution of property.⁷ Regardless, however, of the length of the term, estates for years are of less dignity, by common law, than life estates, although a life tenant would not live as long as the designated period.

As above defined, estates for years include all terms for a definite, ascertained period. It may be any period of time, as any number of years, a single year, a month, or a week.⁸ The word "years," as used in these estates, means merely a unit of time. The only requirement as to the term is that it must be for a definite, fixed period. By statute, however, in some states, estates for years cannot be created for more than a limited number of years.⁹ Although, technically speaking, a lease is a deed,¹⁰ and although the term "lease" may be applied to instruments creating estates in fee, or for life, where a rent is reserved,¹¹ yet the ordinary meaning of "a lease of land" is that an estate for years in the property is granted to the lessee.¹² Moreover, although, in feudal times, a landlord was the lord or proprietor of the land, while the person who had the use and possession of the land, in return for services rendered, was the vassal, or tenant, yet, by the creation and development of estates for years, the modern relation of landlord and tenant became established between the lessor and

⁶ *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 Pac. 680; *Goodwin v. Goodwin*, 33 Conn. 314; *Field v. Howell*, 6 Ga. 423; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; *Chapman v. Gray*, 15 Mass. 439; *Brewster v. Hill*, 1 N. H. 350; *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 334.

⁷ *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56.

⁸ *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Brown's Adm'r's v. Bragg*, 22 Ind. 122.

⁹ *Infra*.

¹⁰ See *Deeds*, post, chapter XXVII.

LEASE DISTINGUISHED FROM A DEMISE.—The general signification of the word "demise" is that it is a conveyance in fee for life or for years. It denotes something more than a mere letting or lease—as, for instance, a grant. It would seem that it means more to the lessee than a mere letting by the landlord or the mere taking by the lessee, generally embraced in the terms "to lease" or "to let." These latter words, it would appear, can have relation only to the mere term. A "demise" embraces a fee, and it seems particularly designed to use to impart to the agreement between a landlord and tenant implied covenants on the part of the lessor of good right and title to make the lease and an implied covenant of quiet enjoyment. *Mershon v. Williams*, 63 N. J. Law, 398, 44 Atl. 211.

¹¹ *Warner v. Tanner*, 38 Ohio St. 118.

¹² *Mayberry v. Johnson*, 15 N. J. Law, 116.

lessee, in consideration, generally, of a certain rent in money, to be paid by such lessee or tenant.

Protection of Termor's Interest

Two hundred years ago, high judicial authority in England said: "The law is very different now, as to terms for years, from what it was formerly; in ancient times there were no leases for years, but what were for short terms, which were very little regarded; this was the reason why, if a real action were brought against the person who had the freehold, and a recovery was thereupon had, yet the lessee for years, whose estate was precedent to the freehold, was bound by the recovery."¹³ Owing to the fact that a tenant for years had no seisin, he could not protect his possession by the ancient writ of novel disseisin, since this remedy belonged only to a freeholder. He could, it is true, repel force by force, if one attempted to dispossess¹⁴ him of the land; but all the legal remedy he had when ejected was a personal action against his lessor for damages for breach of covenant. Moreover, he did not have even this remedy against the lessor, unless his interest in the lands rested on a covenant by deed. It had been the practice, however, from very early times, to grant leases by deed, and in such a case, if the lessor wrongfully ejected the lessee, the lessee had his remedy by action on the covenant, as in the case of any other covenant under seal. In the course of time, however, a new writ was introduced, which afforded the lessee a remedy against his lord, whether the lease was by deed or not, and also gave him a right to protection against ejectment by a third person. Later the writ was extended to include an additional remedy, the recovery of the possession of the land, instead of mere damages for the breach of the covenant. This writ was known as the "writ of ejectio firmæ," which by a series of fictions, was further extended till, in the form of the action of ejectment, it became the appropriate means of asserting the right to the possession of land, under whatever title, and took its place in modern times as the statutory substitute for all forms of real actions for the recovery of lands. The interest of the termor or lessee for years, therefore, instead of resting upon a covenant with his lessor, and enforceable only as a *jus in personam* against him, became a right of property, a *jus in rem*, which could be enforced against any wrongdoer, by a remedy analogous to that provided

¹³ Lord Chancellor Parker, in *Wind v. Jekyl*, 1 P. Wms. 572 (1719). And see Coke's Inst. I, 46.

¹⁴ 2 P. & M. 106.

for a wrongful ouster of a freeholder from his possession. In this way these interests became rights of property in land.¹⁵

CREATION OF ESTATES FOR YEARS

74. Estates for years are usually created by contract, and never by operation of law.

RELATIONSHIP OF LANDLORD AND TENANT

75. The creation of such estates by contract usually gives rise to the relationship of landlord and tenant. When such a relation is created, the landlord retains an interest or residue known as the landlord's reversion.

COMMENCEMENT AND DURATION

76. Estates for years may be created to begin in futuro, and their commencement and duration will generally depend upon the terms of the contract. As a rule, they may continue any number of years.

How Created

Estates for years never arise by mere operation of law, but only by some act of the parties.¹⁶ They almost always arise by a lease,¹⁷ although, at common law, there were three modes of creating such estates, namely, by deed, by writing not under seal, and by parol.¹⁸ The creation of an estate for years usually results, also, in the formation of the relation of landlord and tenant.

¹⁵ Dig. Real Prop. (4th Ed.) 175; Holds. Hist. of Eng. Law, III, 180.

¹⁶ *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805; *Board of Sup'rs of Cass County v. Cowgill*, 97 Mich. 448, 56 N. W. 849; *Sawyer v. Hanson*, 24 Me. 542; *Loring v. Taylor*, 50 Mo. App. 80. But see *Roe v. Ward*, 1 H. Bl. 97; *Bishop v. Howard*, 2 Barn. & C. 100; *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534. And see, *infra*.

¹⁷ *Jackson ex dem. Webber v. Harsen*, 7 Conn. 323, 17 Am. Dec. 517; *Little v. Libby*, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; *Boone v. Stover*, 66 Mo. 430; *Berridge v. Glassey*, 112 Pa. 442, 3 Atl. 583, 56 Am. Rep. 322.

¹⁸ *Smith, Land. & Ten.* 60; *Den ex dem. Mayberry v. Johnson*, 15 N. J. Law, 116; *Washb. Real Prop.* (6th Ed.) § 617.

DEVISE.—An estate for years may be also created by devise, and, inasmuch as such interests were regarded as mere chattels, they were disposed of by will even prior to the time that estates in land could be devised. 2 P. & M. 115, 329.

The Relation of Landlord and Tenant

The modern relation of landlord and tenant may exist in connection with different kinds of tenancy, such as tenancies for years, from year to year,¹⁹ at will,²⁰ and at sufferance.²¹ Since estates for years are usually created by a lease, and give rise thereby to this relation, it should be considered at this time. This relationship has been well defined as one that arises by contract, either express or implied,²² whereby one person has the possession of lands or tenements of another, in consideration of a certain rent; the tenant occupying the premises in subordination to the rights of his landlord.²³ Although a reservation of rent is usually made, yet it is well settled that the relationship may exist without a rent being reserved.²⁴ The fact, however, that one is in lawful possession of the land of another does not necessarily imply a relation of landlord and tenant.²⁵ One may, for example, be in possession as a mere lodger;²⁶ or as the servant,²⁷ or agent²⁸ of the owner; or under a contract to purchase;²⁹ or as a mortgagee;³⁰ or the relationship between the parties may be that of partners, instead of landlord and tenant.³¹ Whether the relationship of landlord and tenant exists is, in general, a question of fact.³²

The Landlord's Reversion

Although the relation of landlord and tenant does not depend upon the landlord's title,³³ since one may be a lessor of lands, al-

¹⁹ *Infra*.²⁰ *Infra*.²¹ *Infra*.²² *Leonard v. Kingman*, 136 Mass. 123; *Snyder v. Carfrey*, 54 Pa. 90.²³ *Central Mills Co. v. Hart*, 124 Mass. 123; *Adams v. Gilchrist*, 63 Mo. App. 639.²⁴ *Gillespie v. Hendren*, 98 Mo. App. 622, 73 S. W. 361; *Allen v. Koepsel*, 77 Tex. 505, 14 S. W. 151.²⁵ *Cummings v. Smith*, 114 Ill. App. 35; *Curtis v. Treat*, 21 Me. 525; *Edmonson v. Kite*, 43 Mo. 176.²⁶ *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio (N. Y.) 602. And see *infra*.²⁷ *DAVIS v. WILLIAMS*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55, *Burdick Cas. Real Property*; *Richason v. Railway Co.*, 150 Ill. App. 38; *Tucker v. Burt*, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. (N. S.) 510; *Snedaker v. Powell*, 32 Kan. 396, 4 Pac. 869; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158.²⁸ *Todhunter v. Armstrong* (1898) 6 Cal. Unrep. Cas. 27, 53 Pac. 446.²⁹ *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800; *Glascok v. Robards*, 14 Mo. 350, 55 Am. Dec. 108; *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186.³⁰ See *Matter of Hosley*, 56 Hun. 240, 9 N. Y. Supp. 752.³¹ *Norton v. Wiswall*, 26 Barb. (N. Y.) 618.³² *McKenzie v. Sykes*, 47 Mich. 294, 11 N. W. 164; *Milling v. Becker*, 96 Pa. 182. But see *Howard v. Carpenter*, 22 Md. 10; *DOYLE v. RAILROAD CO.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223, *Burdick Cas. Real Property*.³³ *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S. E. 734; *Wilcoxon v. Hybarger*, 1 Ind. T. 138, 38 S. W. 669.

though he is not the owner of the same,³⁴ yet the relationship of landlord and tenant implies that the lessor has always remaining in him some interest or residue over and above the interest he has granted to his lessee.³⁵ This interest is known as the landlord's reversion. Moreover, for many purposes, the possession of the tenant of the leased premises is the possession of the landlord,³⁶ and for this reason a tenant, during his tenancy, cannot claim the land by adverse possession against his landlord.³⁷

Attornment of Tenant

The owner of leased property may assign his reversion to a third person,³⁸ and it is not necessary that the tenant should consent to such a transfer. Moreover, the landlord's grantee will have the same rights and liabilities towards the tenant as the former owner had.³⁹ Under the English feudal system, however, the lord of the land could not transfer his reversion, known as his seignior, without the consent of his vassal or tenant, since the tenant could not be compelled, against his will, to perform a tenant's duties of fealty and service to a new lord.⁴⁰ In case the tenant did consent, he was said to attorn⁴¹ to the new lord, or grantee. By his attornment, therefore, the tenant became the tenant of the new owner. This early law has long since been abrogated by statute in England,⁴² and was never recognized as a part of our American common law.⁴³ It has been held, however, in some states, that attornment is necessary in order to enable a landlord's grantee to sue for rents in his own name.⁴⁴

³⁴ *Strickland v. Styles*, 107 Ga. 308, 33 S. E. 85; *Cheever v. Pearson*, 16 Pick. (Mass.) 266.

³⁵ *McMurphy v. Minot*, 4 N. H. 251.

³⁶ *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032; *Schuykill & D. Imp. & R. Co. v. McCreary*, 58 Pa. 304.

³⁷ See *infra*.

³⁸ *Crosby v. Loop*, 13 Ill. 625; *Beal v. Car Spring Co.*, 125 Mass. 157, 28 Am. Rep. 216; *Peterman v. Kingsley*, 140 Wis. 666, 123 N. W. 137, 133 Am. St. Rep. 1107.

³⁹ *Rising Sun Lodge v. Buck*, 58 Me. 426; *Hovey v. Walker*, 90 Mich. 527, 51 N. W. 678.

⁴⁰ *Co. Litt.* 310b. See, also, *Vigers v. St. Paul*, 14 Q. B. 909.

⁴¹ From old French, *atorner*, to turn or transfer allegiance to another.

⁴² *St. 4 Anne*, c. 16, §§ 9, 10.

⁴³ *Keay v. Goodwin*, 16 Mass. 1; *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390; *Griffin v. Barton*, 22 Misc. Rep. 228, 49 N. Y. Supp. 1021.

⁴⁴ *Marney v. Byrd*, 11 Humph. (Tenn.) 95; *Fisher v. Deering*, 60 Ill. 114. See, however, *Howland v. White*, 48 Ill. App. 236, where the former rule is changed by statute.

Commencement of Term

Although an estate of freehold cannot be created to commence in the future, a term of years may be so granted,⁴⁵ provided the time is not postponed beyond the period allowed by the rule against perpetuities.⁴⁶ An estate of freehold cannot be so limited at common law, because freehold estates were transferred by feoffment and livery of seisin; that is, by transfer of possession. This was a present act, and livery could not be made to operate at some future time. The creation of an estate for years, to begin in futuro, does not violate this common-law rule, since the only right the tenant has is a contract right to have possession at a future time. The seisin remains in the landlord, and the tenant takes no present estate. The commencement of the term should be clearly specified in the lease. It is held sufficient, however, in case of a lease to begin in the future, if the time is so designated that it can be ascertained in the future. Thus a lease for a term of years, to begin when a certain building is erected and ready for occupancy, is good, since the time of commencement can be made certain.⁴⁷ As a general rule, the commencement of a term for years depends upon the construction of the lease, taking into consideration its terms and the circumstances surrounding the contract.⁴⁸ A lease to take effect "from" a certain day may, or may not, include such day according to the construed intention of the parties.⁴⁹ Where a lease ran from a blank date in a specified year, it was held that it would commence from the last day of such year.⁵⁰

Interesse Termini

At common law, the relationship of landlord and tenant was not perfected until the tenant entered into possession of the property. Where the term is to begin in the future, the interval between the making of the lease and the entry into possession may be considerable. At any rate, the right which the tenant

⁴⁵ Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836; Cadell v. Palmer, 1 Clark & F. 372; Field v. Howell, 6 Ga. 423; Whitney v. Allaire, 1 N. Y. 305; Weld v. Traip, 14 Gray (Mass.) 330.

⁴⁶ See Gomez v. Gomez, 81 Hun, 566, 31 N. Y. Supp. 206. As to the rule against perpetuities, see post, chapter XVI.

⁴⁷ Hammond v. Barton, 93 Wis. 183, 67 N. W. 412.

⁴⁸ Carmichael v. Brown, 97 Ga. 486, 25 S. E. 357; Pendill v. Neuberger, 67 Mich. 562, 35 N. W. 249; Feyreisen v. Sanchez, 70 Ill. 105.

⁴⁹ Fox v. Nathans, 32 Conn. 348; Budds v. Frey, 104 Minn. 481, 117 N. W. 158, 15 Ann. Cas. 24; I. X. L. Furniture & Carpet Installment House v. Berets, 32 Utah, 454, 91 Pac. 279.

⁵⁰ Huffman v. McDaniel, 1 Or. 259.

had to enter into possession of the land when his term commenced was called, in the law Latin of the time, the tenant's *interesse termini*. In other words, it is the mere interest in a future term of years which the lessee has in distinction from a term in possession.⁵¹ This interest, however, is assignable,⁵² and as soon as, by the terms of the lease, the lessee is entitled to possession, he may maintain ejectment.⁵³ This right of entry, moreover, is not destroyed by the death of the lessor or of the lessee.⁵⁴ A tenant, however, who neglects or fails to enter upon his term at its commencement, will not, for that reason, be relieved from his obligation to pay rent, since that obligation rests upon his contract, and not upon the fact of entry.

Duration of Term

The terms of the lease will generally govern the duration of the term.⁵⁵ Cases of doubt will be construed in favor of the tenant.⁵⁶ As a rule, a lease "to" a certain day continues during the whole of such day,⁵⁷ although custom,⁵⁸ or a statute,⁵⁹ may control to the contrary. A term may also continue during the option of either of the parties, to be terminated upon notice by the party exercising the option.⁶⁰ In some states estates for years may be created for any length of time, but in a few states there are statutes which forbid their creation for more than limited periods, ranging from 10 to 20 years.⁶¹ Estates for years must be so lim-

⁵¹ Co. Litt. 345; 2 Blk. Comm. 144, 341; 4 Kent, Comm. 97.

⁵² 1 Wood, Landl. & Ten. (2d Ed.) 452; Soffyns' Case, 5 Coke, 123b; Wood v. Hubbell, 10 N. Y. 488.

⁵³ Doe v. Day, 2 Q. B. Div. 156; Gardner v. Keteltas, 3 Hill (N. Y.) 332, 38 Am. Dec. 637; Trull v. Granger, 8 N. Y. 115; Whitney v. Allaire, 1 N. Y. 305, 311.

⁵⁴ 1 Wood, Landl. & Ten. (2d Ed.) 452; 1 Tayl. Landl. & Ten. (8th Ed.) 14; Co. Litt. 46b.

⁵⁵ Surles v. Milikin, 97 Ga. 485, 25 S. E. 322; Burris v. Jackson, 44 Ill. 345.

⁵⁶ Commonwealth v. Philadelphia County, 3 Brewst. (Pa.) 537; Murrell v. Lion, 30 La. Ann. 255.

⁵⁷ People v. Robertson, 39 Barb. (N. Y.) 9.

⁵⁸ Germania Fire Ins. Co. v. Myers, 4 Lanc. Law Rev. (Pa.) 151, holding that tenancy to a particular day expires by custom at noon of the day designated.

⁵⁹ Spies v. Voss (Com. Pl.) 9 N. Y. Supp. 532.

⁶⁰ King v. Ransom, 86 Wis. 496, 56 N. W. 1084. Cf. Clifford v. Gressinger, 96 Ga. 789, 22 S. E. 399. And see, as to privilege of renewal, Pearce v. Turner, 150 Ill. 116, 36 N. E. 962; Robinson v. Beard, 140 N. Y. 107, 35 N. E. 441; Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867; Hughes v. Windpfenig, 10 Ind. App. 122, 37 N. E. 432; Dix v. Atkins, 130 Mass. 171; Anderson v. Critcher, 11 Gill & J. (Md.) 450, 37 Am. Dec. 72.

⁶¹ 1 Stim. Am. St. Law, § 1341. In many states, leases for more than a certain number of years must be recorded. 1 Stim. Am. St. Law, § 1624.

ited, however, that they will terminate at a definite time, or at a time which can be made certain.⁶² However, a condition by which the estate may be determined before the expiration of the time for which it is limited does not make it invalid. For instance, a demise to a man for ninety-nine years, if he lives so long, is good.⁶³

LEASES

77. No particular words are required in order to create a lease. The intention of the parties is the test.

The parties must be competent to enter into the contract.

At common law a lease may be made by parol. The statutes, however, require leases to be made in writing if the term is for a longer time than a period specified by the statutes.

As previously stated, the contract creating a term for years, or any other tenancy existing between the landlord and tenant, is called a "lease." No particular words are necessary, and the word "lease" need not be used. Any words that express the agreement of the parties will be sufficient, if the meaning is clear.⁶⁴ The usual words that have long been used, however, for the creation of a present lease of a term for years are "lease," "demise," and "farm let."⁶⁵ A written lease usually contains the date, names of the parties, the consideration, the description of the premises, and also the covenants and conditions, if any.

Distinguished from an Agreement for a Lease

The distinction, however, between a lease and an agreement for a lease should be noted. Where this question is in doubt, the test

And see *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280. An estate for years may be for a single year, or even a less period. *Brown's Adm'rs v. Bragg*, 22 Ind. 122.

⁶² *Murray v. Cherrington*, 99 Mass. 229; *Horner v. Leeds*, 25 N. J. Law, 106; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93; *Goodright v. Richardson*, 3 Term R. 462. For the method of computing time under a lease, see *Atkins v. Sleeper*, 7 Allen (Mass.) 487; *Deyo v. Bleakley*, 24 Barb. (N. Y.) 9; *Sheets v. Seldon*, 2 Wall. (U. S.) 177, 17 L. Ed. 822.

⁶³ 1 Tayl. Landl. & Ten. (8th Ed.) 86. And see *Lacey v. Newcomb*, 95 Iowa, 287, 63 N. W. 704.

⁶⁴ *Alcorn v. Morgan*, 77 Ind. 184; *Doe v. Ries*, 8 Bing. 178; *Roe v. Ashburner*, 5 Term R. 163; *Jackson ex dem. Bulkley v. Delacroix*, 2 Wend. (N. Y.) 433; *Watson v. O'Hern*, 6 Watts (Pa.) 362; *Moore v. Miller*, 8 Pa. 272; *Moshier v. Reding*, 12 Me. 478; *Smith v. Hubert*, 83 Hun, 503, 31 N. Y. Supp. 1076. A lease of "a building" is a lease of the land on which it stands. *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10.

⁶⁵ 2 Blk. Comm. 317, 318; *Averill v. Taylor*, 8 N. Y. 44; *Wright v. Trevezant*, 3 Car. & P. 441; *Doe v. Benjamin*, 9 Adol. & E. 644.

in all cases is the intention of the parties.⁶⁶ The distinction is important, because a written lease, fully executed, cannot be varied by parol, while, if it is only a contract for lease, omitted terms and conditions may be supplied, according to the intention of the parties.⁶⁷ Moreover, under a lease the lessee has an actual interest in the land, while in case of a mere agreement for a lease he has merely a right to a lease, a right to have a contract executed, for the breach of which he has merely an action for damages.⁶⁸ As a rule, if the instrument contains words of present demise, such as "lets," "hereby lets," and even "agrees to let,"⁶⁹ it will be deemed a lease in *præsenti*, instead of an agreement for a lease in *futuro*, unless the instrument as a whole shows a contrary intention.⁷⁰ Moreover, in general, if the agreement contains all the requisites of a lease, leaving nothing incomplete, it will operate as a present lease.⁷¹ A lease should also be distinguished from a license. Under a lease, a tenant is entitled to the possession of the property, while a license merely gives the licensee a right to use the property in a certain way, the possession remaining with the owner.

Who may Make a Lease

"Any person who by law may hold real estate, and who is under no legal disability, may make a lease of lands that accords with his estate or interest therein."⁷² Leases by, and to, infants,⁷³ lunatics, and intoxicated persons, are voidable, rather than void.⁷⁴ At common law, leases by a married woman of her lands are

⁶⁶ *Goodtitle v. Way*, 1 Term R. 735; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642; *Poole v. Bentley*, 12 East, 168; *Arnold v. R. Rothschild's Sons Co.*, 164 N. Y. 562, 58 N. E. 1085; *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. 523; *Martin v. Davis*, 96 Iowa, 718, 65 N. W. 1001.

⁶⁷ 1 Washb. Real Prop. (5th Ed.) 483; *McFarlane v. Williams*, 107 Ill. 33.

⁶⁸ *Pittsburgh Amusement Co. v. Ferguson*, 100 App. Div. 453, 91 N. Y. Supp. 666; *Sausser v. Steinmetz*, 88 Pa. 324. But see *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586, where specific performance was decreed.

⁶⁹ *Doe v. Benjamin*, 9 Ad. & El. 644.

⁷⁰ *Merki v. Merki*, 212 Ill. 121, 72 N. E. 9; *Shaw v. Farnsworth*, 108 Mass. 357; *Averill v. Taylor*, 8 N. Y. 44.

⁷¹ *Does v. Ries*, 8 Bing. 178.

⁷² 1 Wood, Landl. & Ten. (2d Ed.) § 80.

⁷³ *Clark*, Cont. 210; *Field v. Herrick*, 101 Ill. 110; *Griffith v. Schwenderman*, 27 Mo. 412.

⁷⁴ 1 Tayl. Landl. & Ten. (8th Ed.) 107; 1 Wood, Landl. & Ten. (2d Ed.) 228. Cf. *Nichol v. Thomas*, 53 Ind. 42. But when the lunatic is under guardianship his leases are void. See *Elston v. Jasper*, 45 Tex. 409. And see *Van Deusen v. Sweet*, 51 N. Y. 378.

void,⁷⁵ the husband having the sole power to lease such lands.⁷⁶ Moreover, although, even at common law, a lease may be made by a third person to a married woman, subject to the husband's rights of property therein,⁷⁷ it is only where she has the ability to make contracts that she can bind herself to pay rent for the same.⁷⁸ As now changed by statute, however, a married woman, by virtue of her general contractual powers, or by reason of her right to make contracts in relation to her separate estate, may be able to make a valid lease, under the statutory requirements, if any, as to her husband's consent or joinder.⁷⁹ Leases may be made by agents,⁸⁰ guardians,⁸¹ executors to whom land is devised,⁸² and trustees. Where, however, the beneficiary of the trust does not join, a lessee, who has notice of the trust, will also hold as a trustee.⁸³ As a rule, the lessor must be in possession of the property at the time the lease is made. No lease of land is valid where the lessor has been disseised, and the land is held adversely.⁸⁴ Tenants for life, as in dower, by curtesy, and *pur autre vie*, can make demises of the land which are valid until the termination of the life estate.⁸⁵ Likewise joint tenants,⁸⁶ tenants in common,⁸⁷ and coparceners⁸⁸ can lease their undivided portions without the consent of the co-owners.⁸⁹ Leases made by a mort-

⁷⁵ 1 Wood, Landl. & Ten. (2d Ed.) 216; 1 Tayl. Landl. & Ten. (8th Ed.) 111; *Murray v. Emmons*, 19 N. H. 483.

⁷⁶ *Allen v. Hooper*, 50 Me. 371; *Ross v. Adams*, 28 N. J. Law, 160; *Andriot v. Lawrence*, 33 Barb. (N. Y.) 142.

⁷⁷ *Cruzén v. McKaig*, 57 Md. 454; *Baxter v. Smith*, 6 Bin. (Pa.) 427.

⁷⁸ *Morrison v. Price*, 130 Ky. 139, 112 S. W. 1090; *Worthington v. Cook*, 52 Md. 297; *Vanderberg v. Gas Co.*, 126 Mo. App. 600, 105 S. W. 17.

⁷⁹ *Parent v. Callerand*, 64 Ill. 97; *Pearcy v. Henley*, 82 Ind. 129; *Voss v. Sylvester*, 203 Mass. 233, 89 N. E. 241; *Vandevoort v. Gould*, 36 N. Y. 639.

⁸⁰ 1 Tayl. Landl. & Ten. (8th Ed.) 148; 1 Wood, Landl. & Ten. (2d Ed.) 267.

⁸¹ *Hughes' Minors' Appeal*, 53 Pa. 500; *Hicks v. Chapman*, 10 Allen (Mass.) 463. Leases by guardians must not be for an unreasonable length of time, as beyond the minority of the ward. *Ross v. Gill*, 4 Call (Va.) 250; *Van Doren v. Everitt*, 5 N. J. Law, 460, 8 Am. Dec. 615.

⁸² 1 Wood, Landl. & Ten. (2d Ed.) 238; 1 Tayl. Landl. & Ten. (8th Ed.) 144.

⁸³ 1 Wood, Landl. & Ten. (2d Ed.) 312; 1 Tayl. Landl. & Ten. (8th Ed.) 141.

⁸⁴ 1 Tayl. Landl. & Ten. (8th Ed.) 96; 1 Wood, Landl. & Ten. (2d Ed.) 325.

⁸⁵ 1 Tayl. Landl. & Ten. (8th Ed.) 122; *McIntyre v. Clark*, 6 Misc. Rep. 377, 26 N. Y. Supp. 744; *Sykes v. Benton*, 90 Ga. 402, 17 S. E. 1002; *Coakley v. Chamberlain*, 1 Sweeny (N. Y.) 676.

⁸⁶ See post, chapter XII.

⁸⁷ See post, chapter XII.

⁸⁸ See post, chapter XII.

⁸⁹ 1 Tayl. Landl. & Ten. (8th Ed.) 123. Cf. *Tainter v. Cole*, 120 Mass. 162. And see *Grabfelder v. Gazetti* (Tex. Civ. App.) 26 S. W. 436.

gagor prior to the mortgage are valid against the mortgagee,⁹⁰ but not if subsequent to the execution of the mortgage, where the mortgagee does not join.⁹¹

Must be in Writing When

At common law, an estate for years could be created by parol.⁹² By the English statute of frauds, passed in 1676,⁹³ all leases of lands, tenements, or hereditaments were required to be in writing and signed by the parties making the same, or by their duly authorized agents. This statute also provided that leases not in writing should have the force and effect of leases at will only.⁹⁴ The statute expressly excepted, however, from its provisions leases not exceeding three years from the making.⁹⁵ The provisions of the English statute have been copied, more or less literally, in all our American states;⁹⁶ the excepted term varying, however, all the way from one year to seven.⁹⁷ In some states, however, no exception for a short term is made, and all leases for a term of years must be in writing; verbal leases creating merely tenancies at will.⁹⁸ Some of the American statutes follow the English model in providing that the excepted period shall be reckoned "from the making" of the lease, and this is the general rule followed in computing the time for a valid parol lease. Where, however, the statute provides that a parol lease for more than one year "from the time of entry" shall be void, a parol lease for a year to begin at some future date, would be good. In any case, however, the statute of the particular state should be consulted.

Although, at law, under the statute of frauds, a verbal agree-

⁹⁰ 1 Tayl. Landl. & Ten. (8th Ed.) 129; Moss v. Gallimore, 1 Doug. 279; Rogers v. Humphreys, 4 Adol. & E. 299.

⁹¹ 1 Tayl. Landl. & Ten. (8th Ed.) 128; 1 Wood, Landl. & Ten. (2d Ed.) 254.

⁹² Hisey v. Troutman, 84 Ind. 115; Bakker v. Fellows, 153 Mich. 428, 117 N. W. 52; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; 1 Tayl. Landl. & Ten. § 27.

⁹³ 29 Car. II, c. 3.

⁹⁴ Section 1.

⁹⁵ Section 2.

⁹⁶ Elliott v. Bankston, 159 Ala. 462, 49 South. 76; Creighton v. Sanders, 89 Ill. 543; Ragsdale v. Lander, 80 Ky. 61, 3 Ky. Law Rep. 562; Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785; Barrett v. Cox, 112 Mich. 220, 70 N. W. 446; Wilder v. Stace, 61 Hun. 233, 15 N. Y. Supp. 870; Gladwell v. Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724; Sausser v. Steinmetz, 83 Pa. 324. In Louisiana a lease may be made either orally or in writing.

⁹⁷ One year in most states; two years in Florida; three in Indiana, New Jersey, and Pennsylvania; five in Virginia; and seven in Maryland.

⁹⁸ So in Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Ohio, Vermont, Washington, unless changed by recent statute. See MATH-EWS v. CARLTON, 189 Mass. 285, 75 N. E. 637, Burdick Cas. Real Property.

ment to give a lease may be void, yet equity may decree specific performance where there has been substantial performance, especially where the tenant has entered and made valuable improvements.⁹⁹ Moreover, an action will lie for the use and occupation of premises entered upon and retained by a tenant under an oral lease,¹ and some cases even hold that such a tenant will be liable for the entire term.² It is the general rule, however, that neither oral leases nor oral assignments of leases are valid, at law, against a lessor, by reason of possession and payment by a lessee,³ although some cases hold that possession, coupled with valuable improvements made by the lessee, will take the lease out of the statute of frauds.⁴

In addition to section 1 of the English statute of frauds, which provides that all leases (excepting terms not exceeding three years), and other estates and interests in real property, shall have the effect of leases at will only, unless put in writing; another section of the same statute⁵ (also generally copied by the statutes of this country) provides that no action shall be brought upon any oral agreement not to be performed within one year from the making thereof. In some states this section of the statute is held to apply to parol leases for a year or more; it being held that such leases are unenforceable.⁶ In other states, however, it is held that this section of the statute has no application whatever to oral agreements to lease real property.⁷ In the states

⁹⁹ *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Ladd v. Brown*, 94 Mich. 136, 53 N. W. 1048; *Mortimer v. Orchard*, 2 Ves. 243; *Butcher v. Stapley*, 1 Vern. 363; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Grant v. Ramsey*, 7 Ohio St. 165; *Jackson ex dem. Smith v. Pierce*, 2 Johns. (N. Y.) 221; *Walker v. Walker*, 2 Atk. 98.

¹ *Warner v. Hale*, 65 Ill. 395; *Moore v. Beasley*, 3 Ohio, 294.

² *Rosser v. Harris*, 48 Ga. 512; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Sorrells v. Goldberg*, 34 Tex. Civ. App. 265, 78 S. W. 711.

³ *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; *O'Leary v. Delaney*, 63 Me. 584; *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978. But see *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

⁴ *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608.

⁵ Section 4.

⁶ *Simons v. Trust Co.*, 80 Conn. 263, 67 Atl. 883, 11 Ann. Cas. 477; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167.

⁷ *Steininger v. Williams*, 63 Ga. 475; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385; *Rooks v. Booth*, 160 Mich. 62, 125 N. W. 69; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Stem v. Nysonger*, 69 Iowa, 512, 29 N. W. 433.

where the section in question is held applicable to leases, some cases have held that a part performance of the agreement, as evidenced, for example, by the payment of rent and the making of improvements, will take the oral agreement from the operation of the statute.⁸ In other states of the same class, however, this doctrine as to part performance is rejected.⁹

Execution and Delivery

A written lease must be signed,¹⁰ and delivered to the lessee.¹¹ Whether or not a seal is required will depend upon the jurisdiction, since some statutes require a "deed" for leases for more than a specified term,¹² and, under the statute of frauds, the writing required is not the same thing as a deed.¹³ The English Real Property Act of 1845 provides, however, that a lease required by law to be in writing shall be void unless made by deed. Consequently, in England, a lease for a term longer than three years from its date must be under seal.¹⁴ Also, in Delaware, under a statute providing that no lease of lands for a longer term than one year shall be valid, except as evidenced by a deed, it is held that a lease for a term of five years, if not sealed, is of no validity except as a lease from year to year.¹⁵

⁸ Wallace v. Scoggins, 18 Or. 502, 21 Pac. 558, 17 Am. St. Rep. 749; Steinger v. Williams, 63 Ga. 475; Steel v. Payne, 42 Ga. 207.

⁹ Warner v. Hale, 65 Ill. 395.

¹⁰ Fleming v. King, 100 Ga. 449, 28 S. E. 239; Rice v. Brown, 81 Me. 56, 16 Atl. 334; Clemens v. Broomfield, 19 Mo. 118; Kuntz v. Mahrenholz (Sup.) 88 N. Y. Supp. 1002; Winslow v. Railroad Co., 188 U. S. 646, 23 Sup. Ct. 443, 47 L. Ed. 635.

¹¹ Oneto v. Restano, 89 Cal. 63, 26 Pac. 788; Reynolds v. Greenbaum, 80 Ill. 416; Rhone v. Gale, 12 Minn. 54 (Gil. 25); Witman v. Reading, 191 Pa. 134, 43 Atl. 140.

¹² See 1 Stim. Am. St. Law, § 1471. And see Bratt v. Bratt, 21 Md. 578. But cf., as to the other terms, Doe v. Bell, 5 Term R. 471; Doe v. Stratton, 4 Bing. 446; Richardson v. Gifford, 1 Adol. & E. 52. In the absence of such a deed, the lessee is tenant from year to year. Clayton v. Blakey, 8 Term R. 3.

¹³ See Oliver v. Insurance Co. (1887) 82 Ala. 417, 2 South. 445, holding that a note for rent given by a lessee under a parol lease is, with letters referring to it, a sufficient memorandum in writing to take the lease out of the statute as against the lessee.

¹⁴ Laws of England, vol. 18, p. 384.

¹⁵ Stewart v. Apel, 5 Houst. (Del.) 189; Id., 4 Houst. (Del.) 314.

RIGHTS AND LIABILITIES OF LANDLORD AND TENANT

78. The rights and liabilities of landlord and tenant may, for convenience of treatment, be divided into three classes:

- (a) Rights under express covenants.
- (b) Rights under implied covenants.
- (c) Rights independent of covenants.

RIGHTS UNDER EXPRESS COVENANTS—By express covenants the parties may vary their rights and liabilities almost at will.

Express covenants are either:

- (a) Personal; or
- (b) Such as run with the land.

Covenants

Covenants are express or implied. An express covenant is one that is explicitly stated in words.¹⁶ An implied covenant is one that is inferred or imputed in law from the words used.¹⁷ Blackstone defines a covenant as an agreement in a deed whereby either party stipulates for the truth of certain facts, or binds himself to perform something for the other.¹⁸ Since a deed requires, at common law, a seal,¹⁹ an express covenant has been defined as an agreement under seal.²⁰ The same term, however, is used in those states where seals are abolished. The most usual covenants by the lessor are for quiet enjoyment,²¹ against incumbrances,²² to repair,²³ and to renew the lease.²⁴ The lessee generally covenants

¹⁶ Anderson, Law Dict.

¹⁸ 2 Blk. Comm. 304; 3 Blk. Comm. 155.

¹⁷ Id.

¹⁹ See Deeds, post.

²⁰ 1 Tayl. Landl. & Ten. (8th Ed.) 2, 94.

²¹ Shelton v. Codman, 3 Cush. (Mass.) 318; Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 230; Suydam v. Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Hunt v. Amidon, 4 Hill (N. Y.) 345, 40 Am. Dec. 283; Friedland v. Myers, 139 N. Y. 432, 34 N. E. 1055; Campbell v. Lewis, 3 Barn. & Ald. 392. Cf. Hochenauer v. Hilderbrant, 6 Colo. App. 199, 40 Pac. 470; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830.

²² Ober v. Brooks, 162 Mass. 102, 38 N. E. 429; Sprague v. Baker, 17 Mass. 586; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Pillsbury v. Mitchell, 5 Wis. 17; Redwine v. Brown, 10 Ga. 311.

²³ John Morris Co. v. Southworth, 154 Ill. 118, 39 N. E. 1099; Thompson-Houston Electric Co. of New York v. Improvement Co., 144 N. Y. 34, 39 N. E. 7; Clapper v. Kells, 78 Hun, 34, 28 N. Y. Supp. 1018; Dunn v. Robbins, 65 Hun, 625, 20 N. Y. Supp. 341; Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. Rep. 872; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Post v. Vetter, 2 E. D. Smith (N. Y.) 248; Benja-

²⁴ See note 24 on following page.

to pay rent,²⁵ to insure,²⁶ and not to assign,²⁷ or underlet.²⁸ The parties may agree, of course, to do or to perform any other lawful thing in connection with the leasing of the premises.²⁹ For example, covenants are sometimes inserted binding the tenant to repair,³⁰ to reside on the premises,³¹ not to engage in certain trades,³² to build in a prescribed manner,³³ or, if a farm lease, to cultivate in a certain way.³⁴ No precise or technical language is required to constitute a covenant, since any words that amount to an agreement will be sufficient.³⁵ Upon a breach of a covenant, a cause of action accrues for all damages sustained by reason of the breach.³⁶

min v. Heeney, 51 Ill. 492. The landlord must be notified that repairs are needed. *Ploen v. Staff*, 9 Mo. App. 309; *Walker v. Gilbert*, 2 Rob. (N. Y.) 214; *Wolcott v. Sullivan*, 6 Paige (N. Y.) 117.

²⁴ *Piggot v. Mason*, 1 Paige (N. Y.) 412; *Renoud v. Daskam*, 34 Conn. 512; *Blackmore v. Boardman*, 28 Mo. 420; *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278. A covenant for perpetual renewal is good. *Blackmore v. Boardman*, 28 Mo. 420. But see *Western Transp. Co. of City of Buffalo v. Lansing*, 49 N. Y. 499.

²⁵ *Hurst v. Rodney*, 1 Wash. C. C. 375, Fed. Cas. No. 6,937; *Main v. Feathers*, 21 Barb. (N. Y.) 646; *Jacques v. Short*, 20 Barb. (N. Y.) 269; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Thomson-Houston Electric Co. v. Improvement Co.*, 144 N. Y. 34, 39 N. E. 7.

²⁶ *Vernon v. Smith*, 5 Barn. & Ald. 1; *Doe v. Peck*, 1 Barn. & Adol. 428; *Thomas' Adm'r v. Von Kapff's Ex'rs*, 6 Gill & J. (Md.) 372.

²⁷ *Williams v. Earle*, 9 Best & S. 740; *Matthews v. Whitaker* (Tex. Civ. App.) 23 S. W. 538.

²⁸ *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223.

²⁹ See *Postal Telegraph Cable Co. v. Telegraph Co.*, 155 Ill. 335, 40 N. E. 587; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 56 N. W. 784; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *McManus v. Clothing Co.*, 60 Mo. App. 216, 1 Mo. App. Rep'r, 73; *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638.

³⁰ *Scott v. Brick Co.*, 135 N. Y. 141, 31 N. E. 1102. Cf. *Standen v. Chris-mas*, 10 Q. B. Div. 135. But see 1 Stim. Am. St. Law, § 2045. The covenant to repair is always implied.

³¹ *Tatem v. Chaplin*, 2 H. Bl. 133.

³² *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434. And see *Kugel v. Painter*, 166 Pa. 592, 31 Atl. 338; *Round Lake Ass'n v. Kellogg*, 141 N. Y. 348, 36 N. E. 326.

³³ *City of New York v. Insurance Co.*, 41 Barb. (N. Y.) 231; *City of New York v. Insurance Co.*, 10 Bosw. (N. Y.) 537.

³⁴ *Cockson v. Cock*, Cro. Jac. 125. See, also, *Callan v. McDaniel*, 72 Ala. 96.

³⁵ *Lovering v. Lovering*, 13 N. H. 513. It may be in the form of a condition. *Surplice v. Farnsworth*, 7 Man. & G. 576. Or an exception. *Russel v. Gulwel*, Cro. Eliz. 657; *South Congregational Meeting House in Lowell v. Hilton*, 11 Gray (Mass.) 407. Or a recital. *Penn v. Preston*, 2 Rawle (Pa.) 14; *Vaughan v. Matlock*, 23 Ark. 9.

³⁶ *Miller v. Benton*, 55 Conn. 529, 13 Atl. 678; *Cole v. Hardware Co.*, 139

Quiet Enjoyment

The landlord's covenant for quiet enjoyment binds him to secure the tenant against any hindrance or disturbance of his possession and enjoyment of the premises either on the part of the persons deriving their title from the landlord, or from a paramount title.³⁷ There must be an eviction of the tenant, but the eviction may be either actual³⁸ or constructive.³⁹ A tenant may be constructively evicted when the acts of the landlord, either of commission or omission, make the occupation of the premises practically impossible.⁴⁰ A failure of the landlord's title, however, unless followed by an ouster, will not constitute a breach of this covenant,⁴¹ and an eviction, to have the effect of a breach, must be under a legal title.⁴² The landlord does not covenant, under this contract, against trespassing or other wrongful disturbance by strangers.⁴³

Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846; *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Levy v. Roosevelt*, 131 App. Div. 8, 115 N. Y. Supp. 475; *Gibson v. Oliver*, 158 Pa. 277, 27 Atl. 961.

³⁷ *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Jackson v. Paterno*, 58 Misc. Rep. 201, 108 N. Y. Supp. 1073; *Blodgett v. Jensen*, 2 Neb. Unof. 543, 89 N. W. 399; *Pabst Brewing Co. v. Thorley*, 127 Fed. 439.

³⁸ The common-law rule was that the eviction must be an actual one. *St. John v. Palmer*, 5 Hill (N. Y.) 599; *Kerr v. Shaw*, 13 Johns. (N. Y.) 236; *Schuyllkill & D. Imp. & R. Co. v. Schmoele*, 57 Pa. 271.

³⁹ *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984; *Berrington v. Casey*, 78 Ill. 317; *Boyer v. Investment Co.*, 110 Iowa, 491, 81 N. W. 720; *Brown v. Water-Power Co.*, 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844; *City of New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Tucker v. Du Puy*, 210 Pa. 461, 60 Atl. 4.

⁴⁰ *Leadbeater v. Roth*, 25 Ill. 587; *Harford v. Taylor*, 181 Mass. 266, 63 N. E. 902; *Feist v. Peters* (Sup.) 120 N. Y. Supp. 805; *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. 588, 34 L. R. A. 575; *Silber v. Larkin*, 94 Wis. 9, 68 N. W. 406.

⁴¹ 1 *Tayl. Landl. & Ten.* (8th Ed.) 355; 1 *Wood, Landl. & Ten.* (2d Ed.) 771; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *Mills v. Sampsel*, 53 Mo. 360. Even a recovery in ejectment is no breach, unless it is followed by an ouster. *Kerr v. Shaw*, 13 Johns. (N. Y.) 236.

⁴² *Morse v. Goddard*, 13 Metc. (Mass.) 177, 46 Am. Dec. 728; *Ross v. Dysart*, 33 Pa. 452; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506.

⁴³ *Kiernan v. Music Co.*, 229 Ill. 494, 82 N. E. 410; *Cornell-Andrews Smelting Co. v. R. Corp.*, 202 Mass. 585, 89 N. E. 118; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173. A mere trespass by the lessor would not be a breach, as it is not an eviction. *City of New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680. But see *Bennet v. Bittle*, 4 Rawle (Pa.) 339.

Incumbrances—Repairs

The lessor may expressly covenant against incumbrances; that is, that no third persons have any easements or other rights in the premises which will disturb, or interfere with, the tenant's exclusive right of possession.⁴⁴ In the absence of such an express covenant, the tenant takes the property subject to whatever servitudes or other incumbrances may burden the property at the time of the lease.⁴⁵ Concerning repairs, the general rule is that a landlord is under no obligation to make them, in absence of a statute, or of an express agreement on his part.⁴⁶ He may, however, bind himself to make repairs,⁴⁷ although such covenants will not by construction 'be extended beyond their fair intent.'⁴⁸ In some states, there are statutes requiring lessors, particularly in the leasing of dwelling houses, to keep the premises in ordinary repair, in absence of any express agreement to the contrary.⁴⁹ Where a building is leased, however, to various tenants, who use in common a hallway, stairway, elevator, or other common parts of the premises under the control of the landlord, he will, by weight of authority, be liable for injuries received from his neglect to make necessary repairs in such common entrances, even though he has made no agreement to do so.⁵⁰

⁴⁴ Woodburn v. Renshaw, 32 Mo. 197; McManus v. Clothing Co., 60 Mo. App. 216.

⁴⁵ Hobson v. Silva (1902) 137 Cal. xix, 70 Pac. 619; Thompson v. Flathers, 45 La. Ann. 120, 12 South. 245.

⁴⁶ Gallagher v. Button, 73 Conn. 172, 46 Atl. 819; Cromwell v. Allen, 151 Ill. App. 404; Voss v. Sylvester, 203 Mass. 233, 89 N. E. 241; Sawyer v. Adams, 140 App. Div. 756, 126 N. Y. Supp. 128; Medary v. Cathers, 161 Pa. 87, 28 Atl. 1012.

⁴⁷ Culver v. Hill, 68 Ala. 66, 44 Am. Rep. 134; Neglia v. Lielouka, 32 Misc. Rep. 707, 65 N. Y. Supp. 500; Rife v. Reynolds, 137 Mo. App. 290, 117 S. W. 652.

⁴⁸ Cowell v. Lumley, 39 Cal. 151, 2 Am. Rep. 430; Vale v. Trader, 5 Kan. App. 307, 48 Pac. 458; Bennett v. Sullivan, 100 Me. 118, 60 Atl. 886; Zbarazer Realty Co. v. Brandstein, 61 Misc. Rep. 623, 113 N. Y. Supp. 1078; Clark v. Babcock, 23 Mich. 164; Hollidaysburg Male & Female Seminary Co. v. Gray, 45 Pa. Super. Ct. 426.

⁴⁹ Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S. E. 928; Edmison v. Aslesen, 4 Dak. 145, 27 N. W. 82; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; Torreson v. Walla, 11 N. D. 481, 92 N. W. 834; Tucker v. Bennett, 15 Okl. 187, 31 Pac. 423.

⁵⁰ Fairmount Lodge No. 590, A. F. & A. M., v. Tilton, 122 Ill. App. 636; Watkins v. Goodall, 138 Mass. 533; Olson v. Schultz, 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437; Peters v. Kelly, 129 App. Div. 290, 113 N. Y. Supp. 357; Lewin v. Pauli, 19 Pa. Super. Ct. 447.

Assigning and Subletting

In the absence of an express covenant to the contrary, the lessee of a term for years may assign,⁵¹ or sublet⁵² his term, unless some statute prevents.⁵³ An assignment is to be distinguished, however, from a subletting. In an assignment, the tenant transfers his entire term, retaining no reversionary interest.⁵⁴ A subletting occurs when a tenant leases any part of his term less than the whole.⁵⁵ For example, if a tenant for a term of five years sublets to another person for a term of one year, or for any length of time less than the entire five years, the transfer is a subletting, and not an assignment. It consequently follows that a covenant not to assign is not broken by a subletting,⁵⁶ and it is also held that a covenant not to sublet is not broken by an assignment.⁵⁷

Real and Personal Covenants

Covenants are either real or personal. A real covenant is one that "runs with the land," or, in other words, is binding upon the assignee, the burden passing with the land to every one to whom the term is from time to time assigned.⁵⁸ In the same manner, the benefits of covenants relating to the land, entered into by the lessor, will pass to the assignee.⁵⁹ Covenants that run with the land cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate, and bind the parties in respect to the privity of the estate.⁶⁰ They

⁵¹ *Garner v. Byard*, 23 Ga. 289, 68 Am. Dec. 527; *Gillespie v. Gas Co.*, 236 Ill. 188, 86 N. E. 219; *Lynch v. Hotel Co.* (Sup.) 112 N. Y. Supp. 915; *Philadelphia & E. R. Co. v. Railroad Co.*, 53 Pa. 20; *Cooney v. Hayes*, 40 Vt. 478, 94 Am. Dec. 425.

⁵² *Maddox v. Westcott*, 156 Ala. 492, 47 South. 170, 16 Ann. Cas. 604; *Martin v. Sexton*, 112 Ill. App. 199; *Weatherly v. Baker*, 25 La. Ann. 229; *Schenkel v. Lischinsky*, 45 Misc. Rep. 423, 90 N. Y. Supp. 300.

⁵³ *Bass v. West*, 110 Ga. 698, 36 S. E. 244; *Gano v. Prindle*, 6 Kan. App. 851, 50 Pac. 110; *Pierce, Ceugin & Co. v. Meadows* (Ky.) 86 S. W. 1127; *Roth Tool Co. v. Spring Co.*, 93 Mo. App. 530, 67 S. W. 967; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

⁵⁴ *Hicks v. Martin*, 25 Mo. App. 359; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Murdock v. Fishel*, 67 Misc. Rep. 122, 121 N. Y. Supp. 624; *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844.

⁵⁵ *Shumway v. Collins*, 6 Gray (Mass.) 227; *Geer v. Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151; *Hudgins v. Bowes* (Tex. Civ. App.) 110 S. W. 178.

⁵⁶ *Den ex dem. Bockover v. Post*, 25 N. J. Law, 285; *Jackson ex dem. Welden v. Harrison*, 17 Johns. (N. Y.) 66; *Hargrave v. King*, 40 N. C. 430.

⁵⁷ *Field v. Mills*, 33 N. J. Law, 254; *Murdock v. Fishel*, 67 Misc. Rep. 122, 121 N. Y. Supp. 624; *Lynde v. Hough*, 27 Barb. (N. Y.) 415.

⁵⁸ *Williams*, Real Prop. p. 567.

⁵⁹ *Id.*

⁶⁰ The assignee is bound by privity of estate, while the personal representative is bound by privity of contract. 1 Tayl. Landl. & Ten. (8th Ed.)

are exceptions to the rule of the common law that choses in action cannot be assigned.⁶¹ If a covenant touches or concerns the thing demised, and there is privity of estate between the parties, it runs with the land.⁶² If it relates to something in existence when the lease was executed, the assignees may enforce it without being named in the lease.⁶³ If, however, it relates to something not in existence at that time, the assignees must be named in the covenant, or they cannot enforce it.⁶⁴ In no case, however, are the lessee's assigns bound by personal covenants between the original parties.⁶⁵ Covenants to repair,⁶⁶ pay rent,⁶⁷ cultivate in a certain mode, for quiet enjoyment,⁶⁸ to insure,⁶⁹ or covenants restricting

308; *Spencer's Case*, 5 Coke, 16. See, also, *Minshull v. Oakes*, 2 Hurl. & N. 793; *Martyn v. Clue*, 18 Q. B. Div. 661; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282.

⁶¹ 4 Kent, Comm. 472. Assignees of the lessor could not enforce covenants against the lessee or his assignees until the statute of 32 Hen. VIII, c. 34.

⁶² 1 Tayl. Landl. & Ten. (8th Ed.) 308; *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Piggot v. Mason*, 1 Paige (N. Y.) 412; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Wooliscroft v. Norton*, 15 Wis. 198; *Blackmore v. Boardman*, 28 Mo. 420; *Gordon v. George*, 12 Ind. 408; *Tatem v. Chaplin*, 2 H. Bl. 133; *Vernon v. Smith*, 5 Barn. & Ald. 1; *Vyvyan v. Arthur*, 1 Barn. & C. 410; *Williams v. Earle*, L. R. 3 Q. B. 739. And see, for covenants running with the land, between parties not lessor and lessee, *National Union Bank at Dover v. Segur*, 39 N. J. Law, 173; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Lyon v. Parker*, 45 Me. 474.

⁶³ *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; *Scheidt v. Belz*, 4 Ill. App. 431; *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870; *Storandt v. Vogel & Binder Co.*, 140 App. Div. 671, 125 N. Y. Supp. 568; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13. *Parkenhams Case*, Y. B. 42 Edw. III, c. 3, pl. 14; *Anon.*, Moore, 179, pl. 318.

⁶⁴ *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Ovington Bros. Co. v. Henshaw*, 47 Misc. Rep. 167, 93 N. Y. Supp. 380; *Bream v. Dickerson*, 2 Humphr. (Tenn.) 126; *Spencer's Case*, 5 Coke, 16; *Masury v. Southworth*, 9 Ohio St. 340; *Doe v. Seaton*, 2 Cromp., M. & R. 730; *Verplanck v. Wright*, 23 Wend. (N. Y.) 506; *Wakefield v. Brown*, 9 Q. B. Div. 209.

⁶⁵ *Mayor, etc., of Congleton v. Pattison*, 10 East, 130; *Dolph v. White*, 12 N. Y. 296; *Curtis v. White, Clarke, Ch.* (N. Y.) 389; *Inhabitants of Plymouth v. Carver*, 16 Pick. (Mass.) 183; *Spencer's Case*, supra; *Gray v. Cuthbertson*, 2 Chit. 482. Cf. *Mayho v. Buckhurst*, Cro. Jac. 438; *Dolph v. White*, 12 N. Y. 296.

⁶⁶ *Herboth v. Radiator Co.*, 145 Mo. App. 484, 123 S. W. 533; *Silberberg v. Trachtenberg*, 58 Misc. Rep. 536, 109 N. Y. Supp. 814; *Pollard v. Shaaffer*, 1 Dall. (Pa.) 210, 1 L. Ed. 104, 1 Am. Dec. 239; *Congham v. King*, Cro. Car. 221; *Twynam v. Pickard*, 2 Barn. & Ald. 105.

⁶⁷ *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Patten v. Deshon*, 1 Gray (Mass.) 325; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Fennell v. Guffey*, 139 Pa. 341, 20 Atl. 1048.

⁶⁸ *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Hamilton v. Wright's Adm'r*, 28 Mo. 199; 1 Tayl. Landl. & Ten. (8th Ed.) 313.

⁶⁹ *Vernon v. Smith*, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; *Douglass v. Murphy*, 16 U. C. Q. B. 113.

the use of the premises,⁷⁰ run with the land, as do also all implied covenants;⁷¹ while covenants purely personal, such as an agreement to pay the lessee for a building to be erected by him, do not run with the land.⁷² So a covenant to build a wall in a certain place may not bind an assignee of the term.⁷³ A lessee is bound by an express covenant, even though he has assigned the term,⁷⁴ and so is the lessor.⁷⁵

SAME—RIGHTS UNDER IMPLIED COVENANTS

79. The principal implied covenants in a lease are:

- (a) By the lessor, for quiet enjoyment and to pay taxes.
 - (b) By the lessee, to pay rent, not to commit waste, to cultivate farm land properly, and, at common law, to repair.
- Implied covenants always run with the land.

By the Lessor

Besides express covenants, there are others which are implied by law from the execution of the lease.⁷⁶ It is held that the words "demise" or "grant" imply a covenant by the lessor for quiet enjoyment.⁷⁷ There is also an implied covenant by the lessor that he will pay all taxes and assessments levied on the premises demised.⁷⁸ There is, however, no covenant implied that

⁷⁰ *Wheeler v. Earle*, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649; *Fleetwood v. Hull*, 23 Q. B. D. 35, 54 J. P. 229, 58 L. J. Q. B. 341.

⁷¹ 1 Tayl. Landl. & Ten. (8th Ed.) 313.

⁷² *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Bream v. Dickerson*, 2 Humph. (Tenn.) 126; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Mayor, etc., of Congleton v. Pattison*, 10 East, 138; *Sampson v. Easterby*, 9 Barn. & C. 505. Cf. *Thomas v. Hayward*, L. R. 4 Exch. 311. Such a covenant may be enforced by an assignee of the lessee. *Hunt v. Danforth*, 2 Curt. 592, Fed. Cas. No. 6,887.

⁷³ *Spencer's Case*, 5 Coke, 16a. And see *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Masury v. Southworth*, 9 Ohio St. 340.

⁷⁴ *Barnard v. Godscall*, Cro. Jac. 309.

⁷⁵ *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485.

⁷⁶ 1 Tayl. Landl. & Ten. (8th Ed.) 301; 1 Wood, Landl. & Ten. (2d Ed.) 691.

⁷⁷ *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Grannis v. Clark*, 8 Cow. (N. Y.) 36; *Barney v. Keith*, 4 Wend. (N. Y.) 502; *Tone v. Brace*, 8 Paige (N. Y.) 597; *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 486; *Maule v. Ashmead*, 20 Pa. 482; *Hamilton v. Wright's Adm'r*, 28 Mo. 199; *Wade v. Halligan*, 16 Ill. 507. But see *Sedberry v. Verplanck* (Tex. Civ. App.) 31 S. W. 242; *Groome v. City Corporation*, 10 Utah, 54, 37 Pac. 90.

⁷⁸ *Stubbs v. Parsons*, 3 Barn. & Ald. 516; *Watson v. Atkins*, Id. 647. If

the premises are in a tenantable condition, or even reasonably suitable for occupation. The rule of *caveat emptor* applies.⁷⁹ Moreover, there is no implied covenant that premises are fit for the use or purpose intended,⁸⁰ and this general rule is held to apply also to the lease of a dwelling house.⁸¹ It has been held, however, that where a furnished house is leased there is an implied agreement that it is fit for immediate habitation.⁸²

By the Lessee—Rent

Although a valid term of years may be created without the reservation of a rent,⁸³ yet, whenever a rent is reserved, there is an implied covenant on the part of the lessee to pay it, whether he ever takes possession or not.⁸⁴ Where, also, there is an express covenant to pay, a destruction of the demised premises will not relieve him.⁸⁵ When, however, the tenant is evicted from part

the lessor falls to do so, the lessee may pay them, to prevent the loss of his estate, and deduct the amount from the rent. *McPherson v. Railroad Co.*, 66 Mo. 103.

⁷⁹ *Cromwell v. Allen*, 151 Ill. App. 404; *Rand v. Adams*, 185 Mass. 341, 70 N. E. 445; *Benett v. Sullivan*, 100 Me. 118, 60 Atl. 886; *Reeves v. McComiskey*, 168 Pa. 571, 32 Atl. 96; *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671; *DOYLE v. RAILWAY CO.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223, *Burdick Cas. Real Property*; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Fisher v. Lighthall*, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Blake v. Ranous*, 25 Ill. App. 486; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006.

⁸⁰ *Rubens v. Hill*, 115 Ill. App. 565; *Voss v. Sylvester*, 203 Mass. 233, 89 N. E. 241; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *Scheffler Press v. Perlman*, 130 App. Div. 576, 115 N. Y. Supp. 40; *Hazlett v. Powell*, 30 Pa. 293; *Koen v. Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

⁸¹ *DALY v. WISE*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236, *Burdick Cas. Real Property*; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671; *Flannery v. Simons*, 47 Misc. Rep. 123, 93 N. Y. Supp. 544. *Contra*, *Thompson v. Walker*, 6 Ga. App. 80, 64 S. E. 336.

⁸² Such is the English rule. See *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, 2 Exch. Div. 336. See, also, *INGALLS v. HOBBS*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460, *Burdick Cas. Real Property*. The weight of authority, however, in this country, is to the contrary. See note to 38 Am. St. Rep. 479.

⁸³ *Sherwin v. Lasher*, 9 Ill. App. 227; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665. Cf. *Hooton v. Holt*, 139 Mass. 54, 22 N. E. 221; *Osborne v. Humphrey*, 7 Conn. 335. If no rent is reserved, there may be a recovery for use and occupation, according to the real value of the premises, unless a contrary intention of the parties is shown. 1 Tayl. Landl. & Ten. (8th Ed.) 434; 2 Wood, Landl. & Ten. (2d Ed.) 1328.

⁸⁴ *McGlynn v. Brock*, 111 Mass. 219; *Mechanics' & Traders' Fire Ins. Co. v. Scott*, 2 Hilt. (N. Y.) 550; *McMurphy v. Minot*, 4 N. H. 251.

⁸⁵ 1 Tayl. Landl. & Ten. (8th Ed.) 436; *Peck v. Ledwidge*, 25 Ill. 109; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; *Fowler v. Bott*, 6 Mass. 63;

or all of the premises by a title paramount, his liability for rent ceases in proportion.⁸⁶ Moreover, when he is evicted by the landlord, even from a part, the whole liability for rent is at an end.⁸⁷ It is customary to reserve a right of re-entry for nonpayment of rent.⁸⁸

Waste—Husbandry

Waste and good husbandry have been previously explained in connection with estates for life.⁸⁹ The same general principles, in connection with these incidents, apply to tenants for years as to life tenants. The law imposes an obligation, even in absence of express covenant, and, in fact, independent of covenants,⁹⁰ upon a lessee to surrender the premises, at the close of his term, in as good condition, reasonable wear and tear excepted, as when he received them. In other words, he must so treat the property that no substantial injury be done to it by his negligence.⁹¹

French v. Richards, 6 Phila. (Pa.) 547; *Holtzapffel v. Baker*, 18 Ves. 115. This rule may be changed, however, by statute. See *GAY v. DAVEY*, 47 Ohio St. 396, 25 N. E. 425, *Burdick Cas. Real Property*.

⁸⁶ *Frommer v. Roessler*, 12 Misc. Rep. 152, 33 N. Y. Supp. 13; *Lansing v. Van Alstyne*, 2 Wend. (N. Y.) 561; *Carter v. Burr*, 39 Barb. (N. Y.) 59; *Fillebrown v. Hoar*, 124 Mass. 580; *Stevenson v. Lambard*, 2 East, 575; *Friend v. Supply Co.*, 165 Pa. 652, 30 Atl. 1134. Cf. *M'Loughlin v. Craig*, 7 Ir. Com. Law, 117; *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Morse v. Goddard*, 13 Metc. (Mass.) 177, 46 Am. Dec. 728; *Big Black Creek Imp. Co. v. Kemmerer*, 162 Pa. 422, 29 Atl. 739; *Sylvester v. Hall*, 47 Ill. App. 304. But see *Ray v. Johnson*, 98 Mich. 34, 56 N. W. 1048; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966.

⁸⁷ *Coulter v. Norton*, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *City Power Co. v. Water Co.*, 55 Minn. 172, 56 N. W. 685, 1006; *Leishman v. White*, 1 Allen (Mass.) 489; *Christopher v. Austin*, 11 N. Y. 216; *Graham v. Anderson*, 3 Har. (Del.) 364; *Bennet v. Bittle*, 4 Rawle (Pa.) 339; *Lewis v. Payn*, 4 Wend. (N. Y.) 423; *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415; *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 356. See, also, *Grabenhorst v. Nicodemus*, 42 Md. 236. See, also, *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Hoeverler v. Fleming*, 91 Pa. 322. But cf. *Smith v. Raleigh*, 3 Camp. 513; *Lawrence v. French*, 25 Wend. (N. Y.) 443; *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. 929; *Ogilvie v. Hull*, 5 Hill (N. Y.) 52; *Edgerton v. Page*, 20 N. Y. 281; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Townsend v. Wharf Co.*, 117 Mass. 501.

⁸⁸ When no right of re-entry is reserved, the landlord's only remedy for a breach of covenant is an action for damages. *Brown v. Kite*, 2 Overt. (Tenn.) 233; *Den ex dem. Bockover v. Post*, 25 N. J. Law, 285.

⁸⁹ *Ante*.

⁹⁰ *Infra*.

⁹¹ *Franklin v. Triplett*, 79 Ark. 82, 94 S. W. 929; *Bryan v. French*, 20 La. Ann. 366; *Sigur v. Lloyd*, 1 La. Ann. 421; *Genan v. District of Columbia*, 20 Ct. Cl. 389.

In the case of farm lands, there is an implied covenant that no waste shall be committed, and that the land shall be cultivated in a husbandlike manner.⁹²

Repairs

At common law, there is an implied covenant on the part of the tenant to repair,⁹³ and his failure to do so constitutes permissive waste.⁹⁴ This implied duty is connected with his obligation to deliver the premises, at the expiration of his term, in good condition; consequently the duty extends only to keeping a house wind and water tight,⁹⁵ and he is not liable for deteriorations resulting from ordinary wear and tear.⁹⁶ It is not his duty, for example, to paint, whitewash, or to paper, buildings or rooms, nor to shingle a roof, or to make substantial repairs of any sort requiring the substitution of new material for worn-out parts.⁹⁷ In case of the accidental destruction of the premises, by fire or otherwise, a tenant is under no implied obligation to rebuild the same.⁹⁸

⁹² *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874; *Manly v. Pearson*, 1 N. J. Law, 377; *Wing v. Gray*, 36 Vt. 261; *Hubble v. Cole*, 85 Va. 87, 7 S. E. 242; *Walker v. Tucker*, 70 Ill. 527; *Aughinbaugh v. Coppenheffer*, 55 Pa. 347; *Powley v. Walker*, 5 Term R. 373; *Legh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 3 Moore, C. P. 536.

⁹³ *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Shelby v. Hearne*, 6 Yerg. (Tenn.) 512; *Pollard v. Shaffer*, 1 Dall. (U. S.) 210, 1 L. Ed. 104; *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65; *Miller v. Shields*, 55 Ind. 71; *Turner v. Townsend*, 42 Neb. 376, 60 N. W. 587. The lessor is never bound to repair unless there is a stipulation to that effect. Nor must he rebuild a house, if it burns down, without a covenant to do so. *Sheets v. Selden*, 7 Wall. (U. S.) 423, 19 L. Ed. 166; *Leavitt v. Fletcher*, 10 Allen (Mass.) 121; *Gill v. Middleton*, 105 Mass. 478, 7 Am. Rep. 548; *Doupe v. Gerrin*, 45 N. Y. 119, 6 Am. Rep. 47; *Little v. Macadaras*, 29 Mo. App. 332; *Id.*, 38 Mo. App. 187; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Medary v. Cathers*, 161 Pa. 87, 28 Atl. 1012; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430; *Jones v. Millsaps*, 71 Miss. 10, 14 South. 440, 23 L. R. A. 155. The duty is imposed by statute in several states. 1 Stim. Am. St. Law, § 2041.

⁹⁴ 1 Tayl. Landl. & Ten. (8th Ed.) 408; 1 Wood, Landl. & Ten. (2d Ed.) 980; *Lothrop v. Thayer*, 138 Mass. 466, 52 Am. Rep. 286, and cases cited.

⁹⁵ *Parrott v. Barney*, Deady, 405, Fed. Cas. No. 10,773a; *Kastor v. Newhouse*, 4 E. D. Smith (N. Y.) 20; *Auworth v. Johnson*, 5 Car. & P. 239.

⁹⁶ *Torriano v. Young*, 6 Car. & P. 8.

⁹⁷ *Johnson v. Dixon*, 1 Daly (N. Y.) 178; *Long v. Fitzsimmons*, 1 Watts & S. (Pa.) 530.

⁹⁸ *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Eagle v. Swayze*, 2 Daly (N. Y.) 140. And see *Payne v. James*, 45 La. Ann. 381, 12 South. 492. Cf., however, *Peck v. Manufacturing Co.*, 43 Ill. App. 360.

Taxes—Insurance—Assigning

Covenants on the part of a tenant to pay taxes,⁹⁹ to insure, or not to assign are never implied.¹

SAME—RIGHTS AND LIABILITIES INDEPENDENT OF COVENANTS

80. As incidents of the relation, and independent of any covenants, the parties have the following rights:

- (a) The landlord has a right to protect the reversion.
- (b) He may distrain for rent.
- (c) The tenant is entitled to exclusive possession.
- (d) He is liable for waste.
- (e) He may take estovers.
- (f) He is entitled to emblements, when his estate is cut off by some contingency, without his fault.
- (g) The lessee, and all persons claiming under him, are estopped to deny the lessor's title.

The Landlord's Rights and Liabilities

Irrespective of covenants, either express or implied, there are certain rights and liabilities, on the part of the landlord, and also on the part of the tenant, that arise from the very fact of the relation. The landlord has the right to protect his reversion by maintaining actions against all persons doing permanent injury to the property.² This does not mean that the landlord may sue for an injury merely to the tenant's possession,³ but for wrongs that

⁹⁹ Except by statute. 1 Stim. Am. St. Law, § 2042.

¹ Wood, Landl. & Ten. (2d Ed.) 701, 709; 2 Wood, Landl. & Ten. (2d Ed.) 954; 1 Tayl. Landl. & Ten. (8th Ed.) 398, 477, 479; Church v. Brown, 15 Ves. 258.

² Lachman v. Deisch, 71 Ill. 59; Brown v. Bridges, 31 Iowa, 138; Fitch v. Gosser, 54 Mo. 267; Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783; Starr v. Jackson, 11 Mass. 519; French v. Fuller, 23 Pick. (Mass.) 104; Little v. Palister, 3 Greenl. (Me.) 6; Austin v. Railroad Co., 25 N. Y. 334; Aycock v. Railroad Co., 89 N. C. 321; City of Cartersville v. Lyon, 69 Ga. 577; Jesser v. Gifford, 4 Burrows, 2141; Gulf, C. & S. F. Ry. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S. W. 89; Missouri, K. & T. Ry. Co. v. Fulmore (Tex. Civ. App.) 26 S. W. 238. But see Anthony v. Railway Co., 162 Mass. 60, 37 N. E. 780.

³ The tenant alone can sue for injuries to the possession. Seaboard Air Line R. Co. v. Brown, 158 Ala. 630, 48 South. 48; Southern R. Co. v. State, 116 Ga. 276, 42 S. E. 508; Walden v. Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; Van Ness v. Telephone Co., 78 N. J. Law, 511, 74 Atl. 456; Moody v. King, 74 Me. 497.

affect the permanent value of the property, his reversionary interests.⁴ The owner of leased property may also sell the same, or he may assign the lease.⁵

A landlord is liable to strangers for injuries resulting from the dangerous condition of the premises at the time the lease was executed.⁶ In case, however, of injuries received by strangers from the negligence of the tenant, the landlord is not liable.⁷ While a statute may make it the duty of landlord to keep the sidewalks of leased premises in repair, yet, in absence of such legislation, it is not his duty to keep such places in safe condition, nor to remove snow and ice therefrom.⁸ In some states a landlord, by force of statute, must provide suitable fire escapes from the

⁴ *Heilbron v. Water Ditch Co.*, 75 Cal. 117, 17 Pac. 65; *Bulkley v. Dolbeare*, 7 Conn. 232; *Sayers v. Railroad Co.*, 82 Kan. 123, 107 Pac. 641, 27 L. R. A. (N. S.) 168; *Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267; *Cramer v. Groseclose*, 53 Mo. App. 648; *Logan v. Telephone Co.*, 40 Pa. Super. Ct. R. 644.

⁵ *Infra*.

⁶ *House v. Metcalf*, 27 Conn. 631; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099; *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; *Maloney v. Hayes*, 206 Mass. 1, 91 N. E. 911, 28 L. R. A. (N. S.) 200; *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56; *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051; *Kirchner v. Smith*, 207 Pa. 431, 56 Atl. 947; *Marshall v. Heard*, 59 Tex. 266; *City of Denver v. Solomon*, 2 Colo. App. 534, 31 Pac. 507. So the landlord may be liable to the tenant for injuries, where the former retains control of part of the tenement. *Elliott v. Pray*, 10 Allen (Mass.) 378, 87 Am. Dec. 653; *Watkins v. Goodall*, 138 Mass. 533; *Payne v. Irvin*, 144 Ill. 482, 33 N. E. 756; *Davis v. Power Co.*, 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156; *Montieth v. Finkbeiner*, 66 Hun, 633, 21 N. Y. Supp. 288; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732. But see *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497; *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012; *McLean v. Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Daley v. Quick*, 99 Cal. 179, 33 Pac. 859. The tenant, while he has control of the premises, is liable to strangers for negligence. *Stickney v. Munroe*, 44 Me. 195; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897, 60 N. W. 373; *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197. So he may be liable to the landlord for injury to the premises. *Stevens v. Pantlind*, 95 Mich. 145, 54 N. W. 716; *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. 1105; *Olsen v. Webb*, 41 Neb. 147, 59 N. W. 520.

⁷ *Bailey v. Dunaway*, 8 Ga. App. 713, 70 S. E. 141; *Wheeler v. Car Co.*, 131 Ill. App. 262; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Boss v. Jarmulowsky*, 81 App. Div. 577, 81 N. Y. Supp. 400; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

⁸ *Gardner v. Rhodes*, 114 Ga. 929, 41 S. E. 63, 57 L. R. A. 749; *Coman v. Alles*, 198 Mass. 99, 83 N. E. 1097, 14 L. R. A. (N. S.) 950; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Atwill v. Blatz*, 118 Wis. 226, 95 N. W. 99.

upper floors of certain buildings, particularly in case of factories and workshops.⁹ For injuries received by a tenant,¹⁰ or by a subtenant,¹¹ guest, or servant¹² of the tenant, and resulting from defects in the premises, a landlord will be liable, as a general rule, only when, having knowledge of latent defects, he conceals them from his tenant. In the absence of a statute,¹³ or of an agreement with his tenant,¹⁴ a landlord has, generally, no right to enter upon the leased premises for the purpose of making repairs.¹⁵ He may enter, however, to prevent waste,¹⁶ or for the purpose of putting the premises in safe condition to protect himself from actions based upon his negligence.¹⁷

Distress for Rent.

At common law, a landlord may seize or distrain personal property found upon the leased premises, in case the rent is in arrear.¹⁸

⁹ Carrigan v. Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; Ziebig v. Chemical Co., 150 Mo. App. 482, 131 S. W. 131. And see Lee v. Smith, 42 Ohio St. 458, 51 Am. Rep. 839; Keely v. O'Conner, 106 Pa. 321.

¹⁰ Miner v. McNamara, 81 Conn. 690, 72 Atl. 138, 21 L. R. A. (N. S.) 477; Lazarus & Cohen v. Parmly, 113 Ill. App. 624; Moore v. Parker, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778; Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431; Smith v. Donnelly, 45 Misc. Rep. 447, 92 N. Y. Supp. 43; Davis v. Smith, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478, 106 Am. St. Rep. 691, 3 Ann. Cas. 832; DOYLE v. RAILROAD CO., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223, Burdick Cas. Real Property.

¹¹ Smith v. State, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772; McLean v. Warehouse Co., 158 Mass. 472, 33 N. E. 499; Peterson v. Smart, 70 Mo. 34; Dood v. Rothschild, 31 Misc. Rep. 721, 65 N. Y. Supp. 214; Burns v. Luckett, 7 Ohio Dec. 483.

¹² Davis v. Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156; Fisher v. Jansen, 128 Ill. 549, 21 N. E. 598; Copley v. Balle, 9 Kan. App. 465, 60 Pac. 656; Nash v. Webber, 204 Mass. 419, 90 N. E. 872; Sciolaro v. Asch, 198 N. Y. 77, 91 N. E. 263, 32 L. R. A. (N. S.) 945; Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736; Godley v. Hagerty, 20 Pa. 387, 59 Am. Dec. 731.

¹³ Dwyer v. Carroll, 86 Cal. 298, 24 Pac. 1015; Campbell v. Porter, 46 App. Div. 628, 61 N. Y. Supp. 712; Bonnacaze v. Beer, 37 La. Ann. 531.

¹⁴ Marks v. Gartside, 16 Ill. App. 177; White v. Meallo, 37 N. Y. Super. Ct. 72; Rowan v. Kelsey, 18 Barb. (N. Y.) 484; Clark v. Lindsay, 7 Pa. Super. Ct. 43; HAYNES v. ALDRICH, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636, Burdick Cas. Real Property.

¹⁵ Spades v. Murray, 2 Ind. App. 401, 28 N. E. 709; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Hahs v. Railroad Co., 147 Mo. App. 262, 126 S. W. 524; Bedlow v. Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; Wunder v. McLean, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702.

¹⁶ Sulzbacher v. Dickie, 51 How. Prac. (N. Y.) 500. See, also, Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

¹⁷ Dawson v. Brouse, Wils. (Ind.) 441; Anderson v. Dickie, 26 How. Prac. (N. Y.) 105.

¹⁸ 2 Tayl. Landl. & Ten. (8th Ed.) 163; 2 Wood, Landl. & Ten. (2d Ed.)

This is a right growing out of the relation of landlord and tenant, and is not dependent upon agreement,¹⁹ and this remedy lies for all rents reserved which are certain.²⁰ At common law, the distraint may be made by the lessor, or the assignee of the reversion, for all the rent due.²¹ It is now required, however, in most states, that a warrant be executed by a proper officer.²² At common law, any chattels²³ found upon the premises could be distrained, whether belonging to the tenant, or to others.²⁴ An exception, however, was made in favor of goods brought there in course of trade.²⁵ The tendency of modern decisions and statutes is to restrict the right of distraining to the property of the lessee.²⁶ There can be no distress for rent unless the relationship of landlord and tenant actually exists,²⁷ and also an express contract to pay rent.²⁸ Under the common law, the landlord had merely the

1305; *Newman v. Anderton*, 2 Bos. & P. (N. R.) 224. Cf. *Beesard v. Capel*, 8 Barn. & C. 141; *Prescott v. Boucher*, 3 Barn. & Adol. 849.

¹⁹ In Colorado distress for rent does not exist in the absence of an express agreement. *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342.

²⁰ *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193. Cf. *Tutter v. Fryer*, *Winch*, 7; *Paxton v. Kennedy*, 70 Miss. 865, 12 South. 546.

²¹ *Slocum v. Clark*, 2 Hill (N. Y.) 475; *Lathrop v. Clewis*, 63 Ga. 282. But not by executor for rent accruing in decedent's lifetime. *Prescott v. Boucher*, 3 Barn. & Adol. 849. Cf. ——— *v. Cooper*, 2 Wills. 375; *Parmenter v. Webber*, 8 Taunt. 593.

²² For the details and procedure, the local statutes must be consulted.

²³ Unless of a perishable nature. *Morley v. Pincombe*, 2 Exch. 101. And see *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434.

²⁴ *Swartz v. Brewing Co.*, 109 Md. 393, 71 Atl. 854, 16 Ann. Cas. 1156; *Allen v. Agnew*, 24 N. J. Law. 443; *Weidman v. Rieker*, 44 Pa. Super. Ct. 85; *Himely v. Wyatt*, 1 Bay (S. C.) 102; *Hughes v. Smallwood*, 25 Q. B. D. 306; 59 L. J. Q. B. 503; *Blanche v. Bradford*, 38 Pa. 344, 80 Am. Dec. 489; *Spencer v. McGowen*, 13 Wend. (N. Y.) 256. And see *Paine v. Lock Co.*, 64 Miss. 175, 1 South. 56; *Davis v. Payne's Adm'r*, 4 Rand. (Va.) 332.

²⁵ *Brown v. Stackhouse*, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908; *Cadwalader v. Tindall*, 20 Pa. 422; *Knowles v. Pierce*, 5 Houst. (Del.) 178; *Block v. Latham*, 63 Tex. 414.

²⁶ *Robelen v. Bank*, 1 Marv. (Del.) 346, 41 Atl. 80; *Kennedy v. Lange*, 50 Md. 91; *Kleber v. Ward*, 88 Pa. 93; 2 Tayl. Landl. & Ten. (8th Ed.) 197; *Connah v. Hale*, 23 Wend. (N. Y.) 475; *Peacock v. Purvis*, 2 Brod. & B. 362.

²⁷ *Sims v. Price*, 123 Ga. 97, 50 S. E. 961; *Murr v. Glover*, 34 Ill. App. 373; *Paxton v. Kennedy*, 70 Miss. 865, 12 South. 546; *Grier v. McAlerney*, 148 Pa. 587, 24 Atl. 119; *Selby v. Greaves*, L. R. 3 C. P. 594, 37 L. J. C. P. 251.

²⁸ *Melick v. Benedict*, 43 N. J. Law. 425. But see *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193. In many states the remedy is incorporated within the law of liens and attachments. See 1 Stim. Am. St. Law, §§ 2031-2036. And see *Willard v. Rogers*, 54 Ill. App. 583; *Rogers v. Grigg* (Tex. Civ. App.) 29 S. W. 654; *Belser v. Youngblood*, 103 Ala. 545, 15 South. 863; *Manhattan Trust Co. v. Railroad Co.*, 68 Fed. 72; *Smith v. Dayton*, 94 Iowa, 102, 62

right to keep the goods until the rent was paid.²⁹ He could not, moreover, use them for his own benefit.³⁰ Under the statutes, however, the goods may be sold, upon due notice, if they are not redeemed within the time fixed by the statutes.³¹ The remedy of distress for rent still exists in a number of our states,³² although the proceedings based thereon have been much modified by statute.³³ In some jurisdictions, the remedy is held by judicial decisions to be obsolete.³⁴ In other states, it has been expressly abolished by statute.³⁵

N. W. 650; *Toney v. Goodley*, 57 Mo. App. 235; *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98.

²⁹ *Curtis v. Bradley*, 75 Ill. 180; *Lamotte v. Wisner*, 51 Md. 543; *Davis v. Davis*, 128 Pa. 100, 18 Atl. 514; *Smith v. Ambler*, 1 Munf. (Va.) 596.

³⁰ *Weber v. Vernon*, 2 Pennewill (Del.) 359, 45 Atl. 537; *Bagshawe v. Goward*, Cro. Jac. 147; *Chamberlayn's Case*, 1 Leon. 220.

³¹ The power to sell was first conferred by the statute of 2 W. & M. c. 5, § 2, which provided that, unless the tenant or owner replevied the property within 5 days after the distress and notice thereof, the person distraining was authorized to have the distress appraised, and after such appraisal to sell the same toward the satisfaction of the rent and expenses incident to the distress. This statute has been copied in many of the United States. See *Cahill v. Lee*, 55 Md. 319; *Butts v. Edwards*, 2 Denio (N. Y.) 164; *Richards v. McGrath*, 100 Pa. 389.

³² *Blanchard v. Raines' Ex'x*, 20 Fla. 467; *Keller v. Weber*, 27 Md. 660; *Toland v. Swearingen*, 39 Tex. 447; *Flury v. Grimes*, 52 Ga. 341.

³³ The local statutes must, of course, be consulted for any particular state. Examples of other remedies may be seen in the following cases: For rent: *Debt*, *Bordman v. Osborn*, 23 Pick. (Mass.) 295; *assumpsit*, *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; *Chambers v. Ross*, 25 N. J. Law, 293; *Brolasky v. Ferguson*, 48 Pa. 434; *covenant*, *Gale v. Nixon*, 6 Cow. (N. Y.) 445. Actions to prevent waste, *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; and for damages, *Harder v. Harder*, 26 Barb. (N. Y.) 409. To recover possession are: *Ejectment*, *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Penn's Lessee v. Divellin*, 2 Yeates (Pa.) 309; *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Colston v. McVay*, 1 A. K. Marsh. (Ky.) 251; and summary proceeding given by statute in most states, *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Marsters v. Cling*, 163 Mass. 477, 40 N. E. 763. The lessee's actions are: *Replevin*, for wrongful distress, *Hunter v. Le Conte*, 6 Cow. (N. Y.) 728; *trespass*, for interference with his possession, *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157; *Hey v. Moorhouse*, 8 Scott, 156; *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 385; *Lunt v. Brown*, 13 Me. 236; *case*, for excessive distress, *Hare v. Stegall*, 60 Ill. 380 (and see *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354); and *covenant*, 2 *Taylor, Landl. & Ten.* (8th Ed.) 260. For the action of forcible entry and detainer, see 2 *Tayl. Landl. & Ten.* (8th Ed.) 396; 2 *Wood, Landl. & Ten.* (2d Ed.) 1374; *Willard v. Warren*, 17 Wend. (N. Y.) 257; *Toby v. Schultz*, 51 Ill. App. 487.

³⁴ *Folmar v. Copeland*, 57 Ala. 588; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Welch v. Ashby*, 88 Mo. App. 400; *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173; *Smith v. Wheeler*, 4 Okl. 138, 44 Pac. 203.

³⁵ See *Scruggs v. Gibson*, 40 Ga. 511; *Dutcher v. Culver*, 24 Minn. 584;

The Tenant's Rights and Liabilities—Possession

The tenant has a right to the exclusive possession of the leased premises.³⁶ This includes the right to enjoy all easements³⁷ servient to the property.³⁸ For injuries to the tenant's possession, as distinguished from injuries to the landlord's reversion,³⁹ the tenant alone has the right of action,⁴⁰ and a tenant may sue even the landlord for a trespass that affects the possession.⁴¹ A tenant, however, cannot put the property to any uses not intended by the lease,⁴² and, as previously stated, he will be liable for waste, either by acts of commission or omission, if he uses the property, or permits it to be used, in any way or manner that results in injury to buildings or lands beyond the reasonable wear and tear of the same.⁴³ A tenant may remove his trade, agricultural, or domestic fixtures,⁴⁴ without any express provision to that effect in the lease.⁴⁵

Patty v. Bogle, 59 Miss. 491. Right of distress for rent was abolished in New York by act of May 13, 1846 (Laws 1846, c. 274).

³⁶ *Kansas Inv. Co. v. Carter*, 160 Mass. 421, 36 N. E. 63; *Phelps v. Randolph*, 147 Ill. 335, 35 N. E. 243. And see *Bentley v. City of Atlanta*, 92 Ga. 623, 18 S. E. 1013. Any right of re-entry in the lessor is entirely a reserved right. *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *State v. Piper*, 89 N. C. 551.

³⁷ As to easements, see post, chapter XVII.

³⁸ *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28. And see *Marsh v. McNider*, 88 Iowa, 390, 55 N. W. 469, 20 L. R. A. 333, 45 Am. St. Rep. 240. The tenant is bound by any easements to which the land is subject. *McDermott v. Railroad Co.*, 28 Hun (N. Y.) 325; *Prescott v. White*, 21 Pick. (Mass.) 342, 32 Am. Dec. 266.

³⁹ *Supra*.

⁴⁰ *Seaboard Air Line R. Co. v. Brown*, 158 Ala. 630, 48 South. 48; *Southern R. Co. v. State*, 116 Ga. 276, 42 S. E. 508; *Walden v. Conn*, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; *Van Ness v. Telephone Co.*, 78 N. J. Law, 511, 74 Atl. 456; *Eno v. Del Vecchio*, 6 Duer (N. Y.) 17.

⁴¹ *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 288.

⁴² *Chamberlain v. Brown*, 141 Iowa, 540, 120 N. W. 334; *Junction Mining Co. v. Coal Co.*, 122 Ill. App. 574; *Fogarty v. Pressed Brick Co.*, 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756; *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Mudge v. Brewing Co.*, 68 Misc. Rep. 362, 125 N. Y. Supp. 15; *Heise v. Railroad Co.*, 62 Pa. 67; *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812; *Lovett v. United States*, 9 Ct. Cl. 479.

⁴³ *Brooks v. Rogers*, 101 Ala. 111, 13 South. 386; *Nave v. Berry*, 22 Ala. 382; *Miles v. Lauraine*, 99 Ga. 402, 27 S. E. 739; *Grabenhorst v. Nicodemus*, 42 Md. 236; *Richardson v. Richardson*, 9 Gray (Mass.) 213; *Murphy v. Type Foundry*, 29 Mo. App. 541; *Klie v. Von Broock*, 56 N. J. Eq. 18, 37 Atl. 469; *Guth v. Mehling*, 84 App. Div. 586, 82 N. Y. Supp. 1018; *Walsh v. The Bourse*, 15 Pa. Super. Ct. 219.

⁴⁴ See *Fixtures*, chapter III.

⁴⁵ *Mason v. Fenn*, 13 Ill. 525; *Moore v. Wood*, 12 Abb. Prac. (N. Y.) 393;

Estovers—Emblements

At common law, a tenant is entitled to estovers.⁴⁶ By this it is meant that a tenant of farm land has the right to take and use such material found upon the land, providing it is suitable for the purpose, as may be necessary for the repair of buildings and fences, and agricultural implements, and also the dead and fallen timber for fuel.⁴⁷ He cannot, of course, use shrubbery and ornamental trees for such purposes, nor, as a rule, cut standing timber, since such acts would constitute waste.⁴⁸ The term "emblements," in the law of landlord and tenant, has a special meaning, namely, "the waygoing crop." Of course, as long as a tenant is in possession, he has the right to gather his crops from year to year; but in the case of a tenant for years, where the termination of the lease is fixed, the outgoing tenant is not entitled to the crops left growing on the land at the end of his term.⁴⁹ He may be entitled, however, to such emblements if his interest is terminated, without his fault, by some contingency happening during the term.⁵⁰ If he causes a forfeiture, his subtenant is entitled to emblements.⁵¹

Bircher v. Parker, 40 Mo. 118; *Chandler v. Oldham*, 55 Mo. App. 139. Cf. *Davidson v. Manufacturing Co.*, 99 Mich. 501, 58 N. W. 475; *Pendill v. Maas*, 97 Mich. 215, 56 N. W. 597; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *Goedeke v. Baker* (Tex. Civ. App.) 28 S. W. 1039.

⁴⁶ *Hubbard v. Shaw*, 12 Allen (Mass.) 120; *Walters v. Hutchins' Adm'x*, 29 Ind. 136; *Harris v. Goslin*, 3 Har. (Del.) 340; *Van Deusen v. Young*, 29 N. Y. 9; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Wright v. Roberts*, 22 Wis. 161.

⁴⁷ *Anderson v. Cowan*, 125 Iowa, 259, 101 N. W. 92, 68 L. R. A. 641, 106 Am. St. Rep. 303.

⁴⁸ See *Anderson v. Cowan*, *supra*; *Co. Litt.* 53; *McCullough v. Irvine's Ex'rs*, 13 Pa. 438.

⁴⁹ *Chesley v. Welch*, 37 Me. 106; *Bain v. Clark*, 10 Johns. (N. Y.) 424; *Sanders v. Ellington*, 77 N. C. 255; *Andrews v. Jones*, 36 Tex. 149; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935; *Gossett v. Drydale*, 48 Mo. App. 430; *Baker v. McInturff*, 49 Mo. App. 505; *Maclary v. Turner*, 9 Houst. (Del.) 281, 32 Atl. 325; *Monig's Adm'x v. Phillips* (Ky.) 29 S. W. 970. And see 1 Stim. Am. St. Law, § 2064.

⁵⁰ Thus some jurisdictions hold that the tenant of a mortgagor is entitled to the crop against the purchaser at a foreclosure sale. *First Nat. Bank of Clay Center v. Beegle*, 52 Kan. 709, 35 Pac. 814, 39 Am. St. Rep. 365; *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585; *Monday v. O'Neill*, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760; *Hubbard v. Berry*, 10 Ind. App. 594, 38 N. E. 77. See, *contra*, *Howell v. Schenck*, 24 N. J. Law, 89; *Samson v. Rose*, 65 N. Y. 411.

⁵¹ *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139. But see *Samson v. Rose*, 65 N. Y. 411. They cannot be claimed by a mortgagee of the lessee. *Gregg v. Boyd*, 69 Hun, 588, 23 N. Y. Supp. 918. And one holding an estate for years as lessee of a tenant for life may claim emblements. *Dorsett v. Gray*,

Estopped to Deny Landlord's Title

Where the relation of landlord and tenant exists, whether the tenancy be for years, or at will, or at sufferance, the tenant will be estopped to deny the landlord's title.⁵² Under the earlier common law, the doctrine of estoppel applied only in case of a lease under seal; that is, an estoppel by deed.⁵³ The modern rule, however, is of an equitable origin, an estoppel in pais, and is based upon public policy.⁵⁴ It applies to a tenant holding under a parol agreement, and also to a tenant holding over his term.⁵⁵ Even though a lease be void, the rule is not affected.⁵⁶ Where, however, the relationship of landlord and tenant is induced by fraud, duress, or mistake, the rule does not apply.⁵⁷ The estop-

98 Ind. 273; *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139; *Marshall, J.*, in *Miller v. Shackleford*, 4 Dana (Ky.) 277.

⁵² *Cleveland v. Alba*, 155 Ala. 468, 46 South. 757; *DAVIS v. WILLIAMS*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55, *Burdick Cas. Real Property*; *Washington v. Moore*, 84 Ark. 220, 105 S. W. 253, 120 Am. St. Rep. 29; *Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Milliken v. Lockwood*, 80 Kan. 600, 103 Pac. 124; *Binney v. Chapman*, 5 Pick. (Mass.) 124; *Moore v. Gair*, 108 App. Div. 23, 95 N. Y. Supp. 475; *Bertram v. Cook*, 32 Mich. 518; *Townsend v. Boyd*, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1148; *Gray v. Johnson*, 14 N. H. 414; *Hamilton v. Pittcock*, 158 Pa. 457, 27 Atl. 1079; *Sexton v. Carley*, 147 Ill. 269, 35 N. E. 471; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Dixon v. Stewart*, 113 N. C. 410, 18 S. E. 325; *Hackett v. Marmet Co.*, 3 C. C. A. 76, 52 Fed. 268. But see *Lakin v. Dolly*, 53 Fed. 333; *Chicago & A. R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33; *McKinnis v. Mortgage Co.*, 55 Kan. 259, 39 Pac. 1018; *Suddarth v. Robertson*, 118 Mo. 286, 24 S. W. 151. The rule has been extended to adjoining lands gained by the tenant by disseisin. *Doe v. Jones*, 15 Mees. & W. 580; *Doe v. Rees*, 6 Car. & P. 610; *Andrews v. Hailes*, 2 El. & Bl. 349. The old common-law rule that a disclaimer of the landlord's title would cause a forfeiture is no longer the law. *Fusselman v. Worthington*, 14 Ill. 135; *Newman v. Rutter*, 8 Watts (Pa.) 51; *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 605; *Jackson ex dem. Van Schaick v. Vincent*, 4 Wend. (N. Y.) 633. But see *Newman v. Rutter*, 8 Watts (Pa.) 51. Refusal to pay rent will not cause a forfeiture. *Doe v. Wells*, 10 Adol. & E. 427; *Kiernan v. Terry*, 26 Or. 494, 38 Pac. 671.

⁵³ *Co. Litt.* 47b.

⁵⁴ *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; 1 Tayl. Landl. & Ten. § 89; *Den ex dem. Howell v. Ashmore*, 22 N. J. Law, 261; *Smythe v. Henry*, 41 Fed. 705; *Vernam v. Smith*, 15 N. Y. 327.

⁵⁵ *Voss v. King*, *supra*.

⁵⁶ *Crawford v. Jones*, 54 Ala. 459; *Maudlin v. Cox*, 67 Cal. 387, 7 Pac. 804; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Byrne v. Beeson*, 1 Dougl. (Mich.) 179. Unless the lease is void as against public policy, in which case the rule is otherwise. See *Dupas v. Wassell*, 8 Fed. Cas. No. 4,182, 1 Dill. 213; *Welder v. McComb*, 10 Tex. Civ. App. 85, 30 S. W. 822.

⁵⁷ *Farris v. Houston*, 74 Ala. 162; *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Carter v. Marshall*, 72 Ill. 609; *Suddarth v. Robertson*, 118

pel extends, moreover, to all claiming under the lessee.⁵⁸ It can be set up by the heirs or assignees of the lessor,⁵⁹ but the lessee can controvert the fact of an assignment.⁶⁰ So, against the heir, he may show that the reversion was devised to a third person.⁶¹ Against the lessor, he may show that the latter has parted with his interest since making the lease,⁶² for the lessee may have purchased the reversion from the lessor,⁶³ or have paid the rent to the lessor's assignee.⁶⁴ The tenant, however, cannot assert an outstanding title which he has brought in,⁶⁵ nor can he accept a lease from a stranger.⁶⁶ However, if there is an eviction under a paramount title, the tenant may take a new lease from the holder of such title, and it is not necessary that he be actually expelled from the premises, to justify him in so doing. It will be sufficient if the right to evict is asserted by one entitled to the possession, and the tenant in good faith accepts a new lease to avoid eviction.⁶⁷

Mo. 286, 24 S. W. 151; *Ingraham v. Baldwin*, 9 N. Y. 45; *Boyer v. Smith*, 5 Watts. (Pa.) 55.

⁵⁸ *Rose v. Davis*, 11 Cal. 133; *Russell v. Irwin's Adm'r*, 38 Ala. 44, 50; *Derrick v. Luddy*, 64 Vt. 462, 24 Atl. 1050; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682. Cf. *Swan v. Busby*, 5 Tex. Civ. App. 63, 24 S. W. 303.

⁵⁹ *Blantin v. Whitaker*, 11 Humph. (Tenn.) 313; *Russell v. Allard*, 18 N. H. 225; *State v. Votaw*, 13 Mont. 403, 34 Pac. 315.

⁶⁰ *Despard v. Walbridge*, 15 N. Y. 377; *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656.

⁶¹ *Despard v. Walbridge*, *supra*. And see *Lane v. Young*, 66 Hun, 563, 21 N. Y. Supp. 838.

⁶² *Wolf v. Johnson*, 30 Miss. 513; *Horner v. Leeds*, 25 N. J. Law, 106; *Robinson v. Mining Co.*, 55 Mo. App. 662; *Winn v. Strickland*, 34 Fla. 610, 16 South. 606; *Robertson v. Biddell*, 32 Fla. 304, 13 South. 358; *West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987.

⁶³ *Elliott v. Smith*, 23 Pa. 131; *George v. Putney*, 4 Cush. (Mass.) 355, 50 Am. Dec. 788; *Camley v. Stanfield*, 10 Tex. 546, 60 Am. Dec. 219.

⁶⁴ *Stedman v. Gasset*, 18 Vt. 346; *Welch v. Adams*, 1 Metc. (Mass.) 494; *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70.

⁶⁵ *Sharpe v. Kelley*, 5 Denio (N. Y.) 431; *Drane v. Gregory's Heirs*, 3 B. Mon. (Ky.) 619; *Elliott v. Smith*, 23 Pa. 131; *Marley v. Rodgers*, 5 Yerg. (Tenn.) 217; *Anderson v. Anderson*, 104 Ala. 428, 16 South. 14. And see *Barlow v. Dahm*, 97 Ala. 414, 12 South. 293, 38 Am. St. Rep. 192.

⁶⁶ *Doe ex dem. Kennedy's Heirs v. Reynolds*, 27 Ala. 364, 376; *Russell v. Fabyan*, 34 N. H. 223; *Ragor v. McKay*, 44 Ill. App. 79. But see *Nash v. Springfield*, 72 Hun, 474, 25 N. Y. Supp. 279.

⁶⁷ *Morse v. Goddard*, 13 Metc. (Mass.) 177, 46 Am. Dec. 728; *Simers v. Saltus*, 3 Denio (N. Y.) 217. And see *Delaney v. Fox*, 2 C. B. (N. S.) 775.

TRANSFER OF ESTATES FOR YEARS

81. After an estate for years has been created, the interests of the parties are transferable. The transfer may be:

(a) By act of parties, as where:

(1) The lessor assigns the rent or the reversion, or both.

(2) Or where the lessee

(I) Assigns his term, in which case the assignee is liable on all covenants running with the land.

(II) Or where the lessee sublets his term, in which case the sublessee is liable only to the sublessor.

(b) By operation of law, as where:

(1) The interest of either party is taken on execution.

(2) Or where, on the lessor's death, his interest goes to his heirs or devisees.

(3) Or where, on the lessee's death, his interest goes to his personal representative.

Transfer by Lessor

Unless restrained by express covenants, or by a statute in case of the lessee,⁶⁸ either the lessor or the lessee may transfer his interest under a lease.⁶⁹ The landlord may sell the entire property during the tenant's term,⁷⁰ or he may assign the reversion without transferring the rent,⁷¹ or he may assign the rent without the reversion.⁷² The landlord may transfer the reversion either to the tenant, or to a third party. In the former case, the two interests would merge.⁷³ He may also assign the rent to one man, and

⁶⁸ Or by statute, as lessee is in a few states. 1 Stim. Am. St. Law, § 2043.

⁶⁹ Dixon v. Buell, 21 Ill. 203; Webster v. Nichols, 104 Ill. 160; Crommelin v. Thiess, 31 Ala. 412, 421, 70 Am. Dec. 499; Woodhull v. Rosenthal, 61 N. Y. 382; Gould v. School Dist., 8 Minn. 427 (Gil. 382); Indianapolis Mfg. & Carpenters' Union v. Railway Co., 45 Ind. 281; Rex v. Inhabitants of Aldborough, 1 East, 597.

⁷⁰ Crosby v. Loop, 13 Ill. 625; Marley v. Rodgers, 5 Yerg. (Tenn.) 217; Peterman v. Kingsley, 140 Wis. 666, 123 N. W. 137, 133 Am. St. Rep. 1107.

⁷¹ Beal v. Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216; Demarest v. Willard, 8 Cow. (N. Y.) 206.

⁷² Wineman v. Houghson, 44 Ill. App. 22; Watson v. Hunkins, 13 Iowa, 547; Root v. Trapp, 10 Kan. App. 575, 62 Pac. 248; Brownson v. Roy, 133 Mich. 617, 95 N. W. 710; Iowa Sav. Bank v. Frink, 1 Neb. Unof. 14, 26, 92 N. W. 916; Thomson v. Ludlum, 36 Misc. Rep. 801, 74 N. Y. Supp. 875.

⁷³ Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; Hudson Bros. Commission Co. v. Gravel Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722; Kershaw v. Supplee, 1 Rawle (Pa.) 131.

the reversion to another. He may also split up the reversion into parcels, but the rent cannot be made payable to several without the consent of the tenant.⁷⁴ An assignee of the reversion is entitled to receive the rents from the tenant after giving notice of the assignment.⁷⁵ Such assignee can also enforce, and is liable on, covenants running with the land.⁷⁶

Transfer by Lessee

The tenant's right either to assign or to sublet his term has already been considered, together with the distinction between an assignment and a subletting.⁷⁷ He may also mortgage his interest.⁷⁸ The requirements of the statutes as to written agreements are the same for an assignment or a subletting as in case of the original lease.⁷⁹ There may be an assignment of part of the premises.⁸⁰ In the case of a sublease, the subtenant is not liable for rent to the original lessor, or on the covenants of the original lease.⁸¹ An assignee, however, is liable to the original lessor on all the covenants which run with the land.⁸² The lessee continues liable, after he has assigned, on express covenants;⁸³ but an assignee may avoid future obligation by assigning over, whether

⁷⁴ *Ryerson v. Quackenbush*, 26 N. J. Law, 254; *Ards v. Watkin*, Cro. Eliz. 637.

⁷⁵ *Hunt v. Thompson*, 2 Allen (Mass.) 341; *O'Connor v. Kelly*, 41 Cal. 432; *Moffatt v. Smith*, 4 N. Y. 126; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164; *Watson v. Hunkins*, 13 Iowa, 547; *Page v. Culver*, 55 Mo. App. 606. Prior to the statute of 4 Anne, c. 16, § 9 (which has been generally adopted in the United States), it was necessary that the tenant should agree to accept the assignee of the reversion as his landlord. This was known as "attornment," and has already been considered. See *supra*.

⁷⁶ *Astor v. Miller*, 2 Paige (N. Y.) 68; *Stevenson v. Lambard*, 2 East, 575; *Burton v. Barclay*, 7 Bing. 745; *Van Horne v. Crain*, 1 Paige (N. Y.) 455; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Campbell v. Lewis*, 3 Barn. & Ald. 392; *King v. Jones*, 5 Taunt. 418.

⁷⁷ *Supra*.

⁷⁸ *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853. And see *Barrett v. Trainor*, 50 Ill. App. 420; *Drda v. Schmidt*, 47 Ill. App. 267; *Menger v. Ward* (Tex. Civ. App.) 28 S. W. 821. Contra, as to a lease on shares. *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269.

⁷⁹ *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394.

⁸⁰ *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960. But see *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123.

⁸¹ 1 Tayl. Landl. & Ten. (8th Ed.) § 16; 1 Wood, Landl. & Ten. (2d Ed.) 181; *Trustees of Dartmouth College v. Clough*, 8 N. H. 22. But he may pay rent to avoid eviction. *Peck v. Ingersoll*, 7 N. Y. 528.

⁸² *Fennell v. Guffey*, 155 Pa. 38, 25 Atl. 785; *Sanders v. Partridge*, 108 Mass. 556. But cf. *Dey v. Greenebaum*, 82 Hun, 533, 31 N. Y. Supp. 610.

⁸³ *Grommes v. Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168; *Conrad v. Bywaters* (Tex. Civ. App.) 24 S. W. 961; *Bouscaren v. Brown*, 40 Neb. 722, 59 N. W. 385;

there is an express covenant or not.⁸⁴ The lessee and his assignee or sublessee may insert any covenants they choose in the instrument of transfer, and so regulate their obligations to each other, as in case of the original landlord and tenant.

Transfer by Operation of Law

Both the reversion and the term are subject to involuntary alienation, such as sale on execution, and a purchaser assumes the rights and liabilities of an assignee.⁸⁵ An assignee in bankruptcy or insolvency, however, does not become liable as assignee of a term owned by his assignor until he has had a reasonable time to ascertain whether it is an available asset. Before then he is not presumed to accept.⁸⁶ A lessee may dispose of his estates for years by will,⁸⁷ but if he fail to do so they pass on his death to his personal representative, who thus becomes an assignee.⁸⁸ The reversion, if not disposed of, is subject to the ordinary rules governing the descent of realty; and the rent follows the reversion, unless it has been separately assigned.⁸⁹ As a general rule, an agreement not to transfer is not broken by a transfer by operation of law.⁹⁰ Consequently, unless it be done fraudulently,⁹¹ a transfer of a lease upon execution sale,⁹² foreclosure,⁹³ or bank-

Charless v. Froebel, 47 Mo. App. 45; Pittsburg Consol. Coal Co. v. Greenlee, 164 Pa. 549, 30 Atl. 489; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Walker's Case, 3 Coke, 22a; Calborne v. Wright, 2 Lev. 239.

⁸⁴ McBee v. Sampson, 66 Fed. 416; Armstrong v. Wheeler, 9 Cow. (N. Y.) 88; Childs v. Clark, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102. But see Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Drake v. Lacoe, 157 Pa. 17, 27 Atl. 538; Lindsley v. Brewing Co., 59 Mo. App. 271.

⁸⁵ McNeil v. Ames, 120 Mass. 481; Lancashire v. Mason, 75 N. C. 455.

⁸⁶ Pratt v. Levan, 1 Miles (Pa.) 358; Bagley v. Freeman, 1 Hilt. (N. Y.) 196; Copeland v. Stephens, 1 Barn. & Ald. 594; Carter v. Warne, 4 Car. & P. 191.

⁸⁷ They pass by a devise of "personal estate." Brewster v. Hill, 1 N. H. 350.

⁸⁸ Martin v. Tobin, 123 Mass. 85; Sutter v. Lackmann, 39 Mo. 91; Murdock v. Ratcliff, 7 Ohio, 119, pt. 1; Charles v. Byrd, 29 S. C. 544, 8 S. E. 1. The rule is otherwise in a few states, by statute. The lessee's estate continues liable for the rent. Hutchings v. Bank, 91 Va. 68, 20 S. E. 950.

⁸⁹ Lewis v. Wilkins, 62 N. C. 303.

⁹⁰ Powell v. Nichols, 26 Okl. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886;

Charles v. Byrd, 29 S. C. 544, 8 S. E. 1; Horton v. Horton, Cro. Jac. 74.

⁹¹ Jackson ex dem. Stevens v. Silvernail, 15 Johns. (N. Y.) 278; Jackson v. Corliss, 7 Johns. (N. Y.) 531; Doe v. Carter, 8 Term R. 300.

⁹² Farnum v. Hefner, 92 Cal. 542, 28 Pac. 602; Medinah Temple Co. v. Currey, 58 Ill. App. 433; Jackson ex dem. Stevens v. Silvernail, supra.

⁹³ Dunlop v. Mulry, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104; Riggs v. Pursell, 66 N. Y. 193. Contra, West Shore R. Co. v. Wenner, 70 N. J. Law,

ruptcy proceedings⁹⁴ will not amount to a breach of a covenant not to assign or to sublet, unless a provision to such effect is inserted in the lease.⁹⁵ A devise of a term is not, however, a transfer by operation of law, and is held to violate an agreement not to assign.⁹⁶

TERMINATION OF ESTATES FOR YEARS

82. An estate for years may be terminated:

- (a) By expiration of the term.
- (b) By merger.
- (c) By destruction of the premises (in some cases).
- (d) By surrender.
- (e) By eviction.
- (f) By forfeiture.
- (g) By an exercise of the power of eminent domain, or by other operation of law (in some cases).

Expiration of Term

Estates for years in most cases determine by the mere expiration of the term of the tenancy; that is, the period for which the lease was made. Upon such lapse of time, the term is thereby at an end, without notice by either party,⁹⁷ unless, in case of an optional termination, notice may be necessary.⁹⁸ In case the ter-

233, 57 Atl. 408, 103 Am. St. Rep. 801, 1 Ann. Cas. 790; Id., 71 N. J. Law, 682, 60 Atl. 1134.

⁹⁴ *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976; *Bemis v. Wilder*, 100 Mass. 446; *In re Bush*, 126 Fed. 878; *Philpot v. Hoare*, 2 Atk. 219, 26 Eng. Reprint, 535. Contra, *In re Breck*, Fed. Cas. No. 1,822, 8 Ben. 93.

⁹⁵ *Davis v. Eyton*, 7 Bing. 154, 4 M. & P. 820, 20 E. C. L. 77; *Doe v. Clark*, 8 East, 185, 9 Rev. Rep. 402; *Roe v. Galliers*, 2 Term R. 133, 1 Rev. Rep. 455.

⁹⁶ *Berry v. Taunton*, Cro. Eliz. 331; *Knight v. Mory*, Cro. Eliz. 60; *Barry v. Stanton*, Cro. Eliz. 330.

⁹⁷ *State v. Burr*, 29 Minn. 432, 13 N. W. 676; *Philip v. McLaughlin*, 24 N. Brunsw. 532; *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64; *Bedford v. McElherron*, 2 Serg. & R. (Pa.) 49; *Ackland v. Lutley*, 9 Adol. & E. 879; *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805; *Dunphy v. Goodlander*, 12 Ind. App. 609, 40 N. E. 924; *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619; *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794. And the tenant becomes a wrongdoer if he refuses to surrender possession. *Frost v. Iron Co.*, 12 Misc. Rep. 348, 33 N. Y. Supp. 654; *Jackson ex dem. Van Courtlandt v. Parkhurst*, 5 Johns. (N. Y.) 128; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Bedford v. McElherron*, 2 Serg. & R. (Pa.) 49.

⁹⁸ *Bernstein v. Koch*, 52 Misc. Rep. 550, 102 N. Y. Supp. 524; *Henderson v. Manufacturing Co.*, 24 Pa. Super. Ct. 422; *Ashhurst v. Phonograph Co.*, 166 Pa. 357, 31 Atl. 116.

mination of the lease is in doubt between two days, the tenant may elect the day of expiration,⁹⁹ and where the termination is made optional, without specifying at whose option, it will be the tenant's option.¹ As a rule, a lease for a year expires on the anniversary of the day preceding the day of its commencement.² A lease "to" a certain day expires at midnight on the preceding day.³ A lease expiring "on" a particular day includes the whole of such day.⁴ Custom and usage, however, may affect these general rules in particular localities.⁵

Merger

The acquisition of the landlord's fee by the tenant will merge the lesser estate in the greater.⁶ Such a termination of an estate for years applies to a merger by deed,⁷ descent,⁸ devise,⁹ or by purchase at an execution sale.¹⁰ A merger does not take place, however, where there is an intervening estate.¹¹ An estate for years will merge, however, in a life estate,¹² or in another term for years.¹³ A term for years will also usually merge in case the tenant conveys his interest to the landlord,¹⁴ particularly when

⁹⁹ *Murrell v. Lion*, 30 La. Ann. 255.

¹ *Commonwealth v. Philadelphia County*, 3 Brewst. (Pa.) 537.

² *Buchanan v. Whitman*, 76 Hun, 67, 27 N. Y. Supp. 604; *Marys v. Anderson*, 24 Pa. 272.

³ *People v. Robertson*, 39 Barb. (N. Y.) 9.

⁴ *People v. Robertson*, *supra*.

⁵ *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *American Academy of Music v. Bert*, 8 Pa. Co. Ct. R. 223; *Martyn v. Clue*, 18 Q. B. 661, 22 L. J. Q. B. 147, 83 E. C. L. 661.

⁶ *Jackson ex dem. Webb v. Roberts*, 1 Wend. (N. Y.) 478; *Carroll v. Bal-lance*, 26 Ill. 19, 79 Am. Dec. 354; *McMahan v. Jacoway*, 105 Ala. 585, 17 South. 39. Merger will also destroy covenants incident to the reversion. *Webb v. Russel*, 3 Term R. 393; *Thorn v. Woolcombe*, 3 Barn. & Adol. 586.

⁷ *Story v. Ulman*, 88 Md. 244, 41 Atl. 120; *Burnett v. Scribner*, 16 Barb. (N. Y.) 621; *Mixon v. Coffield*, 24 N. C. 301.

⁸ *Matter of Hughey*, 7 N. Y. St. Rep. 732.

⁹ *Starr v. Church*, 112 Md. 171, 76 Atl. 595; *Debozeur v. Butler*, 2 Grant Cas. (Pa.) 417.

¹⁰ *Moston v. Stow*, 91 Mo. App. 554; *Reed v. Munn*, 148 Fed. 737, 80 C. C. A. 215.

¹¹ *Simmons v. MacAdaras*, 6 Mo. App. 297; *Burton v. Barclay*, 7 Bing. 745, 5 M. & P. 785, 20 E. C. L. 331.

¹² Even though the term be longer than the life estate can possibly last. 1 Washb. Real Prop. (5th Ed.) 586.

¹³ 4 Kent, Comm. (12th Ed.) 99. The second term need not be as long as the term to be merged. *Stephens v. Bridges*, 6 Madd. 66.

¹⁴ *Smiley v. Van Winkle*, 6 Cal. 605; *Shepard v. Spalding*, 4 Metc. (Mass.) 416; *Sutliff v. Atwood*, 15 Ohio St. 186. Where the intention of the parties is not to merge the estate, no merger results. *Spencer v. Austin*, 38 Vt. 258.

in connection therewith the premises are surrendered.¹⁵ A conveyance, however, by a tenant to one of several lessors will not operate as a merger.¹⁶

Destruction of Premises

At common law, a lease of land on which there is a building is not terminated by the destruction of the building.¹⁷ Where, however, a room, or a building, is leased apart from the land, the destruction of the premises, in absence of a covenant to rebuild, will end the term.¹⁸ The matter is regulated by statute in a number of states, provision being made that, in absence of an agreement to the contrary, the destruction of leased premises, without fault on the tenant's part, may, at the tenant's option, operate as a termination of the lease.¹⁹ The parties may, of course, stipulate what effect, if any, the destruction, or the injury, of the premises shall have upon the lease.²⁰

Surrender

A surrender will terminate an estate for years.²¹ By surrender is meant the yielding up of the leasehold to the landlord in accord-

¹⁵ *Kower v. Gluck*, 33 Cal. 401.

¹⁶ *Sperry v. Sperry*, 8 N. H. 477.

¹⁷ *Moran v. Bergin*, 111 Ill. App. 313; *Langher v. Glenn*, 37 Minn. 4, 33 N. W. 10; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007.

¹⁸ *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Gavan v. Norcross*, 117 Ga. 356, 49 S. E. 771; *Austin v. Field*, 7 Abb. Prac. N. S. (N. Y.) 29; *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, 45 Am. Dec. 220; *Hecht v. Herrwagen*, 13 Misc. Rep. 316, 34 N. Y. Supp. 456; *Graves v. Berdan*, 26 N. Y. 498; *Ainsworth v. Ritt*, 33 Cal. 89; *Buschman v. Wilson*, 29 Md. 553. This is regulated by statute in some states. 1 Stim. Am. St. Law, § 2062. And see *Craig v. Butler*, 83 Hun, 286, 31 N. Y. Supp. 963; *Fleischman v. Toplitz*, 134 N. Y. 349, 31 N. E. 1089.

¹⁹ *Reynolds v. Egan*, 123 La. 294, 48 South. 940; *Fleischman v. Toplitz*, 134 N. Y. 349, 31 N. E. 1089; *Viterbo v. Friedlander*, 22 Fed. 422. And see *GAY v. DAVEY*, 47 Ohio St. 396, 25 N. E. 425, *Burdick Cas. Real Property*.

²⁰ *Tedstrom v. Puddephatt*, 99 Ark. 193, 137 S. W. 816, *Ann. Cas.* 1913A, 1092; *Woodside v. Talley*, 135 Ga. 337, 69 S. E. 492; *Weeber v. Hawes*, 80 Minn. 476, 83 N. W. 447; *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64; *Einstein v. Levi*, 25 App. Div. 565, 49 N. Y. Supp. 674; *Beham v. Ghio*, 75 Tex. 87, 12 S. W. 996.

²¹ *Conway v. Carpenter*, 80 Hun, 428, 30 N. Y. Supp. 315; *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846; *Wolf v. Guffey*, 161 Pa. 276, 28 Atl. 1117; *Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237; *May v. Oil Co.*, 152 Pa. 518, 25 Atl. 564; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978; *Nelson v. Thompson*, 23 Minn. 508. See *Burnham v. O'Grady*, 90 Wis. 461, 63 N. W. 1049; *Aderhold v. Supply Co.*, 158 Pa. 401, 28 Atl. 22; *National Union Bldg. Ass'n v. Brewer*, 41 Ill. App. 223. The surrender must be accepted. *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467; *Stevens v. Pantlind*, 95 Mich. 145, 54 N. W. 716; *Lane v. Nelson*, 167 Pa. 602, 31 Atl. 864; *Reeves v. McComeskey*,

ance with a mutual agreement that it shall be extinguished.²² A surrender may be express,²³ or it may result as an operation of law.²⁴ There must be a consideration in order to support a surrender.²⁵

When the parties to the lease act in a way entirely inconsistent with the relationship of landlord and tenant, a surrender may be implied by law.²⁶ For example, a conveyance of the leased premises by the lessor to the lessee amounts to a surrender.²⁷ The acceptance of a new lease during the term may operate as a surrender of the former lease.²⁸ There is also a surrender by operation of law, when the landlord, by a new lease, with the consent of the tenant, substitutes a new tenant for the former.²⁹ A sublessee or assignee of the lease cannot, however, without the consent of the original tenant, surrender the term to the original landlord, so as to affect the original tenant.³⁰

Eviction

The relation of landlord and tenant will be terminated by an actual eviction of the tenant by a title paramount, and will relieve

168 Pa. 571, 32 Atl. 96; *Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310; *Stern v. Thayer*, 56 Minn. 93, 57 N. W. 329.

²² *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92; *Sammis v. Day*, 48 Misc. Rep. 327, 96 N. Y. Supp. 777; *Greider's Appeal*, 5 Pa. 422.

²³ *McKinney v. Reader*, 7 Watts (Pa.) 123.

²⁴ *McKinney v. Reader*, *supra*; *Acheson v. McMurray*, 41 U. C. Q. B. 484.

²⁵ *Creighton v. Finlayson*, 46 Neb. 457, 64 N. W. 1103; *Wallace v. Patton*, 12 Cl. & F. 491, 8 Eng. Reprint, 1501. See, also, *Goldsmith v. Schroeder*, 93 App. Div. 206, 87 N. Y. Supp. 558.

²⁶ *Churchill v. Lammers*, 60 Mo. App. 244; *Buffalo County Nat. Bank v. Hanson*, 34 Neb. 455, 51 N. W. 1035; *Miller v. Dennis*, 68 N. J. Law, 320, 53 Atl. 394; *Levitt v. Zindler*, 136 App. Div. 695, 121 N. Y. Supp. 483; *Beall v. White*, 94 U. S. 382, 24 L. Ed. 173.

²⁷ *O'Dougherty v. Remington*, 7 Hun (N. Y.) 514; *Doe v. Hunter*, 4 U. C. Q. B. 449.

²⁸ *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.*, 160 Ill. 288, 43 N. E. 393; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *Douglaston Realty Co. v. Hess*, 124 App. Div. 508, 108 N. Y. Supp. 1036; *Reading Trust Co. v. Jackson*, 22 Pa. Super. Ct. 69; *Wade v. Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Walker v. Githens*, 156 Pa. 178, 27 Atl. 36; *Evans v. McKanna*, 89 Iowa, 362, 56 N. W. 527. But see *Witmark v. Railroad Co.*, 76 Hun, 302, 27 N. Y. Supp. 777. Cf. *Beal v. Car Spring Co.*, 125 Mass. 157, 28 Am. Rep. 216.

²⁹ *Hoerd v. Hahne*, 91 Ill. App. 514; *Donahoe v. Rich*, 2 Ind. App. 540, 28 N. E. 1001; *Weiner v. Baldwin*, 9 Kan. App. 772, 59 Pac. 40; *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774; *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. 629; *Gutman v. Conway*, 45 Misc. Rep. 363, 90 N. Y. Supp. 290; *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. 1101.

³⁰ *Firth v. Rowe*, 53 N. J. Eq. 520, 32 Atl. 1064; *Baynton v. Morgan*, 22 Q. B. D. 74, 53 J. P. 166, 58 L. J. Q. B. 139.

the tenant from an obligation to pay the subsequent rent.⁸¹ It is not necessary, however, that there should be an actual physical eviction. Any act on the part of the landlord which permanently deprives the tenant of the use and enjoyment of the premises will amount to an eviction.⁸² There must be, however, an abandonment of the premises in order to give rise to a constructive eviction.⁸³ The right to rent would be restored, moreover, if the tenant should return and occupy the premises.⁸⁴ An eviction from a part of the premises does not necessarily put an end to the lease,⁸⁵ although it would relieve the tenant, pro rata, from his liability for rent.⁸⁶

Forfeiture

When the lease expressly provides that the landlord may treat the lease as terminated upon the breach of a condition, or of a covenant, his election to do so puts an end to the term.⁸⁷ Forfeitures for such breaches are not favored, however, by the courts,⁸⁸ and when the breach is due to accident or mistake, and can be compensated in damages, as it usually can be in the case of rent, relief will be granted the tenant.⁸⁹ The relief does not extend

⁸¹ *Wright v. Lattin*, 38 Ill. 293; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Pridgeon v. Boat Club*, 66 Mich. 326, 33 N. W. 502; *Holmes v. Guion*, 44 Mo. 164; *Lester v. Griffin*, 57 Misc. Rep. 628, 108 N. Y. Supp. 580; *Murphy v. Marshall*, 179 Pa. 516, 36 Atl. 294.

⁸² *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; *McCall v. Ins. Co.*, 201 Mass. 223, 87 N. E. 582, 21 L. R. A. (N. S.) 38; *Fox v. Murdock*, 58 Misc. Rep. 207, 109 N. Y. Supp. 108; *Hoeveler v. Flemming*, 91 Pa. 322.

⁸³ *Anderson v. Winton*, 136 Ala. 422, 34 South. 962; *Fred K. Higbie Co. v. Charles Weeghman Co.*, 126 Ill. App. 97; *Mahoney v. Malting Co.*, 57 Misc. Rep. 430, 108 N. Y. Supp. 237; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857; *Witte v. Quinn*, 38 Mo. App. 681; *Sutton v. Foulke*, 2 Pa. Co. Ct. R. 529, 159 Pa. 228, 28 Atl. 228.

⁸⁴ *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Mackubin v. Whetcroft*, 4 Har. & Mc. (Md.) 135; *Cibel v. Hill*, 4 Leon. 110.

⁸⁵ *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272; *Leishman v. White*, 1 Allen (Mass.) 489.

⁸⁶ *Seabrook v. Moyer*, 88 Pa. 417; *Stokes v. Cooper*, 3 Campb. 513.

⁸⁷ See *Miller v. Havens*, 51 Mich. 482, 16 N. W. 865; *Lowther Oil Co. v. Guffey*, 52 W. Va. 91, 43 S. E. 101 (failure to work an oil lease); *Carnegie Nat. Gas Co. v. Philadelphia Co.*, 158 Pa. 317, 27 Atl. 951; *Heinouer v. Jones*, 159 Pa. 228, 28 Atl. 228. In a few states the statutes require a short notice. 1 Stim. Am. St. Law, §§ 2054, 2055.

⁸⁸ *Patterson v. Trust Co.*, 231 Ill. 22, 82 N. E. 840, 121 Am. St. Rep. 299; *Bacon v. Furniture Co.*, 53 Ind. 229; *Cole v. Johnson*, 120 Iowa, 667, 94 N. W. 1113; *Miller v. Havens*, supra; *Tate v. Crowson*, 28 N. C. 65. And see *Sommers v. Reynolds*, 103 Mich. 307, 61 N. W. 501; *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538.

⁸⁹ *Baxter v. Lansing*, 7 Paige (N. Y.) 350; *Gregory v. Wilson*, 9 Hare; 683;

to cases, however, where the damage is not a mere matter of computation, as where there is a breach of a covenant not to assign, or a covenant to repair.⁴⁰ In order to effect a forfeiture there must be some provision in the lease for such a result, or a right of re-entry upon the breach.⁴¹ In some jurisdictions it is provided by statute, however, that the breach of certain covenants, as, for example, a failure to pay rent,⁴² or an agreement not to assign or sublet,⁴³ will authorize the landlord to terminate the lease, irrespective of any express covenant to that effect. To create a forfeiture for nonpayment of rent, there must be, at common law, a demand for its payment upon the most notorious place of the premises.⁴⁴ Under the statutes, however, the requirement of such a demand is dispensed with by giving, in lieu thereof, a notice to quit.⁴⁵ Re-entry for forfeiture is optional with the lessor.⁴⁶ The lessee cannot insist upon it, and so avail himself of

Nokes v. Gibbon, 3 Drew. 681. But see *Rolfe v. Harris*, 2 Price, 206, note; *Cage v. Russel*, 2 Vent. 352.

⁴⁰ 2 Tayl. Landl. & Ten. (8th Ed.) 81.

⁴¹ *Denecke v. Miller*, 142 Iowa, 486, 119 N. W. 380, 19 Ann. Cas. 949; *People, to Use of Wilkinson Co., v. Gilbert*, 64 Ill. App. 203; *Phillips v. Tucker*, 3 Ind. 132; *Vanatta v. Brewer*, 32 N. J. Eq. 268; *Doe v. Godwin*, 4 M. & S. 265, 16 Rev. Rep. 463.

⁴² See *Brown v. Thompson*, 45 Ind. App. 188, 90 N. E. 631; *Chadwick v. Parker*, 44 Ill. 326; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266.

⁴³ See *Bernero v. Allen*, 68 Cal. 505, 9 Pac. 429; *Wray-Austin Mach. Co. v. Flower*, 140 Mich. 452, 103 N. W. 873; *Markowitz v. Theatrical Circuit Co.* (Tex. Civ. App.) 75 S. W. 74.

⁴⁴ *McGlynn v. Moore*, 25 Cal. 384; *Chapman v. Wright*, 20 Ill. 120; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Chapman v. Harney*, 100 Mass. 353; *Blackman v. Welsh*, 44 Mo. 41; *Jewett v. Berry*, 20 N. H. 36; *Van Rensselaer v. Jewett*, 2 N. Y. 141, 51 Am. Dec. 275; *Prout v. Roby*, 15 Wall. (U. S.) 471, 21 L. Ed. 58. At common law, the demand must be made on the land, at the front door of the house, if there is a house, and at a convenient time before sunset of the very day the rent falls due, unless a demand is dispensed with by the terms of the lease. 2 Tayl. Landl. & Ten. § 493; *Smith v. Whitbeck*, 13 Ohio St. 471; *Jackson ex dem. Welden v. Harrison*, 17 Johns. (N. Y.) 66; *Van Rensselaer v. Snyder*, 9 Barb. (N. Y.) 302; *Connor v. Bradley*, 1 How. (U. S.) 211, 11 L. Ed. 105; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833. Cf. *Haynes v. Investment Co.*, 35 Neb. 766, 53 N. W. 979. Even if no person be upon the land, the old rule was that the demand should be made of the land itself as the principal debtor. *Kidwelly v. Brand*, Plowd. 70.

⁴⁵ *Wm. J. Lemp Brewing Co. v. Lonergan*, 72 Ill. App. 223; *Woods v. Soucy*, 166 Ill. 407, 47 N. E. 67; *Cockerline v. Fisher*, 140 Mich. 95, 103 N. W. 522; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Bowyer v. Seymour*, 13 W. Va. 12; *Skinner's Co. v. Knight*, 2 Q. B. 542, 56 J. P. 36, 60 L. J. Q. B. 629.

⁴⁶ *Hopkins v. Levandowski*, 250 Ill. 372, 95 N. E. 496; *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167, 100 Pac. 72; *Morrison v. Smith*, 90 Md. 76, 46 Atl. 1031; *Small v. Clark*, 97 Me. 304, 54 Atl. 758; *Trask v. Wheeler*, 7 Allen

his own breach.⁴⁷ Acceptance of rent accruing after a breach will be a waiver of the forfeiture,⁴⁸ but acceptance of rent due before the breach will not.⁴⁹ Other acts of the landlord, with knowledge of the breach, showing an intention to treat the lessee as his tenant, will also operate as a waiver.⁵⁰

Eminent Domain

If the demised premises are taken under the power of eminent domain, the relation of landlord and tenant comes to an end,⁵¹ particularly where the lease so provides.⁵² If only a part is taken, both lessor and lessee can claim compensation for the taking, and

(Mass.) 109; *Simon v. Schmitt* (Mun. Ct.) 118 N. Y. Supp. 326; *Cochran v. Pew*, 159 Pa. 184, 23 Atl. 219. Or his assignee, who may also claim it. 2 Tayl. Landl. & Ten. (8th Ed.) 75. And see *Wilson v. Goldstein*, 152 Pa. 524, 25 Atl. 493.

⁴⁷ *Gibson v. Oliver*, 158 Pa. 277, 27 Atl. 961; *Brady v. Nagle* (Tex. Civ. App.) 29 S. W. 943; *Arnsby v. Woodward*, 6 Barn. & C. 519; *Reid v. Parsons*, 2 Chit. 247.

⁴⁸ *Jackson ex dem. Norton v. Sheldon*, 5 Cow. (N. Y.) 448; *Bleecker v. Smith*, 13 Wend. (N. Y.) 530; *Gomber v. Hackett*, 6 Wis. 323, 70 Am. Dec. 467; *Newman v. Rutter*, 8 Watts (Pa.) 51; *Doe v. Rees*, 4 Bing. N. C. 384; *Koehler v. Brady*, 78 Hun, 443, 29 N. Y. Supp. 388; *Brooks v. Rodgers*, 99 Ala. 433, 12 South. 61. The landlord must have knowledge of the breach. *Jackson ex dem. Lewis v. Schutz*, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195; *People's Bank of City of New York v. Mitchell*, 73 N. Y. 406; *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Roe v. Harrison*, 2 Term R. 425; *Barber v. Stone*, 104 Mich. 90, 62 N. W. 139; *Stover v. Hazelbaker*, 42 Neb. 393, 60 N. W. 597; *Bowling v. Crook*, 104 Ala. 130, 16 South. 131. But see *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434.

⁴⁹ *Jackson ex dem. Blanchard v. Allen*, 3 Cow. (N. Y.) 220; *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Conger v. Duryee*, 24 Hun (N. Y.) 617; *Frazier v. Caruthers*, 44 Ill. App. 61; *Carraher v. Bell*, 7 Wash. 81, 34 Pac. 469.

⁵⁰ *Hopkins v. Levandowski*, 250 Ill. 372, 95 N. E. 496; *Heitz v. Telephone Co.*, 46 Ind. App. 485, 92 N. E. 1040; *Montant v. Moore*, 135 App. Div. 334, 120 N. Y. Supp. 556; *Norris v. Morrill*, 43 N. H. 213; *People's Bank of City of New York v. Mitchell*, 73 N. Y. 406; *Lynch v. Gas Co.*, 165 Pa. 518, 30 Atl. 984; *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944; *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562. But see *Cleminger v. Gas Co.*, 159 Pa. 16, 23 Atl. 293; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194. A notice to quit at the end of a certain time, given after the breach, may constitute a waiver. *Doe v. Miller*, 2 Car. & P. 348; *Doe v. Allen*, 3 Taunt. 78.

⁵¹ *City of Chicago v. Messler*, 38 Fed. 302; *Board of Levee Com'rs v. Johnson*, 66 Miss. 248, 6 South. 199; *Barclay v. Picker*, 38 Mo. 143; *Biddle v. Hussman*, 23 Mo. 597. Compare *City of Chicago v. Garrity*, 7 Ill. App. 474.

⁵² *Goodyear Shoe Mach. Co. v. Terminal Co.*, 176 Mass. 115, 57 N. E. 214; *United States v. Inlots*, Fed. Cas. No. 15,441a.

the tenancy continues,⁵³ although the relation of landlord and tenant will be terminated *pro tanto*.⁵⁴

A lease will also be terminated by other acts of law, as for example, by a mortgage foreclosure sale, where the mortgage antedated the lease,⁵⁵ or by an execution sale upon a judgment rendered before the lease was made.⁵⁶

⁵³ *Parks v. City of Boston*, 15 Pick. (Mass.) 198; *Workman v. Mifflin*, 30 Pa. 362; *City of Chicago v. Garrity*, 7 Ill. App. 474; *Footte v. City of Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737. And see *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212.

⁵⁴ *Kingsland v. Clark*, 24 Mo. 24; *Gillespie v. New York*, 23 Wend. (N. Y.) 643; *Workman v. Mifflin*, 30 Pa. 362.

⁵⁵ *Barelli v. Szymanski*, 14 La. Ann. 47; *Oakes v. Aldridge*, 46 Mo. App. 11; *Burr v. Stenton*, 52 Barb. (N. Y.) 377.

⁵⁶ *Smith v. Aude*, 46 Mo. App. 631.

CHAPTER XI

ESTATES LESS THAN FREEHOLDS (Continued)—TENANCIES AT WILL,
FROM YEAR TO YEAR, AND AT SUFFERANCE

- 83. Tenancies at Will.
- 84. Creation.
- 85. Incidents.
- 86. Termination.
- 87. Tenancies from Year to Year.
- 88. Creation.
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- 91. Tenancies at Sufferance.
- 92. Creation
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- 94. Termination.
- 95. Renting Land on Shares.
- 96. Letting of Lodgings.
- 97. Licenses.
- 98. Revocation of Licenses.

TENANCIES AT WILL

83. A tenancy at will is a letting of land to be held during the joint will of the parties.

SAME—CREATION

84. Tenancies at will are created:

- (a) At common law, by letting for an indefinite period, not in a form to pass a freehold, and without a reservation of rent.
- (b) By express agreement.
- (c) By implication of law.
- (d) By holding over a definite term in some jurisdictions, with the assent of the landlord.

Tenancies at will, although not anciently classed as estates, were recognized by the time of Littleton.¹ That author defines a tenant at will as "where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of

¹ A. D. 1422-1481.

which lease the lessee is in possession."² It was determined very early, however, that estates at will were equally at the will of either party,³ and, as defined above, an estate at will is one that a tenant who has made entry thereon holds during the joint will of both the lessor and the lessee.⁴ The tenancy is not created, however, until the lessee enters.⁵ A general letting without limitation as to duration of a term (not being in a form to pass an estate of freehold), or a mere permission to enter and occupy, creates a tenancy at will, provided no rent is reserved.⁶ Although the reservation of a rent raises a presumption that the tenancy is from year to year,⁷ and while the payment of rent will generally operate to turn a tenancy at will into a tenancy from year to year, yet a reservation of rent not referable to a year, or any definite part of a year, will not produce such a result,⁸ and by express agreement a tenancy may remain one at will, even if rent is paid.⁹ A tenancy at will may be created not only by express agreement,¹⁰ but it may also arise by implication of law.¹¹ In such cases the entry is usually for some other purpose than to create a tenancy. Thus one who enters under a contract to purchase, and remains after the negotiation has fallen through, becomes a tenant at will.¹² So a vendor or lessor, by continuing

² Litt. § 68; Co. Litt. 55a; 2 Blk. Comm. 145.

³ Co. Litt. 55a; 2 Blk. Comm. 145; HUNTER v. FROST, 47 Minn. 1, 49 N. W. 327, Burdick Cas. Real Property.

⁴ Bright v. McQuat, 40 Ind. 521; Martin v. Knapp, 57 Iowa, 336, 10 N. W. 721; Cheever v. Pearson, 16 Pick. (Mass.) 266; Shaw v. Hoffman, 25 Mich. 162; Mhoon v. Drizzle, 14 N. C. 414; Beauchamp v. Runnels, 35 Tex. Civ. App. 212, 79 S. W. 1105.

⁵ Hardy v. Winter, 38 Mo. 106; Pollock v. Kitrell, 4 N. C. 585.

⁶ Jones v. Shay, 50 Cal. 508; Michael v. Curtis, 60 Conn. 363, 22 Atl. 949; Bedell v. Clark, 151 Ill. App. 419; Gardner v. Hazelton, 121 Mass. 494; Haines v. Beach, 90 Mich. 563, 51 N. W. 644; Powell v. Plank, 141 Mo. App. 406, 125 S. W. 836; Pfanner v. Sturmer, 40 How. Prac. (N. Y.) 401; Lyons v. Railroad Co., 209 Pa. 550, 58 Atl. 924.

⁷ Fuller v. Sweet, 30 Mich. 237, 18 Am. Rep. 122; Dumn v. Rothermel, 112 Pa. 272, 3 Atl. 800; Morgan v. Williams, 39 Pa. Super. Ct. R. 580; Helams v. Patton, 44 S. C. 454, 22 S. E. 608; Silsby v. Allen, 43 Vt. 172.

⁸ Braithwaite v. Hitchcock, 2 Dowl. P. C. N. S. 444, 6 Jur. 976, 12 L. J. Exch. 38, 10 M. & W. 494; Richardson v. Landridge, 4 Taunt. 128, 13 Rev. Rep. 570.

⁹ Waring v. Railroad Co. (C. C.) 19 Fed. 863; Larkin v. Avery, 23 Conn. 304; Leake, Land. 208. Cf. Doe v. Cox, 11 Q. B. 122.

¹⁰ Den ex dem. McEowen v. Drake, 14 N. J. Law, 523; McFarland Real Estate Co. v. Hotel Co., 202 Mo. 597, 100 S. W. 577.

¹¹ Willis v. Harrell, 118 Ga. 906, 45 S. E. 794; Sullivan v. Enders, 3 Dana (Ky.) 66; Den ex dem. McEowen v. Drake, 14 N. J. Law, 523; Utah Optical Co. v. Keith, 18 Utah, 464, 56 Pac. 155.

¹² WEED v. LINDSAY, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33, Burdick

in possession, may become a tenant at will.¹³ Likewise, an occupancy under an invalid lease is, for the time being, a tenancy at will;¹⁴ and occupancy under an invalid parol lease, made for a longer term than is permitted by the statute of frauds, makes the tenant merely one at will.¹⁵ In some states, moreover, the only tenancy that can be created without writing is a tenancy at will.¹⁶

SAME—INCIDENTS

85. The principal incidents of a tenancy at will are the following:

- (a) The tenant is entitled to emblements, unless he terminates the tenancy himself.
- (b) He must not commit waste.
- (c) His interest cannot be sold on execution.

Cas. Real Property; *Dunne v. Trustees*, 39 Ill. 578; *Doe v. Chamberlaine*, 5 Mees. & W. 14; *Doe v. Miller*, 5 Car. & P. 595; *Gould v. Thompson*, 4 Metc. (Mass.) 224; *Manchester v. Doddridge*, 3 Ind. 360. Entry under a parol contract to purchase creates a tenancy at will. *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360. But if the sale is not consummated, by fault of the vendee, he becomes a mere trespasser, and liable only in tort for the mesne profits. *Prentice v. Wilson*, 14 Ill. 91; *Howard v. Shaw*, 8 Mees. & W. 118; *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; *Clough v. Hosford*, 6 N. H. 231; *Glascock v. Robards*, 14 Mo. 350, 55 Am. Dec. 108. A tenancy at will also arises when possession is taken under an agreement for a lease. *Childers v. Lee*, 5 N. M. 576, 25 Pac. 781, 12 L. R. A. 67.

¹³ *Hall v. Henninger*, 145 Iowa, 230, 121 N. W. 6, 139 Am. St. Rep. 412; *Leavitt v. Maykel*, 203 Mass. 506, 89 N. E. 1056, 133 Am. St. Rep. 323; *Leggett v. Exposition Co.*, 157 Mo. App. 108, 137 S. W. 893; *Altschuler v. Lipschitz*, 113 N. Y. Supp. 1058; *Bennett v. Robinson*, 27 Mich. 26; *Tarlotting v. Bokern*, 95 Mo. 541, 8 S. W. 547; *Brooks v. Hyde*, 37 Cal. 366; *Sherburne v. Jones*, 20 Me. 70. So of a debtor remaining in possession after execution sale. *Nichols v. Williams*, 8 Cow. (N. Y.) 13. But see *Tucker v. Byers*, 57 Ark. 215, 21 S. W. 227; *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021. The English rule required assent of the landlord or some new agreement, express or implied, to continue the tenancy under the lease.

¹⁴ *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517; *Lehman v. Nolting*, 56 Mo. App. 549; *Israelson v. Wollenberg*, 63 Misc. Rep. 293, 116 N. Y. Supp. 626; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812.

¹⁵ *Packard v. Railway Co.*, 46 Ill. App. 244; *Danforth v. Cushing*, 77 Me. 182; *Sprague v. Quinn*, 108 Mass. 553; *Barrett v. Cox*, 112 Mich. 220, 70 N. W. 446; *McFarland Real Estate Co. v. Hotel Co.*, 202 Mo. 597, 100 S. W. 577; *TALAMO v. SPITZMILLER*, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607, *Burdick Cas. Real Property*.

¹⁶ See *Whitney v. Swett*, 22 N. H. 10, 53 Am. Dec. 228; *MATHEWS v. CARLTON*, 189 Mass. 285, 75 N. E. 637, *Burdick Cas. Real Property*.

Every particular tenant who has an estate uncertain, as a tenant for life or at will, is, at common law, entitled to the annual productions of his labor.¹⁷ If, however, the tenant at will puts an end to the relation of lessor and lessee, he is not entitled to emblements;¹⁸ but he is so entitled when the lessor causes the termination of the tenancy.¹⁹ The ancient statutes relating to waste did not apply to the tenant at will, but the landlord might sue in trespass if the tenant committed voluntary waste.²⁰ It is held, however, that a tenant at will is bound to care for farm land in a husbandlike manner,²¹ and other cases hold that the tenant's interest is forfeited for waste.²² A tenant at will has no certain assignable interest, and no interest that can be sold on execution.²³ A sublease may, however, be good between the immediate parties.²⁴

SAME—TERMINATION

86. A tenancy at will may, at common law, be terminated at any time by either party without notice.

The parties may, however, agree to give notice, and, in many states, notice is required by statute.

At common law, the parties to a strict tenancy at will may terminate it at any time either one chooses to do so, and without giving any previous notice of such intention to the other party.²⁵

¹⁷ Litt. §§ 68, 69; Co. Litt. 55b; *Reilly v. Ringland*, 39 Iowa, 106; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Rising v. Stannard*, 17 Mass. 282; *Harwood v. Williams*, 161 Mich. 368, 126 N. W. 475; *Dale v. Parker*, 143 Mo. App. 492, 128 S. W. 510; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Reiff v. Reiff*, 64 Pa. 134.

¹⁸ *Carpenter v. Jones*, 63 Ill. 517.

¹⁹ *Sherburne v. Jones*, 20 Me. 70; *Davis v. Thompson*, 13 Me. 209; *Simpkins v. Rogers*, 15 Ill. 397; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

²⁰ *Holds. History Eng. Law*, III, 107; Co. Litt. 57a (§ 71).

²¹ *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488.

²² *Pettengill v. Evans*, 5 N. H. 54; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Rapallo, J.*, in *Harris v. Frink*, 49 N. Y. 33, 10 Am. Rep. 318. And see *Perry v. Carr*, 44 N. H. 118.

²³ *Packard v. Railway Co.*, 46 Ill. App. 244; *Holbrook v. Young*, 108 Mass. 83; *Austin v. Thomson*, 45 N. H. 113; *Reckhow v. Schanck*, 43 N. Y. 448; *Say v. Stoddard*, 27 Ohio St. 478. And see 1 Stim. Am. St. Law, § 1344.

²⁴ *Holbrook v. Young*, 108 Mass. 83; *Meier v. Thiemann*, 15 Mo. App. 307.

²⁵ *Herrrell v. Sizeland*, 81 Ill. 457; *McGee v. Gibson*, 1 B. Mon. (Ky.) 105; *Curl v. Lowell*, 19 Pick. (Mass.) 25; *Jackson ex dem. Van Denberg v. Bradt*, 2 Caines (N. Y.) 169. See *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, *Burdick Cas. Real Property*.

The parties may, however, by agreement, provide for any kind of a notice they choose, and for any length of time before terminating the tenancy.²⁶ The statutes of many states now require a notice before a tenancy at will can be terminated.²⁷ Where such notice is not required, and the parties have not stipulated for one, either landlord or tenant may put an end to the tenancy by almost any act which shows such an intention.²⁸ Any act on the part of the lessor which shows his intention to assert his right to possession terminates the tenancy.²⁹ An assignment by the tenant of his interest destroys the tenancy, at the landlord's option;³⁰ likewise a denial of the landlord's title.³¹

TENANCIES FROM YEAR TO YEAR

87. A tenancy for an indefinite period, with an annual rent, payable yearly, or at aliquot periods of a year, is a tenancy from year to year.

²⁶ *Roth Tool Co. v. Spring Co.*, 93 Mo. App. 530, 67 S. W. 967; *Currier v. Perley*, 24 N. H. 219; *Humphries v. Humphries*, 25 N. C. 362; *Doe v. Bell*, 5 T. R. 471, 2 Rev. Rep. 642.

²⁷ The length of notice required ranges from a few days to six months. See the following cases: *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818; *Western Union Tel. Co. v. Fain*, 52 Ga. 18; *Betz v. Maxwell*, 48 Kan. 142, 29 Pac. 147; *Gilbert v. Gerrity*, 108 Me. 258, 80 Atl. 704; *Sanford v. Harvey*, 11 Cush. (Mass.) 93; *Haines v. Beach*, 90 Mich. 563, 51 N. W. 644; *Larned v. Hudson*, 60 N. Y. 102; *Richardson v. Langridge*, 4 Taunt. 128, 13 Rev. Rep. 570.

²⁸ *Bennock v. Whipple*, 12 Me. 346, 28 Am. Dec. 186; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Chamberlin v. Donahue*, 45 Vt. 50. But see *Parker v. Constable*, 3 Wils. 25; *Jackson ex dem. Livingston v. Bryan*, 1 Johns. (N. Y.) 322. Death of either party terminates the tenancy. *James v. Dean*, 11 Ves. 383; *Rising v. Stannard*, 17 Mass. 282; *Manchester v. Doddridge*, 3 Ind. 360; *Say v. Stoddard*, 27 Ohio St. 478. But the tenant has a reasonable time to remove his property. *Ellis v. Paige*, 1 Pick. (Mass.) 43.

²⁹ Such as selling the premises, *Howard v. Merriam*, 5 Cush. (Mass.) 563; *Jackson ex dem. Phillips v. Aldrich*, 13 Johns. (N. Y.) 106; *Curtis v. Galvin*, 1 Allen (Mass.) 215; or leasing them, *Clark v. Wheelock*, 99 Mass. 14; *Groustra v. Bourges*, 141 Mass. 7, 4 N. E. 623. So does a demand of possession, *Doe v. McKaeg*, 10 Barn. & C. 721; *Den ex dem. Howell v. Howell*, 29 N. C. 496; or acts which would otherwise be trespass, *Turner v. Doe*, 9 Mees. & W. 643; as an entry upon the land, *Moore v. Boyd*, 24 Me. 242.

³⁰ *King v. Lawson*, 98 Mass. 309; *Abbott v. Lapoint*, 82 Vt. 246, 73 Atl. 166; *Doak v. Donelson's Lessee*, 2 Yerg. (Tenn.) 249, 24 Am. Dec. 485; *Cooper v. Adams*, 6 Cush. (Mass.) 87; *Packard v. Railway Co.*, 46 Ill. App. 244; *Den ex dem. Howell v. Howell*, 29 N. C. 496. And see *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442.

³¹ *Tillotson v. Doe*, 5 Ala. 407, 39 Am. Dec. 330; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14; *Farrow's Heirs v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; *Currier v. Earl*, 13 Me. 216; *Appleton v. Ames*, 150 Mass. 34,

SAME—CREATION

88. A tenancy from year to year generally arises whenever there is a reservation of rent in a letting which would otherwise be a tenancy at will.

Tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies at will.³² The inconveniences of tenancies at will induced the tribunals to provide some means of giving greater security to a tenant who held under no regular lease for years,³³ and estates from year to year, with the right on each side of notice to quit, are a species of judicial legislation tempering the strict letter of the law by the spirit of equity.³⁴ At first, especially where an annual rent was reserved, the only rule was that the notice to quit should be a reasonable one; but later the courts adopted six months as a reasonable time.³⁵ It is now definitely settled that a general letting for no determinate period of time, but by which an annual rent is reserved, payable quarterly or otherwise, is a lease from year to year so long as both parties please,³⁶ unless, of course, it is the intention of the parties that a strict tenancy at will be created.³⁷ As between tenancies at will and tenancies from year to year, the principal distinction is that a reservation of rent makes a general letting a tenancy from year to year,³⁸ which, without a rent reserved, is at will;³⁹ that is, a tenancy

22 N. E. 69, 5 L. R. A. 206; *Jackson ex dem. Haverly v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699.

³² 1 Wood, Landl. & Ten. (2d Ed.) 85; 1 Tayl. Landl. & Ten. (8th Ed.) 62; *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, Burdick Cas. Real Property. The only estate known to modern law which does not appear in Littleton's book, because it is of later origin, is the estate of the tenant from year to year. Hold. History of Eng. Law, II, 490.

³³ Digby, Hist. Real Prop. c. 5, § 1.

³⁴ 4 Kent, Comm. 115.

³⁵ *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, Burdick Cas. Real Property; 2 Blk. Comm. 147, note: "This kind of a lease was in use as long ago as the reign of Henry VIII, where half a year's notice seems to have been required to determine it." Citing Year Book, Tr. 13 Henry VIII, 15, 16.

³⁶ *Williams v. Hall Co.*, 80 Conn. 503, 69 Atl. 12; *Tanton v. Van Alstine*, 24 Ill. App. 405; *Idalia Realty & Development Co. v. Norman*, 232 Mo. 663, 135 S. W. 47, 34 L. R. A. (N. S.) 1069; *Pugsley v. Aikin*, 11 N. Y. 494; *Hey v. McGrath*, *81 Pa. 310. See *Sharswood's Blk. Comm.* II, 147.

³⁷ See *supra*.

³⁸ See *supra*. But cf. *Richardson v. Langridge*, 4 Taunt. 128.

³⁹ *Herrell v. Sizeland*, 81 Ill. 457; *Cheever v. Pearson*, 16 Pick. (Mass.) 266; *Burns v. Bryant*, 31 N. Y. 453; *Sarsfield v. Healy*, 50 Barb. (N. Y.) 245; *Cross*

from year to year arises from a general letting with a reservation of rent,⁴⁰ or when possession is taken under a void lease for years, followed by a periodical rent.⁴¹ The indefiniteness of the number of fixed rental periods is what distinguishes an estate from year to year, or from month to month⁴² from an estate for years. A definite term for a year,⁴³ or for a month,⁴⁴ is a tenancy for years, and not a tenancy from year to year, or from month to month.

Speaking strictly, a tenancy "from year to year" is based upon a yearly rental; that is, a lease for a year certain, with a growing interest during each successive year, springing out of the original contract.⁴⁵ Where the rent is an annual one, the fact that the rent is payable from quarter to quarter,⁴⁶ or from month to month,⁴⁷ does not change its character.⁴⁸ On the other hand, there may be created a tenancy from month to month, where a lease for

v. Upson, 17 Wis. 618; Amick v. Brubaker, 101 Mo. 473, 14 S. W. 627; Le Tourneau v. Smith, 53 Mich. 473, 19 N. W. 151; Blanchard v. Bowers, 67 Vt. 403, 31 Atl. 848; Den ex dem. Humphries v. Humphries, 25 N. C. 362. And see Murray v. Cherrington, 99 Mass. 229; Sanford v. Johnson, 24 Minn. 172; Goodenow v. Allen, 68 Me. 308.

⁴⁰ McIntosh v. Hodges, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; TALAMO v. SPITZMILLER, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607, Burdick Cas. Real Property; Rich v. Bolton, 46 Vt. 84, 14 Am. Rep. 615; Second Nat. Bank v. O. E. Merrill Co., 69 Wis. 501; 34 N. W. 514; Hunt v. Morton, 18 Ill. 75; Ganson v. Baldwin, 93 Mich. 217, 53 N. W. 171; Lesley v. Randolph, 4 Rawle (Pa.) 123. But see Union Depot Co. v. Railway Co., 113 Mo. 213, 20 S. W. 792.

⁴¹ Lockwood v. Lockwood, 22 Conn. 425; Farley v. McKeegan, 48 Neb. 237, 67 N. W. 161; Karsch v. Kalabza, 144 App. Div. 305, 128 N. Y. Supp. 1027; Baltimore & O. R. Co. v. West, 57 Ohio St. 161, 49 N. E. 344; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

⁴² See *infra*.

⁴³ Brown's Adm'rs v. Bragg, 22 Ind. 122; Harley v. O'Donnell, 9 Pa. Co. Ct. R. 56.

⁴⁴ *Id.*

⁴⁵ HUNTER v. FROST, 47 Minn. 1, 49 N. W. 327, Burdick Cas. Real Property; Pugsley v. Aikin, 11 N. Y. 494; Snowhill v. Snowhill, 23 N. J. Law, 447; Hunt v. Norton, 18 Ill. 75. And see Lockwood v. Lockwood, 22 Conn. 425.

⁴⁶ City of San Antonio v. French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763.

⁴⁷ Anderson v. Prindle, 23 Wend. (N. Y.) 616; Sebastian v. Hill, 51 Ill. App. 272; Lehman v. Nolting, 56 Mo. App. 549; Rogers v. Brown, 57 Minn. 223, 58 N. W. 981; Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335. See, also, Cox v. Bent, 5 Bing. 185; Tress v. Savage, 4 El. & Bl. 36.

⁴⁸ Schneider v. Lord, 62 Mich. 141, 28 N. E. 773. See, also, Price v. Raymond, 80 Conn. 607, 69 Atl. 935, and Johnson v. Albertson, 51 Minn. 333, 53 N. W. 642.

an indefinite term with monthly reservation of rent is made.⁴⁹ This distinction is important sometimes, since a tenant for a year or more, who holds over his term without any new agreement, may be treated as a tenant from year to year,⁵⁰ and the tenancy be subject to the covenants in the original lease.⁵¹ Moreover, unless otherwise changed by statute or express agreement, a tenant who holds over is liable for rent for a term of the same length as the preceding term,⁵² and a tenant from month to month, who holds over with the consent of his landlord, continues only as a mere tenant from month to month.⁵³ Such a tenant does not, moreover, become a tenant "from year to year" by continuing in possession for more than a year.⁵⁴ In some states tenancies "from year to year" have been abolished by statute.⁵⁵

⁴⁹ *Wall v. Stimpson*, 83 Conn. 407, 76 Atl. 513; *Thompson v. Baxter*, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575; *Broadway Bldg. Co. v. Fergusson*, 116 N. Y. Supp. 630; *Wall v. Ullman*, 2 Chest. Co. Rep. (Pa.) 178.

⁵⁰ *Streit v. Fay*, 230 Ill. 319, 82 N. E. 648, 120 Am. St. Rep. 304; *Pyle v. Telegraph Co.*, 85 Kan. 24, 116 Pac. 229; *Ganson v. Baldwin*, 93 Mich. 217, 53 N. W. 171; *Hartnett v. Korscherak*, 59 Misc. Rep. 457, 110 N. Y. Supp. 986; *Bakewell v. Turner*, 36 Pa. Super. Ct. 283.

⁵¹ *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; *Gardner v. Commissioners*, 21 Minn. 33; *Stevens v. City of New York*, 111 App. Div. 362, 97 N. Y. Supp. 1062; *Laguerenne v. Dougherty*, 35 Pa. 45. So, too, a tenancy from year to year may arise by holding over after the expiration of an estate for years. If the acts of the parties show an intention to continue the relation of landlord and tenant, the provisions of the old lease will govern, as far as they are applicable. *Ashhurst v. Phonograph Co.*, 166 Pa. 357, 31 Atl. 116; *Patterson v. Park*, 166 Pa. 25, 30 Atl. 1041; *Kleespies v. McKenzie*, 12 Ind. App. 404, 40 N. E. 648; *Johnson v. Doll*, 11 Misc. Rep. 345, 32 N. Y. Supp. 132; *Conway v. Starkweather*, 1 Denio (N. Y.) 113; *Hyatt v. Griffiths*, 17 Q. B. 505; *Amsden v. Atwood*, 67 Vt. 289, 31 Atl. 448; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762. But see *Campau v. Michell*, 103 Mich. 617, 61 N. W. 890; *Chicago & S. E. Ry. Co. v. Perkins*, 12 Ind. App. 131, 38 N. E. 487; *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794; *Goldsborough v. Gable*, 49 Ill. App. 554.

⁵² *Byxbee v. Blake*, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222; *Kelly v. Armstrong*, 139 Ill. App. 467; *Commercial Wharf Corp. v. Boston*, 194 Mass. 460, 80 N. E. 645; *Myers v. Dairy Co.*, 132 App. Div. 710, 117 N. Y. Supp. 569; *Snyder v. Henry*, 32 Pa. Super. Ct. 167.

⁵³ *Marmiche v. Roumieu*, 11 La. Ann. 477; *Backus v. Sternberg*, 59 Minn. 403, 61 N. W. 335; *Smith v. Smith*, 62 Mo. App. 596; *Baker v. Kenny*, 69 N. J. Law, 180, 54 Atl. 526; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956.

⁵⁴ *Jones v. Willis*, 53 N. C. 430; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Spidle v. Hess*, 20 Lanc. Law Rev. (Pa.) 385.

⁵⁵ *Semmes v. United States*, 14 Ct. Cl. 493. See 1 Stim. Am. St. Law, § 2005.

SAME—INCIDENTS

89. The principal incidents of estates from year to year are the following:

- (a) The tenant may take estovers.
- (b) He is entitled to emblements when the landlord terminates the tenancy.
- (c) At common law, he must repair.
- (d) The interests of the parties are assignable.

The incidents and qualities of estates from year to year are for the most part the same as of estates for years.⁵⁶ The tenant is entitled to estovers, and to emblements, when the tenancy is terminated by the landlord,⁵⁷ but not when the tenant terminates it. The tenant's common-law duty to repair extends to keeping the premises wind and water tight.⁵⁸ Either party may assign his interest,⁵⁹ and on the death of the tenant his interest goes to his personal representative.⁶⁰ After the termination of the tenancy has been fixed by notice, it becomes, in effect, equal to a term for years which has nearly expired.⁶¹

SAME—TERMINATION

90. A tenancy from year to year may be terminated, at common law, by either party by a notice given six months before the end of any year. It is also the rule that such a tenancy may be terminated by a notice equal to the length of the periods when the tenancy is for periods of six months or less. These rules, however, do not apply when a different notice has been provided for:

- (a) By agreement of the parties; or
- (b) By statute, as is the case in most states.

⁵⁶ Washb. Real Prop. (5th Ed.) § 637.

⁵⁷ 2 Tayl. Landl. & Ten. (8th Ed.) § 134; *Kingsbury v. Collins*, 4 Bing. 202.

⁵⁸ See, supra, *Estates for Years*. See, also, 2 Wood. Landl. & Ten. (2d Ed.) 992; 1 Tayl. Landl. & Ten. (8th Ed.) 401. As to waste by a tenant from year to year, see 2 Wood, Landl. & Ten. (2d Ed.) 992; *Torriano v. Young*, 6 Car. & P. S.

⁵⁹ *Botting v. Martin*, 1 Camp. 317; *Cody v. Quarterman*, 12 Ga. 386.

⁶⁰ *Doe v. Porter*, 3 Term R. 13; *Cody v. Quarterman*, 12 Ga. 386; *Pugsley v. Aikin*, 11 N. Y. 494.

⁶¹ 1 Washb. Real Prop. (5th Ed.) 637; *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, *Burdick Cas. Real Property*; *Parrott v. Barney*, Fed. Cas. No. 10,773a.

At common law, under a rule developed by the courts, a tenancy from year to year may be terminated by a six months' notice by the party wishing to terminate it.⁶² This notice, moreover, must be so given that the six months will expire by the end of a year,⁶³ and, in general, whatever length of notice may be required, a tenancy from year to year is terminated only by a notice to take effect at the end of the current year.⁶⁴ It is also the general rule that notice equal to the length of the periods is requisite in case of tenancies measured by shorter periods.⁶⁵ The length of notice is now in most states regulated by statutes,⁶⁶ and in some states the statutes provide for a shorter notice of termination in case the tenant fails to pay the rent.⁶⁷ As a general rule, a tenant is required to give notice in order to terminate the tenancy, the same as in case of the landlord.⁶⁸ The statute may, however, confine the requirement of notice to the landlord; no notice being required from the tenant.⁶⁹ The termination of the tenancy may, of course, be fixed by agreement between the parties.⁷⁰ In such a case, the time must be clearly stated; and it must be at the

⁶² *Hall v. Myers*, 43 Md. 446; *Ellis v. Paige*, 2 Pick. (Mass.) 71, note; *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, *Burdick Cas. Real Property*; *Brady v. Flint*, 23 Neb. 785, 37 N. W. 647; *Hankinson v. Blair*, 15 N. J. Law, 181; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523.

⁶³ *Doe v. Watts*, 7 Term R. 83; *Jackson ex dem. Livingston v. Bryan*, 1 Johns. (N. Y.) 322; *Den ex dem. McEowen v. Drake*, 14 N. J. Law, 523; *Morehead v. Watkyns*, 5 B. Mon. (Ky.) 228; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *Right v. Darby*, 1 Term R. 159; *Bessell v. Landsberg*, 7 Q. B. 638. But see *Logan v. Herron*, 8 Serg. & R. (Pa.) 459.

⁶⁴ *Usher v. Moss*, 50 Miss. 208; *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761; *Borough of Phoenixville v. Walters*, 147 Pa. 501, 23 Atl. 776; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545.

⁶⁵ *Stewart v. Murrell*, 65 Ark. 471, 47 S. W. 130; *Seem v. McLees*, 24 Ill. 192; *People v. Darling*, 47 N. Y. 666; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214; *Sanford v. Harvey*, 11 Cush. (Mass.) 93; *Prescott v. Elm*, 7 Cush. (Mass.) 346. And see *Grunewald v. Schaales*, 17 Mo. App. 324; *Doe v. Hazell*, 1 Esp. 94.

⁶⁶ The time required by the statutes varies from thirty days to a year. See the following cases: *Ganson v. Baldwin*, 93 Mich. 217, 53 N. W. 171; *Ware v. Nelson*, 4 Kan. App. 258, 45 Pac. 923; *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, *Burdick Cas. Real Property*; *Dunn v. Rothermel*, 112 Pa. 272, 3 Atl. 800. And see 1 Stim. Am. St. Law, § 2052.

⁶⁷ *Leary v. Meier*, 78 Ind. 393; *Judd v. Fairs*, 53 Mich. 518, 19 N. W. 266; *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

⁶⁸ *Tanton v. Van Alstine*, 24 Ill. App. 405; *Nelson v. Ware*, 57 Kan. 670, 47 Pac. 540; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; *Jones v. Herald Co.*, 44 S. C. 526, 22 S. E. 731.

⁶⁹ *Nelson v. Ware*, 57 Kan. 670, 47 Pac. 540.

⁷⁰ *Woolsey v. Donnelly*, 52 Hun, 614, 5 N. Y. Supp. 238.

end of one of the periods.⁷¹ Unless the statute, or the agreement of the parties, provides otherwise, the notice to terminate an estate from year to year need not be in writing.⁷² It must, however, be certain and definite,⁷³ and the notice should be personally served.⁷⁴ Although the tenancy comes to an end at the expiration of the notice,⁷⁵ yet the parties may waive its effect, and continue the relation. This may be done by express agreement,⁷⁶ or by acts showing such intention,⁷⁷ as, for instance, acceptance by the landlord of rent accruing after the expiration of the notice.⁷⁸

TENANCIES AT SUFFERANCE

91. A tenancy at sufferance is a wrongful holding over of lands after the expiration of a previous lawful possession.

SAME—CREATION

92. To create a tenancy at sufferance, the tenant must have come in by agreement, and not as a trespasser, and he must hold without agreement.

⁷¹ *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523; *HUNTER v. FROST*, 47 Minn. 1, 49 N. W. 327, *Burdick Cas. Real Property*; *Finkelstein v. Herson*, 55 N. J. Law, 217, 26 Atl. 688; *Steffens v. Earl*, 40 N. J. Law, 123, 29 Am. Rep. 214; *Logan v. Herron*, 8 Serg. & R. (Pa.) 459; *Prescott v. Elm*, 7 Cush. (Mass.) 346; *Sanford v. Harvey*, 11 Cush. (Mass.) 93. But see *Currier v. Barker*, 2 Gray (Mass.) 224.

⁷² *Timmins v. Rowlinson*, 3 Burrows, 1603, 1 W. Bl. 533; *Doe v. Crick*, 5 Esp. 196; *Eberlein v. Abel*, 10 Ill. App. 626.

⁷³ *Doe v. Morphet*, 7 Q. B. Div. 577; *Doe v. Smith*, 5 Adol. & E. 350; *Ayres v. Draper*, 11 Mo. 548; *Steward v. Harding*, 2 Gray (Mass.) 335; *Granger v. Brown*, 11 Cush. (Mass.) 191; *Hanchet v. Whitney*, 1 Vt. 311; *Huyser v. Chase*, 13 Mich. 102.

⁷⁴ *Doe v. Williams*, 6 Barn. & C. 41; *Jackson v. Baker*, 10 Johns. (N. Y.) 270. But see *Walker v. Sharpe*, 103 Mass. 154; *Bell v. Bruhn*, 30 Ill. App. 300; *Doe v. Dunbar, Moody & M.* 10. Notice to a subtenant is not sufficient. *Pleasant v. Behson*, 14 East, 234. It is sufficient, however, if actual knowledge of the notice is shown, for the required length of time. *Alford v. Vickery, Car. & M.* 280.

⁷⁵ *Hoske v. Gentzlinger*, 87 Hun, 3, 33 N. Y. Supp. 747.

⁷⁶ *Supplee v. Timothy*, 124 Pa. 375, 16 Atl. 864.

⁷⁷ See *Tuttle v. Bean*, 13 Metc. (Mass.) 275; *Doe v. Palmer*, 16 East, 53.

⁷⁸ *Goodright v. Cordwent*, 6 Term R. 219; *Collins v. Canty*, 6 Cush. (Mass.) 415; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391. Mere demand of rent so accruing will not necessarily be a waiver, *Blyth v. Dennett*, 13 C. B. 178; nor acceptance of rent due before the expiration of the notice, *Kimball v. Rowland*, 6 Gray (Mass.) 224; *Norris v. Morrill*, 43 N. H. 213. And see *Graham v. Dempsey*, 169 Pa. 460, 32 Atl. 408; *Conner v. Jones*, 28 Cal. 59.

A tenancy at sufferance arises where one, after the expiration of his lawful possession, wrongfully holds over, without either the assent or dissent of the owner.⁷⁹ Such a tenancy may arise in various ways, as, for example, where a tenant for a fixed term holds over without any agreement,⁸⁰ or where a grantor of land wrongfully continues in possession after his conveyance.⁸¹ A tenant at sufferance is not a trespasser,⁸² unless made so by statute,⁸³ since his entry was lawful; but he is a wrongdoer, and holds merely because the owner neglects to put him out.⁸⁴ A tenant at will is a tenant by permission of his landlord,⁸⁵ but a tenant at sufferance continues in possession without such permission.⁸⁶ Such a tenant must, however, have come in originally by agreement,⁸⁷ and not by operation of law. A guardian, for example, in possession by operation of law, becomes a trespasser by continuing to hold his ward's land after the ward is of age.⁸⁸ There is, moreover, no tenancy at sufferance where the holding over is by agreement, either express or implied,⁸⁹ and a tenant at sufferance may at any time become a tenant at will, or from year to year, by agreement with the landlord.⁹⁰

⁷⁹ Co. Litt. 57b; *Doe v. Hull*, 2 Dosol. & R. 38; *RUSSELL v. FABYAN*, 34 N. H. 218, *Burdick Cas. Real Property*; *Eichengreen v. Appel*, 44 Ill. App. 19; *Uridias v. Morrell*, 25 Cal. 31; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Finney's Trustees v. St. Louis*, 39 Mo. 177.

⁸⁰ *Hauxhurst v. Lobree*, 38 Cal. 563; *Willis v. Harrell*, *supra*; *Brown v. Smith*, 83 Ill. 291; *Sanders v. Richardson*, 14 Pick. (Mass.) 522; *Jackson ex dem. Anderson v. McLeod*, 12 Johns. (N. Y.) 182; *Jackson ex dem. Van Courtlandt v. Parkhurst*, 5 Johns. (N. Y.) 128. So a subtenant, after the termination of the original lease, *Simkin v. Ashurst*, 1 Cromp., M. & R. 261; or a tenant at will, whose estate has been terminated, Co. Litt. 57b; *Benedict v. Morse*, 10 Metc. (Mass.) 223. And see *Kinsley v. Ames*, 2 Metc. (Mass.) 29.

⁸¹ *Work v. Brayton*, 5 Ind. 396; *Bennett v. Robinson*, 27 Mich. 26.

⁸² *Rising v. Stannard*, 17 Mass. 282.

⁸³ In New York it is now provided by statute that a tenant who holds over a definite term for a brief period without the consent of his landlord does not thereby become a tenant at sufferance, but a trespasser. *Smith v. Littlefield*, 51 N. Y. 539.

⁸⁴ *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *RUSSELL v. FABYAN*, 34 N. H. 218, *Burdick Cas. Real Property*.

⁸⁵ *Bush v. Fuller*, 173 Ala. 511, 55 South. 1000; *Finney's Trustees v. St. Louis*, 39 Mo. 177; *Willis v. Harrell*, *supra*.

⁸⁶ *Kuhn v. Smith*, 125 Cal. 615, 58 Pac. 204, 73 Am. St. Rep. 79; *Salas v. Davis*, 120 Ga. 95, 47 S. E. 644; *Guenther v. Jar Co.*, 28 Pa. Super. Ct. 232.

⁸⁷ *Cook v. Norton*, 48 Ill. 20. So the entry must be lawful. *Reckhow v. Schanck*, 43 N. Y. 448; *Cunningham v. Holton*, 55 Me. 33.

⁸⁸ *Johnson, J.*, in *Livingston v. Tanner*, 14 N. Y. 69.

⁸⁹ *Emmons v. Scudder*, 115 Mass. 367; *Johnson v. Carter*, 16 Mass. 443. But see *Appeal of Landis*, 13 Wkly. Notes Cas. (Pa.) 226.

⁹⁰ *Hoffman v. Clark*, 63 Mich. 175, 29 N. W. 695; *Emmons v. Scudder*, 115 Mass. 367; *Den ex dem. Decker v. Adams*, 12 N. J. Law, 99.

SAME—INCIDENTS

93. The principal incidents of a tenancy at sufferance are as follows:

- (a) The tenant is estopped to deny the landlord's title.
- (b) He is not liable for rent, at common law.
- (c) He is not entitled to emblements.

A tenant at sufferance has no title, no interest, that he can assign.⁹¹ He is, moreover, estopped to deny his landlord's title.⁹² At common law, a tenant at sufferance is not liable for the rents and profits,⁹³ although the landlord may have his action for the use and occupation of the premises.⁹⁴ In some states, by force of statute, a tenant at sufferance may also be liable for rent.⁹⁵ The tenant at sufferance has no permanent rights in the lands⁹⁶ and cannot claim emblements, even though the landlord terminates the tenancy before the tenant has harvested his crop.

SAME—TERMINATION

94. At common law, a tenancy at sufferance may be terminated at any time, by either party, without notice.

In some states, however, a notice is required by statute.

A tenant at sufferance is not entitled, at common law, to a notice to quit,⁹⁷ although he is entitled to a sufficient time to remove

⁹¹ *Reckhow v. Schanck*, 43 N. Y. 448.

⁹² *Kelley v. Kelley*, 23 Me. 192; *Towne v. Butterfield*, 97 Mass. 105; *Griffin v. Sheffield*, 38 Miss. 390, 77 Am. Dec. 646; *Jackson ex dem. Anderson v. McLeod*, 12 Johns. (N. Y.) 182.

⁹³ 2 Blk. Comm. 150; *Martin v. Allen*, 67 Kan. 758, 74 Pac. 249; *Flood v. Flood*, 1 Allen (Mass.) 217; *Delano v. Montague*, 4 Cush. (Mass.) 42. In several states he is made liable for rent by statute. 1 Stim. Am. St. Law, § 2022. And see *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. 181. In many states a tenant who holds over when his interest is ended, and after demand by the landlord, becomes liable for statutory penalties. 1 Stim. Am. St. Law, § 2060.

⁹⁴ *Ibbs v. Richardson*, 9 Adol. & E. 849; *National Oil Refining Co. v. Bush*, 88 Pa. 335; *Hogsett v. Ellis*, 17 Mich. 351. But see *Merrill v. Bullock*, 105 Mass. 486.

⁹⁵ *Martin v. Allen*, 67 Kan. 758, 74 Pac. 249; *Flood v. Flood*, 1 Allen (Mass.) 217.

⁹⁶ *Benton v. Williams*, 202 Mass. 189, 88 N. E. 843; *International & G. N. Ry. Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. 515.

⁹⁷ *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. 45; *Reed v. Reed*, 48

from the premises.⁹⁸ In some states, however, the statutes require that a notice shall be given.⁹⁹ In absence of such a statutory provision, the landlord may enter at any time, and after such entry may treat the tenant as a trespasser.¹ Some cases hold that the landlord may expel the tenant by force,² although the landlord in so doing may be liable to a criminal prosecution under the statutes relating to forcible entry and detainer.³ The landlord, however, according to the weight of authority, will not be liable to the tenant in a civil action for the latter's forcible expulsion,⁴ although, by force of statutes providing summary remedies for the speedy recovery of his premises, other cases hold that the landlord will not be justified in using violence in order to expel his tenant, and, if he does, the tenant may bring his action for damages.⁵

RENTING LAND ON SHARES

95. A renting of land on shares may, according to the character of the contract, give rise to different relations between the parties. Thus they may be:

- (1) Employer and employé.
- (2) Tenants in common of the crop.
- (3) Landlord and tenant.
- (4) Partners.

Me. 388; *Moore v. Moore*, 41 N. J. Law, 515; *Hooton v. Holt*, 139 Mass. 54, 29 N. E. 221; *Jackson ex dem. Van Courtlandt v. Parkhurst*, 5 Johns. (N. Y.) 128; *Jackson ex dem. Anderson v. McLeod*, 12 Johns. (N. Y.) 182; *Livingston v. Tanner*, 14 N. Y. 64. And see *Kinsley v. Ames*, 2 Metc. (Mass.) 29; *Benedict v. Morse*, 10 Metc. (Mass.) 223.

⁹⁸ *Poole v. Johnson*, 101 S. W. 955, 31 Ky. Law Rep. 168; *Pratt v. Farrar*, 10 Allen (Mass.) 519.

⁹⁹ *Livingston v. Tanner*, 14 N. Y. 64; *Eichengreen v. Appel*, 44 Ill. App. 19; 1 Stim. Am. St. Law, § 2050. And see *Minard v. Burtis*, 83 Wis. 267, 53 N. W. 509.

¹ *Wood, Landl. & Ten.* (2d Ed.) 26; 1 *Tayl. Landl. & Ten.* (8th Ed.) 74.

² *Eichengreen v. Appel*, 44 Ill. App. 19; *Adams v. Adams*, 7 Phila. (Pa.) 160; *Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 123; *Overdeer v. Lewis*, 1 Watts & S. (Pa.) 90, 37 Am. Rep. 440; *Allen v. Kelly*, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905; *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442; *Todd v. Jackson*, 26 N. J. Law, 525. Contra, *Reeder v. Purdy*, 41 Ill. 279; *Wilder v. House*, 48 Ill. 279; *Dustin v. Cowdry*, 23 Vt. 631.

³ *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272.

⁴ *Stone v. Lahey*, 133 Mass. 426; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Allen v. Kelly*, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905; *Adams v. Adams*, 7 Phila. (Pa.) 160.

⁵ *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545; *Hubner v. Feige*, 90 Ill. 208;

Land is often cultivated under an agreement by which both the owner and the cultivator are to share in the crop. Such an agreement may establish the relation of employer and employé between the parties, a share of the crops being given in lieu of wages,⁶ or they may be tenants in common of the crop,⁷ or the transaction may constitute a leasing with a rent payable in crops, and the usual incidents of the relation of landlord and tenant exist.⁸ As a rule, an ordinary contract to cultivate land on shares does not make the parties partners,⁹ yet such a relation may be created if the parties so intend.¹⁰ Exactly what relation is created between

Brock v. Berry, 31 Me. 293; *Graham v. Womack*, 82 Mo. App. 618; *Dustin v. Cowdry*, 23 Vt. 631.

⁶ *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204; *Chandler v. Thurston*, 10 Pick. (Mass.) 205; *Tanner v. Hills*, 48 N. Y. 662; *Steel v. Frick*, 56 Pa. 172; *Chase v. McDonnell*, 24 Ill. 236; *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712; *Haywood v. Rogers*, 73 N. C. 320; *Neal v. Bellamy*, 73 N. C. 384. But see *Harrison v. Ricks*, 71 N. C. 7; *State v. Jones*, 19 N. C. 544. Possession and property in the crop remain in the owner of the land. *Adams v. McKesson's Ex'r*, 53 Pa. 81, 91 Am. Dec. 183; *Appling v. Odom*, 46 Ga. 583.

⁷ *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. 701; *Black v. Scott* (1904) 104 Mo. App. 37, 78 S. W. 301; *Walker v. Fitts*, 24 Pick. (Mass.) 191; *Creel v. Kirkham*, 47 Ill. 344; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; *Dinehart v. Wilson*, 15 Barb. (N. Y.) 595; *Wilber v. Sisson*, 53 Barb. (N. Y.) 258; *Edgar v. Jewell*, 34 N. J. Law, 259. And see *Wood v. Noack*, 84 Wis. 398, 54 N. W. 785; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Lowe v. Miller*, 3 Grat. (Va.) 205, 46 Am. Dec. 188; *Moser v. Lower*, 48 Mo. App. 85. The usual incidents of a tenancy in common attach to such holdings. *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256; *Otis v. Thompson*, *Lalor's Supp.* (N. Y.) 131; *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505; *Ferrall v. Kent*, 4 Gill (Md.) 209; *Hurd v. Darling*, 14 Vt. 214. For tenancy in common, see post, chapter XII.

⁸ *Walworth v. Jenness*, 58 Vt. 670, 5 Atl. 887; *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Jackson ex dem. Colden v. Brownell*, 1 Johns. (N. Y.) 267; *Johnson v. Hoffman*, 53 Mo. 504. Cf. *Barry v. Smith*, 69 Hun, 88, 23 N. Y. Supp. 261; *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931. The right of the landlord to the crop attaches only on delivery. *Burns v. Cooper*, 31 Pa. 426; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Butterfield v. Baker*, 5 Pick. (Mass.) 522; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Ill. 384, 89 Am. Dec. 312; *McLellan v. Whitney*, 65 Vt. 510, 27 Atl. 117. But see *Moulton v. Robinson*, 27 N. H. 550; *Horseley v. Moss*, 5 Tex. Civ. App. 341, 23 S. W. 1115; *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712; *Consolidated Land & Irrigation Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904. The rent is only due at harvest time. *Lamberton v. Stouffer*, 55 Pa. 284; *Cobel v. Cobel*, 8 Pa. 342. But see *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312.

⁹ *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Perrine v. Hankinson*, 11 N. J. Law, 181; *Gregory v. Brooks*, 1 Hun (N. Y.) 404; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Brown v. Jaquette*, 94 Pa. 113, 39 Am. Rep. 770.

¹⁰ *Somers v. Joyce*, 40 Conn. 592; *Adams v. Carter*, 53 Ga. 160; *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267; *Curtis v. Cash*, 84 N. C. 41; *Leavitt v. Investment Co.*, 54 Fed. 439, 4 C. C. A. 425.

the parties may, at times, be difficult to determine; but the intention of the parties, as shown by the language used and the circumstances of the transaction, will control.¹¹ If the owner is to receive a certain part of the crops *as rent*, the relation of landlord and tenant will be created.¹² In some states, the question is determined by statute; the parties being treated as landlord and tenant,¹³ or employer and employé,¹⁴ according to the circumstances of the particular case.¹⁵ Moreover, in other jurisdictions, the ordinary contract of renting on shares is held, in the absence of statute, to create the relation of landlord and tenant.¹⁶

LETTING OF LODGINGS

96. An ordinary agreement for lodgings, where the owner of the house retains possession and control, does not create the relation of landlord and tenant.

Although the letting of a number of rooms, or even a single room, may, if under the separate control of the lessee, give rise to the relation of landlord and tenant,¹⁷ yet such a relation does not arise when there is merely a letting of lodgings, with a retention by the owner of full possession and control of the house.¹⁸

¹¹ *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666; *Johnson v. Hoffman*, 53 Mo. 504; *Steel v. Frick*, 56 Pa. 172; *Dixon v. Nicolls*, 39 Ill. 384, 386, 89 Am. Dec. 312; *Lewis v. Lyman*, 22 Pick. (Mass.) 437; *Armstrong v. Bicknell*, 2 Lans. (N. Y.) 216; *Moulton v. Robinson*, 27 N. H. 550. But see *Birmingham v. Rogers*, 46 Ark. 254.

¹² *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Rowlands v. Voechting*, 115 Wis. 352, 91 N. W. 990; *Hoskins v. Rhodes*, 1 Gill & J. (Md.) 266; *Newcomb v. Ramer*, 2 Johns. (N. Y.) 421, note; *Dockham v. Parker*, 9 Greenl. (Me.) 137, 23 Am. Dec. 547. And see *Caruthers v. Williams*, 58 Mo. App. 100.

¹³ *Redmon v. Bedford*, 80 Ky. 13; *Kennedy v. McDiarmid*, 157 Ala. 496, 47 South. 792. See *Hansen v. Hansen*, 88 Neb. 517, 129 N. W. 982.

¹⁴ *Adams v. State*, 159 Ala. 115, 48 South. 795; *Garrick v. Jones*, 2 Ga. App. 382, 58 S. E. 543; *Rogers v. Frazier Bros. & Co.* (Tex. Civ. App.) 108 S. W. 727.

¹⁵ The distinction made by the Alabama statute is based upon the fact whether the cultivator furnishes both labor and teams, or merely labor; the former constituting the relation of landlord and tenant.

¹⁶ *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Wentworth v. Railroad Co.*, 55 N. H. 540; *Reynolds v. Reynolds*, 48 Hun (N. Y.) 142; *Mann v. Taylor*, 5 Heisk. (Tenn.) 267; *Sowles v. Martin*, 76 Vt. 180, 56 Atl. 979.

¹⁷ *Porter v. Merrill*, 124 Mass. 534; *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413; *Monks v. Dykes*, 4 M. & W. 567.

¹⁸ *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Ashton v. Margolies*, 72 Misc. Rep. 70, 129 N. Y. Supp.

In such cases there is only a contract relation.¹⁹ The letting of "flats" does not come within this rule, however, since they are separate dwellings, and the hirer is a lessee, even though there is but a single outer door to the building.²⁰ Reasonable notice is all that is necessary in order to terminate the holding of the lodger.²¹

LICENSES

97. A license is an authority to do some act or a series of acts on the land of the licensor. A license is not an estate, and is not assignable.

In connection with the law of real property, a license, as defined above, is an authority to do some act, or a series of acts, upon the land of another,²² without giving the licensee any estate or interest in the land.²³ It is a purely personal right,²⁴ and cannot be assigned by the licensee.²⁵ In fact, an attempted assignment of a license operates as a revocation of it,²⁶ since one may give a

617; *Mead v. Owen*, 80 Vt. 273, 67 Atl. 722, 13 Ann. Cas. 231. As to who are lodgers, see *Morton v. Palmer*, 51 Law J. Q. B. 7.

¹⁹ *Wilson v. Martin*, 1 Denio (N. Y.) 602; *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28; *Cochrane v. Tuttle*, 75 Ill. 361.

²⁰ *Musgrave v. Sherwood*, 53 How. Prac. (N. Y.) 311; *Young v. City of Boston*, 104 Mass. 95; *Porter v. Merrill*, 124 Mass. 534; *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

²¹ 1 Tayl. Landl. & Ten. (8th Ed.) 78; 1 Wood, Landl. & Ten. (2d Ed.) 133. But see *Huffell v. Armitstead*, 7 Car. & P. 56.

²² *Emerson v. Bergin*, 76 Cal. 197, 18 Pac. 264; *Howes v. Barmon* (1905) 11 Idaho, 64, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. Rep. 255; *Cook v. Stearns*, 11 Mass. 533; *Bagg v. Robinson*, 12 Misc. Rep. 299, 34 N. Y. Supp. 37; *Baldwin v. Taylor*, 166 Pa. 507, 31 Atl. 250.

²³ *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Cook v. Stearns*, supra; *Baltimore & H. R. Co. v. Algire*, 63 Md. 319; *Jackson ex dem. Hull v. Babcock*, 4 Johns. (N. Y.) 418. For the distinction between a license and an easement, see chapter XVII, post.

²⁴ *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Mumford v. Whitney*, 15 Wend. (N. Y.) 381, 30 Am. Dec. 60; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *Ex parte Coburn*, 1 Cow. (N. Y.) 568; *Blaisdell v. Railroad Co.*, 51 N. H. 483.

²⁵ *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. 934; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Pearson v. Hartman*, 100 Pa. 84; *Mumford v. Whitney*, 15 Wend. (N. Y.) 381, 30 Am. Dec. 60; *Mendenhall v. Klinck*, 51 N. Y. 246; *Jackson ex dem. Hull v. Babcock*, 4 Johns. (N. Y.) 418; *De Haro v. United States*, 5 Wall. (U. S.) 599, 18 L. Ed. 681.

²⁶ An attempted sale of the land by the licensor determines the license. *Blaisdell v. Railroad Co.* 51 N. H. 483.

privilege upon his land to one person which he would not give to another.²⁷

A license is to be distinguished from a lease. In a lease, the tenant has exclusive possession of the premises, while under a license the owner retains the possession; the licensee being given merely a privilege, under the owner, to use or occupy the land in a certain specified way.²⁸ In other words, the effect of a license is to permit the licensee to do acts upon the land which, in absence of a license, would be trespass.²⁹

How Created

Licenses may be created either by express agreement, or by implication.³⁰ An example of the latter is the implied license granted by business men to the public to enter their stores or offices during business hours.³¹ So a license may be implied from other acts or representations of the owner of the land.³² The grant of a license carries with it the right to use the necessary and proper means to accomplish the object.³³ The licensee is liable for all damages resulting from negligent or improper execution

²⁷ *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732.

²⁸ *Roberts v. Ice Co.*, 187 Mass. 402, 73 N. E. 523; *Funk v. Haldeman*, 53 Pa. 229. And see *Holladay v. Power Co.*, 55 Ill. App. 463; *Kabley v. Light Co.*, 102 Mass. 392; *Smith v. Simons*, 1 Root (Conn.) 318, 1 Am. Dec. 48; *Heywood v. Fulmer*, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491. A license differs from an easement in not being created by deed. *Morse v. Copeland*, 2 Gray (Mass.) 302; *Mumford v. Whitney*, 15 Wend. (N. Y.) 381, 30 Am. Dec. 60; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214. Cf. *W. U. Tel. Co. v. Bullard*, 67 Vt. 272, 31 Atl. 286.

²⁹ *Blaisdell v. Railroad Co.*, 51 N. H. 483; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Miller v. Railway Co.*, 6 Hill (N. Y.) 61.

³⁰ *Cutler v. Smith*, 57 Ill. 252; *Harmon v. Harmon*, 61 Me. 222; *Lakin v. Ames*, 10 Cush. (Mass.) 198; *Syron v. Blakeman*, 22 Barb. (N. Y.) 336; *Adams v. Burton*, 43 Vt. 36.

³¹ *Gibson, C. J.*, in *Gowen v. Exchange Co.*, 5 Watts & S. (Pa.) 143, 40 Am. Dec. 489. And see *Kay v. Railroad Co.*, 65 Pa. 273, 3 Am. Rep. 628; *Cutler v. Smith*, 57 Ill. 252; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Heaney v. Heaney*, 2 Denio (N. Y.) 625. So a sale of chattels gives an implied license to enter to remove them. *Wood v. Manley*, 11 Adol. & E. 34.

³² So there is an implied license to go to a private residence to make social calls. *Martin v. Houghton*, 45 Barb. (N. Y.) 258; *Adams v. Freeman*, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327. And see *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376.

³³ *Woodruff v. Beekman*, 43 N. Y. Super. Ct. 282; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Commonwealth v. Rigney*, 4 Allen (Mass.) 316; *Driscoll v. Marshall*, 15 Gray (Mass.) 62. As to employ men to help remove a ponderous object from the licensor's land. *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80.

of the license,³⁴ but not for damages which are the natural result of the acts licensed.³⁵

Although a license may be created by a written instrument,³⁶ yet, since it grants no interest in land, it may in all cases be created by parol,³⁷ unless the local statute may otherwise provide.³⁸

SAME—REVOCATION OF LICENSES

98. Licenses are generally revocable in all cases, except:

- (a) When coupled with an interest.
- (b) When affecting only an easement of the licensor.
- (c) In some states, when the licensee, relying on the authority given, has erected improvements on the licensor's land.

Licenses, being mere personal privileges, are generally revocable at the will of the licensor.³⁹ A license, however, coupled with an interest, is not.⁴⁰ For example, if personal property is sold, and a license given to go upon the land of the vendor to remove the goods, it cannot be revoked.⁴¹ A license, moreover, to do acts

³⁴ *Selden v. Canal Co.*, 29 N. Y. 634; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *McKnight v. Ratcliff*, 44 Pa. 156; *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130.

³⁵ *Selden v. Canal Co.*, 29 N. Y. 634.

³⁶ *Freeman v. Underwood*, 66 Me. 229.

³⁷ *Collins Co. v. Marcy*, 25 Conn. 239; *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445; *Jacob Tome Institute of Port Deposit v. Davis*, 87 Md. 591, 41 Atl. 166; *Freeman v. Headley*, 33 N. J. Law, 523; *Walter v. Post*, 4 Abb. Prac. (N. Y.) 382; *Lockhart v. Geir*, 54 Wis. 133, 11 N. W. 245.

³⁸ *People v. Macy*, 22 Hun (N. Y.) 577.

³⁹ *Hibbard, Spencer, Bartlett & Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; *Classen v. Guano Co.*, 81 Md. 258, 31 Atl. 808; *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; *Brown v. New York*, 176 N. Y. 571, 68 N. E. 1115; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Baldwin v. Taylor*, 166 Pa. 507, 31 Atl. 250; *Bass v. Power Co.*, 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247; *Minneapolis W. Ry. v. Railway Co.*, 58 Minn. 128, 59 N. W. 983; *Kremer v. Railway Co.*, 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468; *Carley v. Gitchell*, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428; *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376. A ticket to a theater is a license, and may be revoked, *McCrea v. Marsh*, 12 Gray (Mass.) 211, 71 Am. Dec. 745; or to a horse race, *Wood v. Lead-bitter*, 13 Mees. & W. 838.

⁴⁰ *Barney v. Lincoln Park*, 203 Ill. 397, 67 N. E. 801; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Funk v. Haldeman*, 53 Pa. 229.

⁴¹ *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Wood v. Manley*, 11 Adol. & E. 34; *Carter v. Wingard*, 47 Ill. App. 296. But see *Fish v. Capwell*, 18 R. I. 667, 29 Atl. 840, 25 L. R. A. 159, 49 Am. St. Rep. 807. It may be lost by abandonment. *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247.

which obstruct or destroy an easement of the licensor, cannot be revoked after it is executed, so long as the easement is in force.⁴² In some states, where the licensee, acting under the authority given him, has expended money or has made valuable improvements on the land, equity, regarding the authority either as an easement or an oral agreement to grant an easement, will protect the licensee, and will not suffer the authority to be revoked.⁴³ According to the weight of authority, however, where the authority is, in fact, a mere oral license, it can be revoked, regardless of the expenditures or improvements made, since to hold otherwise would transfer, in effect, an interest in land by parol.⁴⁴ Some courts, however, hold the licensor estopped to revoke,⁴⁵ while others require him to place the licensee in statu quo, by compensating him for his expenditures.⁴⁶ Where the license is in the nature of a contract for a definite time, the licensee may be protected by awarding him specific performance.⁴⁷ The mere fact, however, that the licensee has given a valuable consideration for a license, does not as a rule make it irrevocable,⁴⁸ although some cases do

⁴² *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421.

⁴³ *Kastner v. Benz*, 67 Kan. 486, 73 Pac. 67; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Russell v. Hubbard*, 59 Ill. 335; *Hiers v. Mill Haven Co.*, 113 Ga. 1002, 39 S. E. 444; *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84, 22 Am. St. Rep. 298; *Saucer v. Kellér*, 129 Ind. 475, 28 N. E. 1117; *FERGUSON v. SPENCER*, 127 Ind. 66, 25 N. E. 1035, *Burdick Cas. Real Property*; *McBroom v. Thompson*, 25 Or. 559, 37 Pac. 57, 42 Am. St. Rep. 806; *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887. Cf. *City Council of Augusta v. Burum*, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.

⁴⁴ *West Chicago St. R. Co. v. People*, 214 Ill. 9, 73 N. E. 393; *Whittemore v. Railroad Co.*, 174 Mass. 363, 54 N. E. 867; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Taylor v. Gerrish*, 59 N. H. 569; *Rodefer v. Railroad Co.*, 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844; *Wood v. Lead-bitter*, 13 Mees. & W. 838; *Bridges v. Purcell*, 18 N. C. 492.

⁴⁵ *Risien v. Brown*, 73 Tex. 135, 10 S. W. 661; *School Dist. v. Lindsay*, 47 Mo. App. 134; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439. But see *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578; *Lake Erie & W. R. Co. v. Kennedy*, 132 Ind. 274, 31 N. E. 943.

⁴⁶ *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739. The licensee has in all cases a reasonable time to remove his property from the land after the revocation. *Barnes v. Barnes*, 6 Vt. 388.

⁴⁷ *Williamston & T. R. Co. v. Battle*, 66 N. C. 540; *Veghte v. Power Co.*, 19 N. J. Eq. 142.

⁴⁸ *Minneapolis Mill Co. v. Railway Co.*, 51 Minn. 304, 53 N. W. 639; *Cook v. Ferbert*, 145 Mo. 462, 46 S. W. 947; *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887; *Baldwin v. Taylor*, 166 Pa. 507, 31 Atl. 250.

so hold.⁴⁹ A license is also revoked by the death,⁵⁰ or insanity⁵¹ of either party, by the expiration of the time for which it was given,⁵² by abandonment or nonuser,⁵³ by a sale of the premises,⁵⁴ or by the exercise of the right of eminent domain.⁵⁵ The owner of the land may exercise his right of revocation by giving notice to the licensee, allowing him a reasonable time to remove his property, if any, from the premises.⁵⁶

⁴⁹ *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Harlan v. Gas Co.*, 133 Ind. 323, 32 N. E. 930; *Martin v. O'Brien*, 34 Miss. 21.

⁵⁰ *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Estelle v. Peacock*, 48 Mich. 469, 12 N. W. 659; *Eggleston v. Railway Co.*, 35 Barb. (N. Y.) 162; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Blaisdell v. Railroad Co.*, 51 N. H. 483.

⁵¹ *Berry v. Potter*, 52 N. J. Eq. 664, 29 Atl. 323.

⁵² *Mason v. Holt*, 1 Allen (Mass.) 45; *Glynn v. George*, 20 N. H. 114; *Gilmore v. Wilson*, 53 Pa. 194; *Detroit & B. Plank Road Co. v. Railway Co.*, 103 Mich. 585, 61 N. W. 880.

⁵³ *Lake Erie & W. Ry. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

⁵⁴ *Entwhistle v. Henke*, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196; *Worthen v. Garno*, 182 Mass. 243, 65 N. E. 67; *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887; *Taylor v. Gerrish*, 59 N. H. 569; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839.

⁵⁵ *Clapp v. Boston*, 133 Mass. 367.

⁵⁶ *Fluker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Forbes v. Balenseifer*, 74 Ill. 183; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Troxell v. Iron Co.*, 42 Pa. 513.

CHAPTER XII

JOINT OWNERSHIP OF ESTATES

- 99. Estates as to Number of Owners.
- 100. Joint Estates.
- 101. Joint Tenancies.
- 102. Estates in Coparcenary.
- 103. Estates in Entirety.
- 104. Tenancies in Common.
- 105. Partnership Realty.
- 106. Joint Mortgagees.
- 107. Incidents of Joint Estates.
- 108. Partition.
- 109. Community Property.

ESTATES AS TO NUMBER OF OWNERS

99. Estates are divided according to the number of owners who are entitled to possession at the same time into—
- (a) Estates in severalty; and
 - (b) Joint estates.

JOINT ESTATES

100. Joint estates are those which are owned by two or more persons. The joint estates at common law are:
- (a) Joint tenancies.
 - (b) Tenancies in common.
 - (c) Estates in coparcenary.
 - (d) Estates in entirety.

Joint Ownership

The interests in land hitherto considered have been those in which the ownership, at one and the same time, was in one person. Such interests are called estates in severalty. Estates, however, of the same quantity, quality, and time of enjoyment as estates in severalty, may be held by two or more persons in an undivided ownership, that is, in joint ownership, and when so held they are called joint estates. Although the highest form of ownership in land is naturally associated with the notion of sole dominion over it, an ownership severed from all other persons, or, in other words, an ownership in severalty, yet in all systems of land law, after the doctrine of individual ownership, with the

right of inheritance, becomes established, and the right to alienate the land, either in whole or in part, becomes recognized, the natural justice and the logical necessity of two or more persons having at the same time equal rights or interests in the same parcel of land becomes apparent. We are not referring, of course, to tribal or community ownership of land, which, historically speaking, preceded individual ownership, but to an exclusive ownership by two or more persons, who unite in their joint interests all the rights of an individual ownership, and hold in such joint ownership the property against all the rest of the world. In the English common law, estates held in co-ownership were early recognized. Such ownership is likewise known to the civil law, and also to the older Roman law.¹ In English law, the differences between various kinds of joint ownership developed gradually, but by the time of the reign of Edward I the distinction between joint tenancy and tenancy in common was becoming apparent.² When Littleton wrote, in the fifteenth century, he distinguished four kinds of joint estates, namely, joint tenancy, coparcenary, tenancy by entireties, and tenancy in common.³ To these may be added, for modern consideration, partnership realty, the interests held by joint mortgagees of land, and community property.

SAME—JOINT TENANCIES

101. A joint tenancy is an ownership of land in equal undivided shares by virtue of a grant or a devise which imports an intention that the tenants shall hold one and the same estate. The interests of all the tenants go to the last survivor. For the existence of a joint tenancy the following unities are necessary:

- (a) Unity of interest.
- (b) Unity of title.
- (c) Unity of time.
- (d) Unity of possession.

Definition—How Created

An estate in joint tenancy arises where lands or tenements are granted to two or more persons, to hold in fee simple, fee tail,

¹ See, in general, Hunter, *Rom. Law*, pp. 337-340, 519, 553. The Roman law term for joint ownership is "condominium."

² Holds. Hist. Eng. Law, III, 109; Y. B. 2, 3 Edw. II (S. S.) 144.

³ Litt. §§ 277-324.

for life, for years, or at will.⁴ Joint tenancy is further defined as a simple estate, owned in equal shares by two or more persons, other than husband or wife, under title by purchase.⁵ It may be created by a conveyance,⁶ or by devise,⁷ but can exist only by act of the parties, and never arises by descent or act of the law.⁸ Its creation depends on the wording of the deed or devise under which the tenants claim, and where an instrument gives an estate to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, a joint tenancy arises at common law.⁹ In fact, the early common law favored joint tenancies by reason of the right of survivorship which was incident to such estates.¹⁰ The policy of the law was averse to the division of tenures, because it resulted in a weakening of the efficiency of feudal service.¹¹ Consequently all joint estates were presumed to be joint tenancies, unless there was a contrary provision in the instrument creating them.¹² In later times, however, after the abolition of tenures, the courts following the lead of equity, looked with but little favor upon joint tenancies, by reason of the harshness of the doctrine of survivorship.¹³ Consequently the rule became established that, where the words of the instrument will permit, an intention to create a tenancy in common will, if possible, be imported, rather than an intention to create a joint tenancy.¹⁴ A joint tenancy was anciently said to be held "per my et

⁴ 2 Blk. Comm. 180; *THORNBURG v. WIGGINS*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422, Burdick Cas. Real Property.

⁵ *Stimpson v. Batterman*, 5 Cush. (Mass.) 153; *Blair v. Osborne*, 84 N. C. 417; *Gee v. Gee*, 2 Sneed (Tenn.) 395.

⁶ *Gaunt v. Stevens*, 241 Ill. 542, 89 N. E. 812; *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

⁷ *Wills v. Foltz*, 61 W. Va. 262, 56 S. E. 473, 12 L. R. A. (N. S.) 283; *Sherwood v. Sherwood*, 3 Bradf. Sur. (N. Y.) 230.

⁸ 2 Blk. Comm. 180; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177; *SIMONS v. McLAIN*, 51 Kan. 153, 32 Pac. 919, Burdick Cas. Real Property; *Colson v. Baker*, 42 Misc. Rep. 407, 87 N. Y. Supp. 238; *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

⁹ *Greer v. Blanchard*, 40 Cal. 194; *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598; *Martin v. Smith*, 5 Bin. (Pa.) 16, 6 Am. Dec. 395; *Farr v. Grand Lodge A. O. U. W.*, 83 Wis. 446, 53 N. W. 738, 18 L. R. A. 249, 35 Am. St. Rep. 73.

¹⁰ *Infra*.

¹¹ 4 Kent, Comm. 361.

¹² *Martin v. Smith*, 5 Bin. (Pa.) 16, 6 Am. Dec. 395; *Spencer v. Austin*, 38 Vt. 258; *Crooke v. De Vandes*, 9 Ves. Jr. 197, 32 Eng. Reprint, 577.

¹³ *Infra*.

¹⁴ *Noble v. Teeple*, 58 Kan. 398, 40 Pac. 598; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254; *Spencer v. Austin*, 38 Vt. 258.

per tout,"¹⁵ meaning "by the moiety (or half, or equal share) and by all." This meant that the tenants were seised of the whole for the purpose of tenure and survivorship, while for the purpose of individual alienation each tenant had only a particular share or part.¹⁶

The Essential Unities

For the existence of a joint tenancy there must be present the four unities, as they are called.¹⁷ These are interest,¹⁸ title,¹⁹ time,²⁰ and possession.²¹ By unity of interest, in reference to joint tenancy, is meant a similarity of estate, as regards its extent or duration, in each joint tenant.²² Since joint tenants hold under a grant of a single estate, their interests are necessarily the same in extent. Thus, one cannot be tenant in fee simple and the others in tail, or for life, or for a term of years. But where two or more are joint tenants for life, one of them may have the inheritance in severalty, subject to the joint estate; as where land is granted to A. and B. for their lives, and to the heirs or heirs of the body of A. By unity of the title of joint tenants is meant the creation of their interests by one and the same act; that is, by the same grant or devise. Joint tenants cannot be acquired under different titles.²³ And, at common law, unity of time of commencement of the title was requisite; that is, the interests of the tenants must have vested at one and the same time.²⁴ Thus, if the fee simple in remainder after a life estate were limited to the heirs of A. and the heirs of B., A. and B. being alive at the time of the limitation, but subsequently dying at different times, their respective heirs would not be joint tenants, but tenants in common, since their interests would not have arisen at the same moment. By means,

¹⁵ Bracton, f. 13; Britton, I, 232, 233; WILKINS v. YOUNG, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, Burdick Cas. Real Property.

¹⁶ 4 Kent, Comm. 460; 2 Blk. Comm. 182; WILKINS v. YOUNG, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, Burdick Cas. Real Property.

¹⁷ 2 Blk. Comm. 180; City of Louisville v. Coleburne, 108 Ky. 420, 56 S. W. 681.

¹⁸ Wiscot's Case, 2 Coke, 60b; Putney v. Dresser, 2 Metc. (Mass.) 583; Jones v. Jones, 1 Call (Va.) 458.

¹⁹ De Witt v. San Francisco, 2 Cal. 289.

²⁰ Strattan v. Best, 2 Brown, Ch. 233; Sammes' Case, 13 Coke, 54.

²¹ Thornton v. Thornton, 3 Rand. (Va.) 179.

²² Case v. Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Colson v. Baker, 42 Misc. Rep. 407, 87 N. Y. Supp. 238.

²³ Richardson v. Miller, 48 Miss. 311; Young v. De Bruhl, 11 Rich. (S. C.) 638, 73 Am Dec. 127.

²⁴ Case v. Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; McPherson v. Snowden, 19 Md. 197.

however, of limitations operating by way of springing or shifting use, or executory devise, the interests of joint tenants may be made to arise at different times.²⁵ Unity of possession means only a joint right to possession, which is essential to all joint estates. Although, in a joint tenancy, each tenant must have the entire possession of every parcel of the property as well as of the whole.²⁶

Survivorship

The chief incident of a joint tenancy is the right of survivorship, by which the interest of a joint tenant does not pass to his heirs, but vests, after his death, in his cotenant, or, if there be more than one, it vests in all of them. Therefore, where a joint tenancy exists, either at common law or by force of statute, and one of the joint tenants dies, the survivors take the whole estate.²⁷ This doctrine of survivorship is applied, where there are several joint tenants, until only one joint tenant remains, and on his death the whole estate goes to his heirs.²⁸

Severance of the Tenancy

Upon the happening of any act which destroys one of the four essential unities, a joint tenancy is severed or terminated.²⁹ This may arise, for example, where a joint tenant conveys, mortgages, or leases his interest, thus destroying the unity of title.³⁰ Also, a partition of the land into estates in severalty destroys the unity of possession.³¹ A joint tenant cannot convey the whole estate or any distinct portion of it by metes and bounds, so as to affect the rights of his cotenants,³² yet such a conveyance may operate

²⁵ 4 Kent, Comm. 359; *Powell v. Powell*, 5 Bush (Ky.) 619, 96 Am. Dec. 372.

²⁶ *Case v. Owen*, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; *Colson v. Baker*, 42 Misc. Rep. 407, 87 N. Y. Supp. 238.

²⁷ *WILKINS v. YOUNG*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, *Burdick Cas. Real Property*; *Kinsley v. Abbott*, 19 Me. 430; *Farrelly v. Bank*, 92 App. Div. 529, 87 N. Y. Supp. 54; *Redemptorist Fathers v. Lawler*, 205 Pa. 24, 54 Atl. 487; *United States v. Robertson*, 183 Fed. 711, 106 C. C. A. 149.

²⁸ 4 Kent, Comm. 360; *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13, 17 Am. Dec. 111; *Spencer v. Austin*, 38 Vt. 258; *Herbement's Ex'rs v. Thomas, Cheves, Eq. (S. C.)* 21.

²⁹ 2 Blk. Comm. 185; *Witherington v. Williams*, 1 N. C. 89; *WILKINS v. YOUNG*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, *Burdick Cas. Real Property*.

³⁰ *Davidson's Lessee v. Heydom*, 2 Yeates (Pa.) 459; *Simpson's Lessee v. Ammons*, 1 Bin. (Pa.) 175, 2 Am. Dec. 425.

³¹ *Roddy v. Cox*, 29 Ga. 298, 74 Am. Dec. 64; *Postell v. Skirving's Ex'rs*, 1 Desauss. (S. C.) 158.

³² *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Richardson v. Miller*, 48 Miss. 311; *Fitch v. Boyer*, 51 Tex. 336.

as an estoppel against the grantor.³³ He may, however, convey his undivided share or interest, and such a conveyance causes a severance of the tenancy;³⁴ that is, when a joint tenant mortgages or conveys his part or interest to a stranger, it turns the joint tenancy into a tenancy in common so far as that share is concerned, although the other owners as to each other continue to hold as joint tenants, with all the incidents of joint tenancy.³⁵

Abolished by Statute

In most states, common-law joint tenancies have been modified or entirely abolished by statute. Many jurisdictions provide that, unless the instrument expressly declares or clearly shows an intention to create a joint tenancy, the tenancy shall be regarded as a tenancy in common.³⁶ In most states, the common-law right of survivorship is abolished either by force of such statutes abolishing joint tenancies or by express provision.³⁷ In some states, however, the statutes expressly abolishing the incident of survivorship except from their provisions those cases where the instrument shows an express intention to create a joint tenancy,³⁸ or where a joint tenancy is created in a trust estate.³⁹

SAME—ESTATES IN COPARCENARY

102. An estate in coparcenary is a joint ownership of land in undivided shares by coheirs. Unities of interest, title, and possession are alone necessary. The doctrine of survivorship does not apply.

³³ *Varnum v. Abbott*, 12 Mass. 474, 7 Am. Dec. 87; *McKey's Heirs v. Welch's Ex'x*, 22 Tex. 390.

³⁴ *Frans v. Young*, 24 Iowa, 375; *Neuforth v. Hall*, 6 Kan. App. 902, 51 Pac. 573; *Yank v. Bordeaux*, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522; *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717.

³⁵ *Richardson v. Miller*, 48 Miss. 311; *Simpson's Lessee v. Ammons*, 1 Bin. (Pa.) 175, 2 Am. Dec. 425; *Brown v. Raindle*, 3 Ves. 256.

³⁶ *Greer v. Blanchar*, 40 Cal. 194; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177; *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938; *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486; *Commercial Bank v. Sherwood*, 162 N. Y. 310, 56 N. E. 834; *Bank of Green Brier v. Effingham*, 51 W. Va. 267, 41 S. E. 143.

³⁷ *Hay v. Bennett*, 153 Ill. 271, 38 N. E. 645; *Boyer v. Sims*, 61 Kan. 593, 60 Pac. 309; *Day v. Davis*, 64 Miss. 253, 8 South. 203; *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791; *Telfair v. Howe*, 3 Rich. Eq. (S. C.) 235, 55 Am. Dec. 637; *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613.

³⁸ *Redemptorist Fathers v. Lawler*, 205 Pa. 24, 54 Atl. 487; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254.

³⁹ *Parsons v. Boyd*, 20 Ala. 112; *Boyer v. Sims*, 61 Kan. 593, 60 Pac. 309.

At common law, coparceners, or parceners, so called because they may be compelled to make partition,⁴⁰ are persons taking by descent lands of inheritance.⁴¹ An estate in coparcenary is the joint estate thus acquired. Under the English law of primogeniture, whereby lands descend to the oldest male heir to the exclusion of the other heirs, estates in coparcenary apply only to female heirs taking by descent from the same ancestor.⁴² By gavelkind custom, however, of the county of Kent, male heirs took as coparceners.⁴³ The estate resembles a joint tenancy. The three unities of interest, title, and possession are always present, and also, generally, the unity of time, although this latter unity is not essential.⁴⁴ Coparceners may hold, however, unequal interests, because some of them may be children and others grandchildren. Estates in coparcenary differ from joint tenancies, in that the doctrine of survivorship does not apply, and that they arise by descent, while joint tenancies arise only by purchase.⁴⁵ Estates in coparcenary have been recognized in some of our older states, both male and female heirs, under our rules of descent, being coparceners.⁴⁶ Such estates are, however, practically abolished in this country; heirs, under our statutes, taking generally as tenants in common.⁴⁷

SAME—ESTATES IN ENTIRETY

103. An estate in entirety is one conveyed to a man and his wife to hold jointly. The doctrine of survivorship applies to these estates.

Estates in entirety have been abolished in many states.

At common law, owing to the doctrine of identity of husband and wife, a conveyance or devise of lands to them during coverture does not create a joint tenancy, or a tenancy in common, but

⁴⁰ 2 Blk. Comm. 189.

⁴¹ *Hoffar v. Dement*, 5 Gill (Md.) 132, 46 Am. Dec. 628.

⁴² *Burrill*, Law Dict. tit. "Estates in Coparcenary"; *Chitty*, Descents, 76.

⁴³ 4 Kent, Comm. 366; *Buller v. Exeter*, 1 Ves. 340, 27 Eng. Reprint, 1069.

⁴⁴ 2 Blk. Comm. 188.

⁴⁵ Co. Litt. 163b, 164a; *Hoffar v. Dement*, 5 Gill (Md.) 132, 46 Am. Dec. 628.

⁴⁶ *O'Bannon v. Roberts' Heirs*, 2 Dana (Ky.) 54; *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737; *Stevenson v. Cofferin*, 20 N. H. 150; *Hoffar v. Dement*, 5 Gill (Md.) 132, 46 Am. Dec. 628; *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737; 1 Stim. Am. St. Law, § 1375.

⁴⁷ 4 Kent, Comm. 367; 1 Washb. Real Prop. 414; *Stevenson v. Cofferin*, 20 N. H. 150. And see the statutes of the several states.

creates an estate in entirety.⁴⁸ This estate is confined to the relation of husband and wife, and takes its name from the fact that neither spouse takes by shares, that is, by moieties, but each is seised of the whole, or per tout and not per my, or, in other words, of the entire estate.⁴⁹ In some jurisdictions, however, even in the absence of statutes upon the subject, estates in entirety have never been recognized;⁵⁰ joint conveyances or devises to husband and wife being recognized as joint tenancies or tenancies in common.⁵¹ Moreover, there are cases holding that by force of express words of grant, where there is a manifest intention to create a joint tenancy or a tenancy in common, the husband and wife will take as joint tenants or tenants in common,⁵² although other cases hold that, irrespective of such express intention, they take an estate in entirety.⁵³

When lands are conveyed to husband and wife and to some third person, the husband and wife take, at common law, an undivided half of the estate, which they hold as tenants in entirety, while the third person takes the other half, holding it in common, or as a joint tenancy, as the case might be, with the husband and

⁴⁸ *Strawn v. Strawn's Heirs*, 50 Ill. 33; *Simons v. Bollinger*, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234; *Shinn v. Shinn*, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; *Newlove v. Callaghan*, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762; *Hoover v. Patter*, 42 Pa. Super. Ct. 21.

⁴⁹ *Maitten v. Barley*, 174 Ind. 620, 92 N. E. 738; *Morris v. McCarty*, 158 Mass. 11, 32 N. E. 938; *Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371; *Miner v. Brown*, 133 N. Y. 308, 31 N. E. 24; *Gillan's Ex'rs v. Dixon*, 65 Pa. 395.

⁵⁰ *Whittelsey v. Fuller*, 11 Conn. 337; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Kerner v. McDonald*, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550; *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439. See *Hoffman v. Stigers*, 28 Iowa, 302.

⁵¹ *Whittelsey v. Fuller*, *supra*.

⁵² *Donegan v. Donegan*, 103 Ala. 488, 15 South. 823, 49 Am. St. Rep. 53; *Fladung v. Rose*, 58 Md. 13; *Fulper v. Fulper*, 54 N. J. Eq. 431, 34 Atl. 1063, 32 L. R. A. 701, 55 Am. St. Rep. 590; *Miner v. Brown*, 133 N. Y. 308, 31 N. E. 24; *Stalcup v. Stalcup*, 137 N. C. 305, 49 S. E. 210. So by force of statute in some states. See *WILKINS v. YOUNG*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, *Burdick Cas. Real Property*; *THORNBURG v. WIGGINS*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422, *Burdick Cas. Real Property*.

⁵³ *Young's Estate*, 166 Pa. 645, 31 Atl. 373; *Johnson v. Hart*, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565. See *Scott v. Causey*, 89 Ga. 749, 15 S. E. 650; *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557.

wife.⁵⁴ So, if there were more than three persons to whom the conveyance was made, the husband and wife would together take only one share.⁵⁵ The doctrine of survivorship applies to estates in entirety, and they go to the heirs of the survivor only; the heirs of the first deceased taking nothing.⁵⁶ During the joint lives of the husband and wife the husband has the entire control of the joint estate,⁵⁷ and a conveyance made by him will be effectual during his life;⁵⁸ but if he die first, she may avoid the conveyance.⁵⁹ Lands held by this tenancy may, by weight of authority, be levied on by the husband's creditors; but such a conveyance will be no more effectual against a surviving wife than a voluntary alienation.⁶⁰ Moreover, on the other hand, some states hold that during coverture there can be no sale of any part or execution against either.⁶¹ In England, and in some of our states, modern statutes have abolished estates in entirety,⁶² although in some states they still exist.⁶³ In a number of states, however, the stat-

⁵⁴ *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Johnson v. Hart*, supra. But see *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236.

⁵⁵ *Barber v. Harris*, 15 Wend. (N. Y.) 616; *Johnson v. Hart*, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565.

⁵⁶ *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213; *Jacobs v. Miller*, 50 Mich. 119, 15 N. W. 42; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Long v. Barnes*, 87 N. C. 329; *Stuckey v. Keefe's Ex'rs*, 26 Pa. 397. Cf. *Thornton v. Thornton*, 3 Rand. (Va.) 179.

⁵⁷ *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Washburn v. Burns*, 34 N. J. Law, 18; *French v. Mehan*, 56 Pa. 286; *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

⁵⁸ *Barber v. Harris*, 15 Wend. (N. Y.) 616; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692; *Ames v. Norman*, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269.

⁵⁹ *Pierce v. Chace*, 108 Mass. 254; *McCurdy v. Canning*, 64 Pa. 39; *Chandler v. Cheney*, 37 Ind. 391; *Washburn v. Burns*, 34 N. J. Law, 18.

⁶⁰ *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Mich. Beef & Provision Co. v. Coll*, 116 Mich. 261, 74 N. W. 475; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Brown v. Gale*, 5 N. H. 416; *Farmers' & Mechanics' Bank of Rochester v. Gregory*, 49 Barb. (N. Y.) 155. And see *McCurdy v. Canning*, 64 Pa. 39.

⁶¹ *Almond v. Bonnell*, 76 Ill. 536; *THORNBURG v. WIGGINS*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422, *Burdick Cas. Real Property*; *Shinn v. Shinn*, 42 Kan. 1, 21 Pac. 813, 4 L. R. A. 224; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40; *Farmers' Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220.

⁶² *Hannon v. Railroad Co.*, 12 Cal. App. 350, 107 Pac. 335; *Lott v. Wilson*, 95 Ga. 12, 21 S. E. 992; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Holmes v. Holmes*, 70 Kan. 892, 79 Pac. 163; *Robinson's Appeal*, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; *Stilphen v. Stilphen*, 65 N. H. 126, 23 Atl. 79.

⁶³ *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Dowling v. Salliotte*, 83

utes expressly provide that joint conveyances to husband and wife shall create tenancies in common.⁶⁴

SAME—TENANCIES IN COMMON

104. A tenancy in common is a joint ownership of lands, to which the principle of survivorship does not apply. The only unity necessary for a tenancy in common is that of possession.

Definitions

A tenancy in common is where two or more persons hold the same land with interests accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares.⁶⁵ It has also been defined as the holding of an estate in land by several persons, by several and distinct titles.⁶⁶ Again, tenants in common are said to be such as hold, not by joint title, but by several and distinct titles, although by unity of possession; and because none knoweth his own severalty, they therefore all occupy in common.⁶⁷ Or, as elsewhere said, "joint tenants hold by one joint title and in one right, whereas tenants in common hold by several titles, or by one title and several rights."⁶⁸

Distinguished from Joint Tenancies

Tenancies in common are further distinguished from joint tenancies as follows. In joint tenancies, there must exist the four unities. In a tenancy in common, only the unity of possession is essential.⁶⁹ The other unities may exist in a tenancy in common,

Mich. 131, 47 N. W. 225; *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; *Mardt v. Scharmach*, 65 Misc. Rep. 124, 119 N. Y. Supp. 449; *In re Bramberry's Estate*, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64.

⁶⁴ *Bader v. Dyer*, 106 Iowa, 715, 77 N. W. 469, 68 Am. St. Rep. 332; *Robinson's Appeal*, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; *Clark v. Clark*, 56 N. H. 105; *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *American Nat. Bank of Washington, D. C., v. Taylor*, 112 Va. 1, 70 S. E. 534, Ann. Cas. 1912D, 40.

⁶⁵ 1 Steph. Comm. 323.

⁶⁶ *Manhattan Real Estate & Building Ass'n v. Cudlipp*, 80 App. Div. 532, 80 N. Y. Supp. 993. And see, further, *CARVER v. FENNIMORE*, 116 Ind. 236, 19 N. E. 103, *Burdick Cas. Real Property*.

⁶⁷ Litt. § 292; 2 Blk. Comm. 191.

⁶⁸ 5 Bacon, Abr. 240.

⁶⁹ *Blessing v. House's Lessee*, 3 Gill & J. (Md.) 290; *Laughlin v. O'Reiley*, 92 Miss. 121, 45 South. 193; *Sutton v. Jenkins*, 147 N. C. 11, 60 S. E. 643; *Bush v. Gamble*, 127 Pa. 43, 17 Atl. 865.

but their presence is immaterial.⁷⁰ Moreover, the right of survivorship exists in joint tenancies, but not in a tenancy in common.⁷¹ Again, at common law a joint tenant may convey his interest to a cotenant by a release;⁷² but this a tenant in common cannot do, since each tenant in common stands, towards his own undivided share, in the same relation as, if he were sole owner of the whole, he would stand towards the whole. Accordingly one tenant in common must convey his share to another by some assurance which is proper to convey an undivided hereditament and he cannot so convey by release.⁷³

How Created

At common law, tenancies in common could not be created by descent,⁷⁴ but only by conveyances expressly creating such estates,⁷⁵ or by necessary implication,⁷⁶ as, for example, where one-half of a parcel of land is conveyed without metes and bounds, or where a certain number of acres out of a larger tract are conveyed without the particular part being designated.⁷⁷ In all cases of tenancies in common, the share of each tenant, whatever the number of tenants may be, is presumed to be equal to the shares of the others,⁷⁸ unless it is otherwise expressly provided, or circumstances, such as unequal contributions to the purchase price, rebut such a presumption.⁷⁹ It has already been stated, in connection with joint tenancies,⁸⁰ that in modern times joint estates will, if possible, be presumed to be tenancies in common, unless the contrary appears,⁸¹ and generally, either by force of statute or

⁷⁰ *Silloway v. Brown*, 12 Allen (Mass.) 30; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667.

⁷¹ 5 Bacon, Abr. 240; *Redemptorist Fathers v. Lawler*, 205 Pa. 24, 54 Atl. 487.

⁷² *Id.*

⁷³ *Challis*, Real Prop. 336, 337.

⁷⁴ *Jackson ex dem. Garnsey v. Livingston*, 7 Wend. (N. Y.) 136; *Pruden v. Paxton*, 79 N. C. 446, 28 Am. Rep. 333; *Fisher v. Wigg*, 1 P. Wms. 14, 24 Eng. Rep. 275.

⁷⁵ See *Emerson v. Cutler*, 14 Pick. (Mass.) 108; *Martin v. Smith*, 5 Bin. (Pa.) 16, 6 Am. Dec. 395.

⁷⁶ *Jackson ex dem. Garnsey v. Livingston*, *Pruden v. Paxton*, and *Fisher v. Wigg*, *supra*.

⁷⁷ *Preston v. Robinson*, 24 Vt. 583; *Seckel v. Engle*, 2 Rawle (Pa.) 68; *Wallace v. Miller*, 52 Cal. 655.

⁷⁸ See *Campau v. Campau*, 44 Mich. 31, 5 N. W. 1062; *Gregg v. Patterson*, 9 Watts & S. (Pa.) 197.

⁷⁹ *Rankin v. Black*, 1 Head (Tenn.) 650.

⁸⁰ *Supra*, note 14.

⁸¹ See 1 Stim. Am. St. Law, § 1371; *Case v. Owen*, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253.

judicial construction, a tenancy in common is created whenever an estate is concurrently owned by two or more persons, provided the creating instrument, either expressly or by necessary implication, does not otherwise provide.⁸² Consequently, at the present time, tenancies in common may arise by will, conveyance,⁸³ descent,⁸⁴ mortgage,⁸⁵ prescription,⁸⁶ or by levy of execution.⁸⁷ The individual interests may be held by several and distinct titles,⁸⁸ and these titles may be acquired in different ways.⁸⁹

SAME—PARTNERSHIP REALTY

105. Where title to realty is taken by partners of a firm, they hold, at law, as tenants in common.

Where title to partnership realty is taken by one or more of the partners, it is held, in equity, in trust for the partnership.

Where land is purchased with partnership funds and held by the members of a partnership for partnership purposes, equity will regard the land, for the benefit of creditors, as a part of the personal property of the firm.

Although the phrase "estate in partnership" is a convenient one at times, yet there is no such estate at common law. A partnership is not an artificial person, as is a corporation, and there can be no common-law conveyance to a mere firm name. However, such

⁸² *Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32; *Barnum v. Landon*, 25 Conn. 137; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393; *Goell v. Morse*, 126 Mass. 480; *Valade v. Masson*, 135 Mich. 41, 97 N. W. 59; *McPhillips v. Fitzgerald*, 177 N. Y. 543, 69 N. E. 1126; *Bush v. Gamble*, 127 Pa. 43, 17 Atl. 865.

⁸³ *Haven v. Mehlgarten*, 19 Ill. 91; *Erskin v. Wood*, 77 Kan. 577, 95 Pac. 413; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; *Ferris v. Nelson*, 60 App. Div. 430, 69 N. Y. Supp. 999; *Coleman's Appeal*, 62 Pa. 252; *Green v. Canady*, 77 S. C. 193, 57 S. E. 832.

⁸⁴ *Brumback v. Brumback*, 198 Ill. 66, 64 N. E. 741; *German v. Heath*, 139 Iowa, 52, 116 N. W. 1051; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957; *Cruger v. McLauray*, 41 N. Y. 219.

⁸⁵ *Smith v. Rice*, 56 Ala. 417; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Welch v. Sackett*, 12 Wis. 243.

⁸⁶ *Inglis v. Webb*, 117 Ala. 387, 23 South. 125; *Brock v. Benness*, 29 Ont. 468.

⁸⁷ *Young v. Williams*, 17 Conn. 393; *Leonard v. Scarborough*, 2 Ga. 73; *Strickland v. Parker*, 54 Me. 263; *Barney v. Leeds*, 51 N. H. 253.

⁸⁸ *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Spencer v. Austin*, 38 Vt. 258; *Griswold v. Johnson*, 5 Conn. 363. They may arise by descent, but not at common law. *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957.

⁸⁹ 2 Blk. Comm. 192. And see *Putnam v. Ritchie*, 6 Paige (N. Y.) 390.

an attempted conveyance would not be void, since, while no legal title would pass, an equitable title would be vested in the members of the firm.⁹⁰ The purchase of land by two or more persons who are partners, when such land is not intended for partnership purposes or uses, and where the rights of partnership creditors are not affected, presents no new aspects of joint ownership, since such property is not partnership property, but merely the individual property of the purchasers, and they usually take as ordinary tenants in common.⁹¹ In order that land may be held as partnership property, it must be purchased with partnership funds, and for partnership purposes.⁹² The legal title may be in one partner,⁹³ or in all the partners, and in the latter case the partners are, at law, either joint tenants or tenants in common. In either case, however, where land is purchased with partnership money and for partnership use, equity will regard the holder or holders of the legal title as holding the same in trust for the firm.⁹⁴ Moreover, for the benefit of creditors of the firm, the land will be regarded, under the doctrine of equitable conversion, as personal property. In England, it is regarded as personal property for all purposes;⁹⁵ but the prevailing American rule is that as between the partners themselves, and also as between a surviving partner and the heirs of a deceased partner, it is realty, but as to partnership debts it is personalty.⁹⁶ In other words, with respect to

⁹⁰ *Woodward v. McAdam*, 101 Cal. 438, 35 Pac. 1016; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *New Vienna Bank v. Johnson*, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

⁹¹ *La Soci  t   Francaise de Bienfaisance Mutuelle de Los Angeles v. Weidmann*, 97 Cal. 507, 32 Pac. 583; *Alkire v. Kahle*, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540; *Allen v. Logan*, 96 Mo. 591, 10 S. W. 149; *Schaeffer v. Fowler*, 111 Pa. 451, 2 Atl. 558; *Johnson v. Rankin* (Tenn. Ch. App.) 59 S. W. 638.

⁹² *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802; *Alkire v. Kahle*, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305.

⁹³ *Williams v. Shelden*, 61 Mich. 311, 28 N. W. 115; *Fairchild v. Fairchild*, 64 N. Y. 471.

⁹⁴ *Pepper v. Pepper*, 24 Ill. App. 316; *Buffum v. Buffum*, 49 Me. 108, 77 Am. Dec. 249; *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; *Fairchild v. Fairchild*, 64 N. Y. 471; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799.

⁹⁵ *Waterer v. Waterer*, L. R. 15 Eq. 402, 21 Wkly. Rep. 508; *Essex v. Essex*, 20 Beav. 442, 52 Eng. Reprint, 674. See Brit. Partn. Act (1890) § 22.

⁹⁶ *Morrill v. Colehour*, 82 Ill. 618; *Shearer v. Shearer*, 98 Mass. 107; *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579; *Darrow v. Calkins*, 154 N.

creditors, it is regarded as converted into personal property;⁹⁷ but, after the debts of the firm have been paid, then for the purposes of distribution or dissolution it regains its original character of realty.⁹⁸

SAME—JOINT MORTGAGEES

106. In some jurisdictions joint mortgagees present some of the aspects of joint tenants. Generally they are regarded as tenants in common.

In jurisdictions where a mortgage conveys the legal title to the mortgagee—that is, where a mortgage is an absolute conveyance with a condition subsequent⁹⁹—two or more mortgagees become thereby joint owners of the estate, and consequently some of the rules governing joint estates apply to them.¹ Thus, where the consideration for the mortgages proceeds jointly from two or more persons, and a mortgage is given to them jointly, then, for the purposes of foreclosure, the doctrine of survivorship applies, and the survivor may foreclose without making the heirs or the personal representatives of the deceased mortgagee parties to the action.² The survivor is regarded in equity, however, as the trustee of the representatives of the deceased comortgagee, and the decisions holding that joint mortgagees are joint tenants, with the right of survivorship, do not carry the analogy beyond the purposes of remedies, that is, for the purpose of bringing actions or of being sued thereon,³ since as to the mortgagees themselves they are regarded as tenants in common.⁴ Where, moreover, co-

Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637; *Moore v. Wood*, 171 Pa. 365, 33 Atl. 63; *Shanks v. Klein*, 104 U. S. 18, 26 L. Ed. 635.

⁹⁷ *Dupuy v. Leavenworth*, 17 Cal. 262; *Burchinell v. Koon*, 8 Colo. App. 463, 46 Pac. 932; *State ex rel. Bogey v. Neal*, 29 Wash. 391, 69 Pac. 1103.

⁹⁸ *Carpenter v. Hathaway*, 87 Cal. 434, 25 Pac. 549; *Cooper v. Frederick*, 4 G. Greene (Iowa) 403; *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579; *Molineaux v. Reynolds*, 54 N. J. Eq. 559, 35 Atl. 536; *Haeberly's Appeal*, 191 Pa. 239, 43 Atl. 207.

⁹⁹ See *Mortgages*, post.

¹ *Reeves*, Real Prop. § 696.

² *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Lannay v. Wilson*, 30 Md. 536; *Blake v. Sanborn*, 8 Gray (Mass.) 154; *Appleton v. Boyd*, 7 Mass. 131. For the application of the principle of survivorship to the mortgage debt, see 2 *Jones, Mortg.* (5th Ed.) § 1382.

³ *Wall v. Bissell*, 125 U. S. 382, 8 Sup. Ct. 979, 31 L. Ed. 772; *In re Albrecht*, 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700; *Freeman*, Coten. §§ 16, 42.

⁴ *Goodwin v. Richardson*, 11 Mass. 469; *Appleton v. Boyd*, 7 Mass. 131;

mortgagees are not joint creditors, but take a joint mortgage for the purpose of securing their separate and several claims, they are not regarded as joint tenants, and no doctrine of survivorship applies. In such a case they hold as tenants in common.⁵

INCIDENTS OF JOINT ESTATES

107. The rights and liabilities of tenants of joint estates may be treated under the following heads:

- (a) Possession and disseisin.
- (b) Accounting between cotenants.
- (c) Repairs and waste.
- (d) Transfer of joint estates.
- (e) Actions affecting joint estates.

Possession and Disseisin

The owners of joint estates have in general all the rights of owners in severalty, except the right of sole possession.⁶ In the case of joint tenants there is a unity of possession, and each has a right to the enjoyment of the whole property to the extent of his interest.⁷ Likewise, tenants in common have an equal right to the use and enjoyment of the common property,⁸ and it is only by partition that a tenant in common can obtain the sole and exclusive possession of his interest,⁹ since each tenant is in possession of the whole.¹⁰ It follows, therefore, that the possession of

People v. Keyser, 28 N. Y. 226, 84 Am. Dec. 338; *In re Albrecht*, 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700; *Wall v. Bissell*, 125 U. S. 382, 8 Sup. Ct. 979, 31 L. Ed. 772; *Freeman, Coten.* §§ 16, 42.

⁵ *Burnett v. Pratt*, 22 Pick. (Mass.) 556; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *In re Albrecht*, 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700.

⁶ *Wood v. Phillips*, 43 N. Y. 152; *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Gower v. Quinlan*, 40 Mich. 572.

⁷ *Clark v. Railroad Co.*, 136 Pa. 408, 20 Atl. 562, 10 L. R. A. 238; *Valentine v. Johnson*, 1 Hill, Eq. (S. C.) 49.

⁸ *Adams v. Manning*, 51 Conn. 5; *Haden v. Sims*, 127 Ga. 717, 56 S. E. 989; *Boley v. Barutio*, 120 Ill. 192, 11 N. E. 393; *Peabody v. Minot*, 24 Pick. (Mass.) 329; *McElroy v. O'Callaghan*, 112 Mich. 124, 70 N. W. 441; *Hudson v. Swan*, 83 N. Y. 552; *Kline v. Jacobs*, 68 Pa. 57.

⁹ *Thompson v. Sanders*, 113 Ga. 1024, 39 S. E. 419; *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273; *Pickering v. Moore*, 67 N. H. 533, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695; *Osborn v. Schenck*, 83 N. Y. 201; *Thompson v. Silverthorne*, 142 N. C. 12, 54 S. E. 782, 115 Am. St. Rep. 727; *Heller v. Hufsmith*, 102 Pa. 533.

¹⁰ *Ord v. Chester*, 18 Cal. 77; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723; *Knox v. Silloway*, 10 Me. 201; *Country Club Land Ass'n v. Lohbauer*, 187 N. Y. 106, 79 N. E. 844.

one tenant of a joint estate is not adverse to his cotenants,¹¹ since the possession of one will be presumed, in the absence of positive adverse claims, to be for the benefit of all.¹² Adverse possession and ouster may, however, arise by an actual disseisin of the other tenants, such as an open denial of their rights, under circumstances showing a claim to exclusive possession.¹³ The exclusive enjoyment of rents and profits,¹⁴ or the mere delay of a cotenant not in possession to demand possession,¹⁵ will not, however, in itself, amount to a disseisin. One cotenant may, however, disseise the others by an unauthorized conveyance to a stranger of the whole land, or any particular part thereof by metes and bounds, providing the grantee takes possession under adverse claim against the other tenants.¹⁶ One cotenant cannot, however, purchase the joint property for himself upon a sale for delinquent taxes.¹⁷ Neither can he set up any other adverse title in himself or in another.¹⁸

¹¹ *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Challefoux v. Ducharme*, 4 Wis. 554.

¹² *Lambert v. Hemler*, 244 Ill. 254, 91 N. E. 435; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Schoonover v. Tynner*, 72 Kan. 475, 84 Pac. 124; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18; *Stull v. Stull*, 197 Pa. 243, 47 Atl. 240.

¹³ *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232; *Blankenhorn v. Lennox*, 123 Iowa, 67, 98 N. W. 556; *Rand v. Huff*, 6 Kan. App. 45, 51 Pac. 577; *McClung v. Ross*, 5 Wheat. (U. S.) 116, 5 L. Ed. 46; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *Cameron v. Railway Co.*, 60 Minn. 100, 61 N. W. 814; *Liscomb v. Root*, 8 Pick. (Mass.) 376; *Cummings v. Wyman*, 10 Mass. 464; *Blackmore v. Gregg*, 2 Watts & S. (Pa.) 182; *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521. There must be an actual ouster. *Mansfield v. McGinnis*, 86 Me. 118, 29 Atl. 556, 41 Am. St. Rep. 532.

¹⁴ *Long v. Morrison*, 251 Ill. 143, 95 N. E. 1075; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; *Rodney v. McLaughlin*, 97 Mo. 426, 9 S. W. 726; *Lewitsky v. Sotoloff*, 224 Pa. 610, 73 Atl. 936; *McGee v. Hall*, 26 S. C. 179, 1 S. E. 711.

¹⁵ *Ball v. Palmer*, 81 Ill. 370; *Bader v. Dyer*, 106 Iowa, 715, 77 N. W. 469, 68 Am. St. Rep. 332; *Lefavour v. Homan*, 3 Allen (Mass.) 354; *Abrams v. Rhoner*, 44 Hun (N. Y.) 507; *Rider v. Maul*, 46 Pa. 376.

¹⁶ *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Kinney v. Slaterry*, 51 Iowa, 353, 1 N. W. 626. But see *Noble v. Hill*, 8 Tex. Civ. App. 171, 27 S. W. 756; *Caldwell v. Neely*, 81 N. C. 114; *Price v. Hall*, 140 Ind. 314, 39 N. E. 941, 49 Am. St. Rep. 196. Such a conveyance must be followed by possession, or there will be no ouster of the other tenants. *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 206. Such a purchaser from one co-tenant is not estopped to set up a title adverse to that of the joint owners. *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44.

¹⁷ *Muthersbaugh v. Burke*, 33 Kan. 260, 6 Pac. 252; *Knolls v. Barnhart*, 71 N. Y. 474; *Davis v. King*, 87 Pa. 261; *Miller v. Donahue*, 96 Wis. 498, 71 N. W. 900; *Dubois v. Campau*, 24 Mich. 360; *Page v. Webster*, 8 Mich. 263, 71

¹⁸ See note 18 on following page.

Accounting Between Cotenants

At common law, a joint tenant was not accountable to his cotenants for the receipt of more than his share of the rents and profits of the joint estate.¹⁹ This rule, however, has long been otherwise under the effect of statutes requiring an accounting.²⁰ Likewise a tenant in common is bound to account to his cotenants for what he receives above his share of the income of the common property.²¹ In the absence of a statute to the contrary, a tenant in common is not liable for rent, however, to his cotenants, unless by agreement, for his sole use and occupation of the land.²² The rule is otherwise by statute in some states,²³ and it is also held that there may be a recovery if the land has been leased, and the whole of the rent has been collected by one tenant.²⁴ As a rule, one tenant in common cannot maintain trespass or trover against a cotenant for taking the crops or for cutting the timber,²⁵

Am. Dec. 446; *Conn v. Conn*, 58 Iowa, 747, 13 N. W. 51; *Clark v. Rainey*, 72 Miss. 151, 16 South. 499. And see *Bracken v. Cooper*, 80 Ill. 221; *Montague v. Selb*, 106 Ill. 49.

¹⁹ *Weaver v. Wible*, 25 Pa. 270, 64 Am. Dec. 696; *Rothwell v. Dewees*, 2 Black (U. S.) 613, 17 L. Ed. 309; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Davis v. Givens*, 71 Mo. 94. An adverse title purchased by one tenant inures to the benefit of the others only when they pay their proportion of the cost. *McFarlin v. Leaman* (Tex. Civ. App.) 29 S. W. 44. When the cotenants hold in remainder, the purchase of the preceding life estate by one tenant does not inure to the benefit of the others. *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. 607. Cf. *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552; *Kirkpatrick v. Mathiot*, 4 Watts & S. (Pa.) 251. See, also, *Palmer v. Young*, 1 Vern. 276; *Hamilton v. Denny*, 1 Ball & B. 199.

¹⁹ *Shiels v. Stark*, 14 Ga. 429; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911.

²⁰ *Conroy v. Waters*, 133 Cal. 211, 65 Pac. 387; *Stokes v. Hodges*, 11 Rich. Eq. (S. C.) 135; *Wiswall v. Wilkins*, 5 Vt. 87; *White v. Stuart*, 76 Va. 546.

²¹ *Regan v. Regan*, 192 Ill. 589, 61 N. E. 842; *Peck v. Carpenter*, 7 Gray (Mass.) 283, 66 Am. Dec. 477; *Lloyd v. Turner*, 70 N. J. Eq. 425, 62 Atl. 771; *Clark v. Platt*, 39 App. Div. 670, 58 N. Y. Supp. 361; *Keisel v. Earnest*, 21 Pa. 90.

²² *Fraser v. Gates*, 118 Ill. 99, 1 N. E. 817; *Owings v. Owings*, 150 Mich. 609, 114 N. W. 393; *Kline v. Jacobs*, 68 Pa. 57; *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. 607; *Sargent v. Parsons*, 12 Mass. 149; *Woolever v. Knapp*, 18 Barb. (N. Y.) 265; *Valentine v. Healey*, 86 Hun, 259, 33 N. Y. Supp. 246; *Thomas v. Thomas*, 5 Exch. 28; *Henderson v. Eason*, 17 Q. B. 701. One tenant may take a lease from his cotenants. *Valentine v. Healey*, 86 Hun, 259, 33 N. Y. Supp. 246.

²³ 1 Stim. Am. St. Law, § 1378. And see *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609.

²⁴ *Miner v. Lorman*, 70 Mich. 173, 38 N. W. 18; *Reynolds v. Wilmeth*, 45 Iowa, 693; *CARVER v. FENNIMORE*, 116 Ind. 236, 19 N. E. 103, *Burdick Cas. Real Property*.

²⁵ *Carr v. Dodge*, 40 N. H. 403; *Roston v. Morris*, 25 N. J. Law, 173;

although some cases, under special circumstances, hold the contrary,²⁶ and it is held that a tenant may recover his share if the whole has been sold by another tenant.²⁷ A cotenant has no claim for improvements which he has made on the common property,²⁸ although he may be given the benefit of them in a partition of the land.²⁹

Repairs and Waste

As a rule, a joint tenant cannot compel contribution for repairs or improvements made without the consent of a cotenant.³⁰ Where, however, the property is in need of repairs to prevent its decay, it has been held that a joint tenant who makes the necessary repairs may enforce contribution from another cotenant.³¹ At common law, moreover, an exception was made in the case of necessary repairs to a house or mill; a joint tenant being permitted to compel another joint tenant to unite in such expense by a writ of *de reparatione facienda*, where the cotenant had refused to join in making the repairs. For repairs already made, however, no recovery could be enforced.³² If a cotenant agrees or consents to repairs, then generally he is liable for his proportionate share.³³ The rule is the same as to tenants in common. They have an equal duty to repair,³⁴ and where there is an agreement to share the expense of repairs one tenant may compel contribution from

Deavitt v. Ring, 73 Vt. 298, 50 Atl. 1066; *Filbert v. Hoff*, 42 Pa. 97, 82 Am. Dec. 493.

²⁶ *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Le Barren v. Babcock*, 46 Hun (N. Y.) 598; *Lewis v. Clark*, 59 Vt. 363, 8 Atl. 158.

²⁷ *Abbey v. Wheeler*, 85 Hun, 226, 32 N. Y. Supp. 1069; *McGahan v. Bank*, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372; *Richardson v. Richardson*, 72 Me. 403. But see *Calhoun v. Curtis*, 4 Metc. (Mass.) 413, 38 Am. Dec. 380.

²⁸ *Rico Reduction & Mining Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Scott v. Guernsey*, 48 N. Y. 106. Compare, however, *CARVER v. FENNIMORE*, 116 Ind. 236, 19 N. E. 103, *Burdick Cas. Real Property*.

²⁹ *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Alleman v. Hawley*, 117 Ind. 532, 20 N. E. 441.

³⁰ *Pickering v. Pickering*, 63 N. H. 468, 3 Atl. 744; *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353; *Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911.

³¹ *Alexander v. Ellison*, 79 Ky. 148.

³² *Bowles' Case*, 11 Coke, 79b; 4 Kent, Comm. 370; *Cooper v. Brown*, 143 Iowa, 482, 122 N. W. 144, 136 Am. St. Rep. 768.

³³ *Young v. Polack*, 3 Cal. 208; *Sears v. Munson*, 23 Iowa, 380; *Houston v. McCluney*, 8 W. Va. 135.

³⁴ *Wolfe v. Childs*, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152; *Adams v. Manning*, 51 Conn. 5; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Henrikson v. Henrikson*, 143 Wis. 314, 127 N. W. 962, 33 L. R. A. (N. S.) 534.

the others.³⁵ A similar rule applies to expenses incurred in the care and management of the property for the common benefit.³⁶ As a rule no lien is created on the land to secure such expenditures;³⁷ although special circumstances will give rise to an equitable lien.³⁸ At common law a joint tenant was not liable for waste,³⁹ although he has been made liable by statutes.⁴⁰ A tenant in common is not liable to his cotenants for the natural wear and tear arising from his reasonable use of the property, but he is liable for acts which amount to its abuse,⁴¹ and acts by less than all of the tenants which result in the permanent injury of the property constitute waste.⁴² The technical rules of waste, however, do not apply. There must be some actual injury to the estate, or the liability is not incurred.⁴³ A tenant in possession may, moreover, be restrained by injunction from malicious injury to the property.⁴⁴

Transfer of Joint Estates

A joint tenant may transfer his interest to a cotenant,⁴⁵ a release being the proper common-law conveyance for such a purpose.⁴⁶ Likewise a tenant in common may convey his interest to his

³⁵ *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *Holt v. Couch*, 125 N. C. 456, 34 S. E. 703, 74 Am. St. Rep. 648; *Reed v. Jones*, 8 Wis. 421.

³⁶ *Gardner v. Diedrichs*, 41 Ill. 158; *Carroll v. Carroll*, 188 Mass. 558, 74 N. E. 913; *Gay v. Berkey*, 137 Mich. 658, 100 N. W. 920; *Matter of Robinson*, 40 App. Div. 23, 57 N. Y. Supp. 502; *Dech's Appeal*, 57 Pa. 467; *Stewart v. Stewart*, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949.

³⁷ *Cotton v. Coit* (Tex. Civ. App.) 30 S. W. 281; *Branch v. Makelg*, 9 Tex. Civ. App. 399, 28 S. W. 1050.

³⁸ *Patrick v. Y. M. C. A.*, 120 Mich. 185, 79 N. W. 208; *Hogan v. McMahon*, 80 Md. 195, 80 Atl. 695, Ann. Cas. 1912C, 1260; *Jones v. Duerk*, 25 App. Div. 551, 49 N. Y. Supp. 987; *Torrey v. Martin* (Tex. Sup.) 4 S. W. 642.

³⁹ See *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

⁴⁰ *Shiels v. Stark*, 14 Ga. 429. And see *Nelson's Heirs v. Clay's Heirs*, supra.

⁴¹ *Trammell v. McDade*, 29 Tex. 360; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2; *Childs v. Railroad Co.*, 117 Mo. 414, 23 S. W. 373; *Wilkinson v. Haygarth*, 12 Q. B. 837. But see *Wait v. Richardson*, 33 Vt. 190. The amount of recovery is apportioned according to the interests of the several owners. *McDodrill v. Lumber Co.*, 40 W. Va. 564, 21 S. E. 878.

⁴² *Nevels v. Lumber Co.*, 108 Ky. 550, 56 S. W. 969, 49 L. R. A. 416, 94 Am. St. Rep. 388; *Shepard v. Pettit*, 30 Minn. 119, 14 N. W. 511; *Dodd v. Watson*, 57 N. C. 48, 72 Am. Dec. 577.

⁴³ *Martyn v. Knowlly*, 8 Term R. 145.

⁴⁴ *Ballou v. Wood*, 8 Cush. (Mass.) 48. But see *Hihn v. Peck*, 18 Cal. 640; *Obert v. Obert*, 5 N. J. Eq. 397.

⁴⁵ *Moser v. Dunkle*, 1 Woodw. Dec. (Pa.) 388; *Eustace v. Scawen*, Cro. Jac. 696.

⁴⁶ *Chester v. Willan*, 2 Saund. 96a; *Gilbert, Tenures*, 72.

fellow tenant,⁴⁷ not, however, by release, at common law, but by feoffment and livery of seisin.⁴⁸ This is explained by the fact that joint tenants hold by a joint title, and, consequently, one joint tenant cannot give any further title by way of feoffment to a fellow joint tenant. The only way, therefore, by which he can transfer his interest, is by a release.⁴⁹ A tenant in common, on the other hand, has a distinct and separate freehold from his cotenant, and this he conveys at common law, not by release, but by feoffment and livery of seisin.⁵⁰ A tenant in common may also convey to a cotenant by a deed operating under the statute of uses.⁵¹ In modern times, one tenant in common may convey to a cotenant by any ordinary mode of conveyance, a quitclaim deed being frequently used; and in a partition of a tenancy in common each tenant may obtain an estate in severalty by mutual conveyances. When a tenant in common conveys to a cotenant, he conveys, of course, only his undivided interest, since he has no specific part of the land which he can convey by metes and bounds. A conveyance, however, in which he does describe the land by metes and bounds, has been held to transfer his undivided interest; the specific description being disregarded.⁵² With reference to third persons, all the cotenants of a joint tenancy may jointly convey the land,⁵³ and one joint tenant may convey his interest to a stranger.⁵⁴ A joint tenant cannot, however, convey to a third person by metes and bounds.⁵⁵ Likewise a tenant in common may convey his undivided interest to a stranger.⁵⁶ A tenant in common cannot, however, devise or convey any particular part of the common property by metes and bounds, so as to give such devisee or grantee any right to such part of the land against the wishes

⁴⁷ *Snell v. Harrison*, 104 Mo. 158, 16 S. W. 152; *Woodlief v. Woodlief*, 136 N. C. 133, 48 S. E. 583; *First Nat. Bank v. Bissell*, 4 Fed. 694.

⁴⁸ See post; *Gilbert, Tenures*, 74.

⁴⁹ As to the nature of a release, see post.

⁵⁰ *Gilbert, Tenures*, 74. And see post, as to feoffment and livery of seisin.

⁵¹ 2 *Minor's Institutes*, 500. And see post.

⁵² *Woods v. Early*, 95 Va. 307, 28 S. E. 374. And see *Eaton v. Tallmadge*, 24 Wis. 217.

⁵³ *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

⁵⁴ *Neuforth v. Hall*, 6 Kan. App. 902, 51 Pac. 573; *Sneed's Heirs v. Waring*, 2 B. Mon. (Ky.) 522; *Yank v. Bordeaux*, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522; *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717.

⁵⁵ *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Richardson v. Miller*, 48 Miss. 311; *Fitch v. Boyer*, 51 Tex. 336.

⁵⁶ *Jones v. Way*, 78 Kan. 535, 97 Pac. 437, 18 L. R. A. (N. S.) 1180; *Reinicker v. Smith*, 2 Harr. & J. (Md.) 421; *Pellow v. Iron Co.*, 164 Mich. 87, 128 N. W. 918, 47 L. R. A. (N. S.) 573, Ann. Cas. 1912B, 827; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179.

or consent of the other tenants in common.⁵⁷ Such a devise or conveyance will operate, however, as an estoppel against the deviser or grantor with reference to his interest in the described part.⁵⁸ Since he cannot convey by metes and bounds, a tenant of a joint estate cannot dedicate land to the public for a street.⁵⁹ It has already been said that one joint tenant, by conveying to a stranger, severs the joint tenancy;⁶⁰ but such a tenant cannot devise his share, unless he be the last survivor.⁶¹ A coparcener, however, may pass his interest by devise.⁶²

Actions Affecting Joint Estates

In actions affecting joint tenancies, it is the general rule, at common law, that all the tenants should be joined, whether parties plaintiff or parties defendant.⁶³ The statute may, however, permit joint tenants either to sue or to be sued separately,⁶⁴ and even in the absence of a controlling statute it is held that as against a trespasser one joint tenant may sue alone.⁶⁵

Relative to actions between joint tenants, one tenant cannot sue another for ejectment unless some act amounting to an ouster has been committed, since all are equally entitled to the possession.⁶⁶ As to tenants in common, in connection with actions with third

⁵⁷ *Hartford & S. Ore. Co. v. Miller*, 41 Conn. 112; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Hunt v. Crowell*, 2 Edm. Sel. Cas. (N. Y.) 385; *Boggess v. Meredith*, 16 W. Va. 1.

⁵⁸ *Mahoney v. Middleton*, 41 Cal. 41; *Kenoy v. Brown*, 82 Miss. 607, 35 South. 163, 100 Am. St. Rep. 645; *Edwards v. Bishop*, 4 N. Y. 61; *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429.

⁵⁹ *Scott v. State*, 1 Sneed (Tenn.) 629. Cf. *Stevens v. Town of Norfolk*, 46 Conn. 227, and *Stevens v. Battell*, 49 Conn. 156.

⁶⁰ *Supra*.

⁶¹ *WILKINS v. YOUNG*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162, *Burdick Cas. Real Property*; *Duncan v. Forrer*, 6 Bin. (Pa.) 193. But see *Nichols v. Denny*, 37 Miss. 59. The interest of a joint tenant may be sold on execution. *Midgley v. Walker*, 101 Mich. 583, 60 N. W. 296, 45 Am. St. Rep. 431; *Wilkins v. Young*, *supra*.

⁶² 1 Washb. Real Prop. (5th Ed.) 684.

⁶³ *Milne v. Cummings*, 4 Yeates (Pa.) 577; *Mobley v. Bruner*, 59 Pa. 481, 98 Am. Dec. 360; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *De Puy v. Strong*, 37 N. Y. 372; *Daniels v. Daniels*, 7 Mass. 135; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Wheat v. Morris*, 21 D. C. 11; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838; *Webster v. Vandeventer*, 6 Gray (Mass.) 428; *Dewey v. Lambier*, 7 Cal. 347. But see *Lowery v. Rowland*, 104 Ala. 420, 16 South. 88; *Hayden v. Patterson*, 51 Pa. 261.

⁶⁴ *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

⁶⁵ *King v. Bullock*, 9 Dana (Ky.) 41; *Rabe v. Fyler*, 10 Smedes & M. (Miss.) 440, 48 Am. Dec. 763; *Presley v. Holmes*, 33 Tex. 476.

⁶⁶ *Lawton v. Adams*, 29 Ga. 273, 74 Am. Dec. 59; *Eads v. Rucker*, 2 Dana (Ky.) 111; *Den ex dem. Obert v. Bordine*, 20 N. J. Law, 394; *Jones v. Weathersbee*, 4 Strobb. (S. C.) 50, 51 Am. Dec. 653.

persons, one tenant may sue alone for the protection of his individual interest.⁶⁷ For injuries, however, to the common property, they should all join.⁶⁸ Thus they should join in suits to recover rent,⁶⁹ or the purchase price of the land.⁷⁰ They are not required to join, but may do so, however, in actions for waste,⁷¹ or for nuisance.⁷² At common law, tenants in common could not join in the action of ejectment,⁷³ but they may do so under the statutes.⁷⁴ As to the amount of recovery, however, there is a conflict in the cases. Many authorities hold that one tenant in common may, in ejectment or trespass, recover the entire property.⁷⁵ On the other hand, many cases limit the recovery to the interest of the plaintiff.⁷⁶

In many jurisdictions, the joinder or nonjoinder of tenants in common, in connection with all actions, is governed by the statutes, which should, of course, be consulted in each case.⁷⁷ Tenants in common, are not persons "united in interest," however, within the code requirement that such persons should join for the recovery of property.⁷⁸

⁶⁷ *Bowser v. Cox*, 3 Ind. App. 309, 29 N. E. 616, 50 Am. St. Rep. 274; *Peck v. McLean*, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665; *Stall v. Wilbur*, 77 N. Y. 158; *De Coursey v. Safe Deposit Co.*, 81 Pa. 217; *Hall v. Leigh*, 8 Cranch (U. S.) 50, 3 L. Ed. 484.

⁶⁸ *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Lane v. Dobyns*, 11 Mo. 105; *Jackson v. Moore*, 94 App. Div. 504, 87 N. Y. Supp. 1101; *Morgan v. Hudnell*, 52 Ohio St. 552, 40 N. E. 716, 27 L. R. A. 862, 49 Am. St. Rep. 741; *Halliday v. Manton*, 29 R. I. 205, 69 Atl. 847.

⁶⁹ *Dorsett v. Gray*, 98 Ind. 273; *Webb v. Conn.*, 1 Litt. (Ky.) 82, 13 Am. Dec. 225; *Blanton v. Vanzant*, 2 Swan (Tenn.) 276.

⁷⁰ *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; *Irwin's Adm'r v. Brown's Ex'rs*, 35 Pa. 331.

⁷¹ *Greenly v. Hall's Ex'r*, 3 Har. (Del.) 9.

⁷² *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310.

⁷³ *De Johnson v. Sepulbeda*, 5 Cal. 149; *Hillhouse v. Mix*, 1 Root (Conn.) 246, 1 Am. Dec. 41; *Doe ex dem. Gaines v. Buford*, 1 Dana (Ky.) 481.

⁷⁴ *Swett v. Patrick*, 11 Me. 179; *Corbin v. Cannon*, 31 Miss. 570; *Gray v. Givens*, 26 Mo. 291; *Poole v. Fleegeer*, 11 Pet. (U. S.) 185, 9 L. Ed. 680.

⁷⁵ *Chipman v. Hastings*, 50 Cal. 310, 19 Am. Rep. 655; *Horner v. Ellis*, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446; *Lamb v. Lamb*, 139 Mich. 166, 102 N. W. 645; *Sherin v. Larson*, 28 Minn. 523, 11 N. W. 70; *Waggoner v. Snody*, 98 Tex. 512, 85 S. W. 1134; *Hardy v. Johnson*, 1 Wall. (U. S.) 371, 17 L. Ed. 502.

⁷⁶ *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563; *Baber v. Henderson*, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540; *Hasbrouck v. Bunce*, 3 Thomp. & C. (N. Y.) 309; *Mobley v. Bruner*, 59 Pa. 481, 98 Am. Dec. 360; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838.

⁷⁷ See *Morehead v. Hall*, 126 N. C. 213, 35 S. E. 428.

⁷⁸ *Mather v. Dunn*, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

In connection with their mutual rights and liabilities, tenants in common have the action of account against cotenants who have received more than their just share of the rents and profits of the common estate,⁷⁹ and where the remedy at law is not adequate equity will afford the requisite relief.⁸⁰ In a proper case, one tenant in common may also sue another to obtain contribution for improvements and repairs, the old common-law writ *de reparatione faciendi* being supplanted by the modern remedies of a bill in equity for contribution,⁸¹ or, in other jurisdictions, by an action at law.⁸² In case of waste by a cotenant, the remedy is case, or the special remedy afforded by the statute,⁸³ although the tort action may be waived, and proceedings for an accounting may be instituted.⁸⁴ Where there is actual or constructive eviction of one tenant in common by another, the wronged tenant may maintain an action in ejectment,⁸⁵ or, in some jurisdictions, an action of trespass to try title.⁸⁶ Trespass *quare clausum* cannot ordinarily, however, be maintained by one tenant in common against another,⁸⁷ and, unless the statute provides otherwise, trespass does not lie unless there has been an ouster of possession.⁸⁸

⁷⁹ *Brady v. Brady*, 82 Conn. 424, 74 Atl. 684; *Woolley v. Schrader*, 116 Ill. 29, 4 N. E. 658; *Moreland v. Strong*, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.

⁸⁰ *Henson v. Moore*, 104 Ill. 403; *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273; *Dyckman v. Valiente*, 42 N. Y. 549; *Harrington v. Oil Co.*, 178 Pa. 444, 35 Atl. 855; *Leach v. Beattie*, 33 Vt. 195.

⁸¹ *McDearman v. McClure*, 31 Ark. 559; *Kenopsky v. Davis*, 27 La. Ann. 174; *Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911.

⁸² *Fowler v. Fowler*, 50 Conn. 256.

⁸³ *Shiels v. Stark*, 14 Ga. 429; *Jenkins v. Wood*, 145 Mass. 494, 14 N. E. 512; *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795; *Hoolihan v. Hoolihan*, 193 N. Y. 197, 85 N. E. 1103, 15 Ann. Cas. 269; *Bush v. Gamble*, 127 Pa. 43, 17 Atl. 865.

⁸⁴ *Darden v. Cooper*, 52 N. C. 210, 75 Am. Dec. 461; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *McGahan v. Bank*, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403.

⁸⁵ *Norris v. Sullivan*, 47 Conn. 474; *Graham v. Ford*, 125 Ill. App. 578; *King v. Dickerman*, 11 Gray (Mass.) 480; *Gilman v. Gilman*, 111 N. Y. 265, 18 N. E. 249; *Ricks v. Pope*, 129 N. C. 52, 39 S. E. 638; *Penrod v. Danner*, 19 Ohio, 218; *Clay v. Field*, 115 U. S. 260, 6 Sup. Ct. 36, 29 L. Ed. 375.

⁸⁶ *Williams v. Sutton*, 43 Cal. 65; *Murray v. Stevens*, Rich. Eq. Cas. (S. C.) 205; *Gilmer v. Beauchamp*, 40 Tex. Civ. App. 125, 87 S. W. 907.

⁸⁷ *Jones v. Chiles*, 8 Dana (Ky.) 163; *Duncan v. Sylvester*, 13 Me. 417, 29 Am. Dec. 512; *Todd v. Lunt*, 148 Mass. 322, 19 N. E. 522; *Wait v. Richardson*, 33 Vt. 190, 78 Am. Dec. 622.

⁸⁸ *Mills v. Richardson*, 44 Me. 79; *Bennett v. Clemence*, 6 Allen (Mass.)

The remedy of injunction may be open to tenants in common for the purpose of protecting their rights to the proper enjoyment of the property, providing there is no ample legal remedy.⁸⁹ This equitable remedy is particularly appropriate in cases of waste.⁹⁰

PARTITION

108. Partition is the dividing of land held by the owners of joint estates into distinct portions, so that each may hold his share in severalty.

There may be partition of all kinds of joint estates, except tenancies in entirety.

Partition may be voluntary or compulsory.

Definition

Partition means a dividing, a separating, and, as applied to the law of real property, means a division into severalty of property held jointly or in common.⁹¹ In early English law, the joint estate of parcenary, the estate taken by coheirs, derived its name from the fact that any one of the heirs could demand a partition.⁹² In this respect, estates of parcenary differed from joint tenancies and tenancies in common, which could not, at common law, be partitioned unless all the cotenants consented.⁹³ Since, however, in modern times, estates in joint tenancy and tenancy in common are subject to partition, and since, in this country, at least, estates in parcenary are generally not recognized,⁹⁴ partition has been aptly defined as "a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interests, so that they may enjoy and possess the same in severalty."⁹⁵ It is not essential, however, that each tenant should

10; *Boynton v. Hodgdon*, 59 N. H. 547; *King v. Phillips*, 1 Lans. (N. Y.) 421; *Bush v. Gamble*, 127 Pa. 43, 17 Atl. 865.

⁸⁹ *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167; *Williams v. Rogers*, 110 Mich. 418, 68 N. W. 240; *Butte & B. Consol. Min. Co. v. Purchasing Co.*, 25 Mont. 41, 63 Pac. 825; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282, 8 Am. Dec. 511.

⁹⁰ *Fenton v. Miller*, 108 Mich. 246, 65 N. W. 966; *Leatherbury v. McInnis*, 85 Miss. 160, 37 South. 1018, 107 Am. St. Rep. 274; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Morrison v. Morrison*, 122 N. C. 598, 29 S. E. 901.

⁹¹ Webster's Dictionary.

⁹² *Supra*.

⁹³ *Bracton*, ff. 72 et seq.; *Year Book*, 19 Edw. III, 12, 14; *Holds. Hist. of Eng. Law*, III, 109.

⁹⁴ *Supra*.

⁹⁵ *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. 757.

take his individual interest in severalty, since, where there are three or more cotenants, a partition of the estate arises when even one has obtained his share in severalty, although the remaining tenants may still hold in common.⁹⁶

Voluntary Partition—How Obtained

Partition may be either voluntary, or compulsory; that is, it may be brought about either by the mutual agreement of the parties interested, or any one of the parties may resort to the courts in order to compel it. Voluntary partition, at common law, could be made by parol in case of parceners and tenants in common, although in the latter estate livery of seisin was necessary.⁹⁷ Joint tenants, however, could obtain estates in severalty, except in estates for years, only by deed.⁹⁸ Since the statute of frauds, requiring interests in land to be evidenced by writing, some cases hold that no partition can be obtained by parol,⁹⁹ although the weight of authority is to the effect that a parol partition, when followed by possession of the shares in severalty, will protect each partitioner in his respective share.¹ In practice, however, a voluntary partition is usually made either by a single written instrument, executed by all the cotenants, describing the allotment or share each one is to take, and vesting in each one, in turn, the title to his designated share,² or mutual conveyances are executed, whereby, in turn, all the cotenants, save the particular grantee, convey or release to each other. Such conveyances, however, are considered merely as parts of one instrument.³ Another method is sometimes employed, where the cotenants unite in a conveyance to some third party, such grantee reconveying to each of his grantors their

⁹⁶ *Infra*.

⁹⁷ *Brooks v. Hubble* (Va.) 27 S. E. 585; *Bolling v. Teel*, 76 Va. 487; *Paine v. Ryder*, 24 Beav. 151, 53 Eng. Reprint, 314.

⁹⁸ *Id*.

⁹⁹ *Duncan v. Duncan*, 93 Ky. 37, 18 S. W. 1022, 40 Am. St. Rep. 159; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Lloyd v. Conover*, 25 N. J. Law, 47; *Melvin v. Bullard*, 82 N. C. 33; *Buzzell v. Gallagher*, 28 Wis. 678.

¹ *Adams v. Spivey*, 94 Ga. 676, 20 S. E. 422; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 764, 16 L. R. A. 326; *Edwards v. Latimer*, 183 Mo. 610, 82 S. W. 109; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 523; *Byers v. Byers*, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. Rep. 765.

² *Center v. Davis*, 113 Cal. 307, 45 Pac. 468, 54 Am. St. Rep. 352; *Staples v. Bradley*, 23 Conn. 167, 60 Am. Dec. 630.

³ *Mitchell v. Smith*, 67 Me. 338; *King v. King*, 7 Mass. 496; *Norris v. Hill*, 1 Mich. 202; *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; *Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757.

separate interests. Of course, the cotenants may unite in selling the land, and divide the proceeds, if desired, among themselves.⁴

Compulsory Partition

Joint estates may be so created that partition of them cannot be had;⁵ but, in absence of such a provision, any joint estate, except estates in entirety,⁶ may be divided at the suit of one of the tenants without the consent of the others.⁷ When, however, compulsory partition is sought, it must be for the whole estate, and not for part of it.⁸ At common law, partition could be compelled against the consent of the cotenants only in the case of coparcenary.⁹ The right to compel partition between joint tenants and tenants in common, by an action at law, was first given by the statutes of 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32 (1540 and 1541); the former applying to estates of inheritance, and the latter to estates for life or for years.¹⁰ Similar statutes have been re-enacted in most of the United States.¹¹

Jurisdiction

In the absence of statutes giving courts of law jurisdiction, partition suits are regularly brought in courts of equity, or on the equity side of courts having a united jurisdiction.¹² In some states,

⁴ *Porter v. Depeyster*, 18 La. 351; *Bray's Ex'x v. Bray*, 16 La. 352; *Carey's Estate*, 10 Kulp (Pa.) 227.

RIGHTS OF CREDITORS.—Tenants in common cannot make a voluntary partition after a judgment lien is levied upon the undivided property. *Simmons v. Gordon*, 98 Miss. 316, 53 South. 623, Ann. Cas. 1913A, 1143.

⁵ *Winthrop v. Minot*, 9 Cush. (Mass.) 405; *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451. So there may be a valid agreement not to partition. *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641; *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80; *Avery v. Payne*, 12 Mich. 540. But see *Mitchell v. Starbuck*, 10 Mass. 5; *Kean v. Tilford*, 81 Ky. 600.

⁶ *Merritt v. Whitlock*, 6 Lack. Leg. N. (Pa.) 76; *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49.

⁷ *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54; *Smith v. Smith*, 10 Paige (N. Y.) 470.

⁸ *Duncan v. Sylvester*, 16 Me. 388.

⁹ 1 Washb. Real Prop. (5th Ed.) 710.

¹⁰ *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162; *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641; *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644.

¹¹ 1 Washb. Real Prop. (5th Ed.) 711. And see *Hall v. Piddock*, 21 N. J. Eq. 311; *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782.

¹² *Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53; *Hoffman v. Beard*, 22 Mich. 59; *Jenkins v. Van Schaack*, 3 Paige (N. Y.) 242; *Mercur v. Jackson*, 3 Pa. Co. Ct. R. 387.

however, the remedy is at law.¹³ Where the proceedings are made statutory, without designating the character of the suit, the prevailing view is that the proceedings are, nevertheless, equitable in their nature.¹⁴ In some states, probate courts are given power to make partitions, especially in connection with the settlement of the estates of decedents.¹⁵

Estates Subject to Partition

From the very nature of things, an estate must be held in cotenancy in order to be the subject of partition;¹⁶ but partition may be made of any kind of an interest or estate in lands, whether of inheritance, or for life,¹⁷ or for years.¹⁸ None but estates in possession, however, can be partitioned, unless otherwise provided by statute.¹⁹ Thus, there can be no partition of mere joint estates in reversion or remainder,²⁰ without some express statutory authority covering such cases.²¹ In New York state, the statute permits the partition of vested remainders or reversions.²² It is not necessary, however, that the estate should be a legal one, since equitable estates may also be partitioned.²³

¹³ *Tate v. Goff*, 89 Ga. 184, 15 S. E. 30; *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655; *Husband v. Aldrich*, 135 Mass. 317.

¹⁴ *Metcalf v. Hoopingardner*, 45 Iowa, 510; *McClure v. McClure*, 1 Phila. (Pa.) 117; *Deery v. McClintock*, 31 Wis. 195.

¹⁵ *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; *Chrisman v. Divina*, 141 Mo. 122, 41 S. W. 920; *Appeal of Wistar*, 115 Pa. 241, 8 Atl. 797; *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912; *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. Ed. 415.

¹⁶ *Brand v. Coal Co.*, 219 Ill. 543, 76 N. E. 849; *Rice v. Osgood*, 9 Mass. 38; *State v. Rickey*, 8 N. J. Law, 50; *Strong v. Harris*, 84 Hun, 314, 32 N. Y. Supp. 349; *Seiders v. Giles*, 141 Pa. 93, 21 Atl. 514.

¹⁷ *Hawkins v. McDougal*, 125 Ind. 597, 25 N. E. 807; *Kinthead v. Maxwell*, 75 Kan. 50, 88 Pac. 523; *Morris v. Morris*, 45 Tex. Civ. App. 60, 99 S. W. 872; *Plano Mfg. Co. v. Kindschi*, 131 Wis. 590, 111 N. W. 680, 11 Ann. Cas. 1039.

¹⁸ *Cowden v. Cairns*, 28 Mo. 471; *Duke v. Hague*, 107 Pa. 57; *Heaton v. Deardon*, 16 Beav. 147, 51 Eng. Reprint, 733.

¹⁹ *Evans v. Bagshaw*, L. R. 5 Ch. 340, 39 L. J. Ch. 45.

²⁰ *Fry v. Hare*, 166 Ind. 415, 77 N. E. 803; *Hunnewell v. Taylor*, 6 Cush. (Mass.) 472; *Maxwell v. Goetschins*, 40 N. J. Law, 383, 29 Am. Rep. 242; *Sullivan v. Sullivan*, 66 N. Y. 37; *Ziegler v. Grim*, 6 Watts (Pa.) 106.

²¹ *Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115; *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161; *Roarty v. Smith*, 53 N. J. Eq. 253, 31 Atl. 1031; *Kerner's Estate*, 12 Pa. Dist. R. 718.

²² *Hovey v. Kelleher*, 36 App. Div. 201, 56 N. Y. Supp. 889.

²³ *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Welch v. Anderson*, 28 Mo. 293; *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Owens v. Owens*, 25 S. C. 155; *Levertton v. Waters*, 7 Coldw. (Tenn.) 20.

The Proceedings—In General

In many states, the steps of procedure in partition suits are outlined in the statutes. In equity, a bill for a partition is filed,²⁴ while under the codes the suit is generally begun by a complaint or petition. All the cotenants must be made parties,²⁵ as well as all other persons interested in the lands, such as lienholders, or they will not be bound by the action.²⁶ The action is a local action in rem,²⁷ but questions of title cannot be settled in an action for partition.²⁸ The actual division of the land is usually made by commissioners appointed by the court.²⁹ If an equitable division cannot be made, one of the cotenants may be given a larger share than the other, and be decreed to pay the other a sum of money called the owelty of partition.³⁰ This cannot be done, however, without his consent.³¹ When one cotenant has made improvements on the joint property, for which the others have not contributed, the court may, in its discretion, give him the land on which those improvements stand.³² Two or more cotenants may have their interests set off to them, to be held in severalty as regards the other tenants, but jointly between themselves.³³ If the estate to be partitioned consists of a number of parcels, each parcel need not be divided, but the partition may be made by assigning the separate parcels to different tenants.³⁴ Some kinds of property, such as mills and factories, cannot be divided, in which case either an owelty of partition must be paid by the one who takes the whole property, or the property must be sold and the

²⁴ *Hall v. Condon*, 164 Ala. 393, 51 So. 20; *Larkin v. Mann*, 2 Paige (N. Y.) 27.

²⁵ *Holman v. Gill*, 107 Ill. 467.

²⁶ *De Uprey v. De Uprey*, 27 Cal. 330, 87 Am. Dec. 81; *Bogert v. Bogert*, 53 Hun, 629, 5 N. Y. Supp. 893; *Cornish v. Gest*, 2 Cox, Ch. 27. But cf. *Sebring v. Mersereau*, 9 Cow. (N. Y.) 344; *Stewart v. Bank*, 101 Pa. 342.

²⁷ *In re Bonner*, 4 Mass. 122; *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9.

²⁸ *Fenton v. Circuit Judge*, 76 Mich. 405, 43 N. W. 437; *Fuller v. Montague*, 8 C. C. A. 100, 59 Fed. 212. Cf., however, *Welch's Appeal*, 126 Pa. 297, 17 Atl. 623; *Hayes' Appeal*, 123 Pa. 110, 16 Atl. 600.

²⁹ *Enyard v. Nevius* (N. J. Ch.) 18 Atl. 192; *Dondero v. Vansickle*, 11 Nev. 389.

³⁰ *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260. And see *Marks v. Sewall*, 120 Mass. 174; *Stewart v. Bank*, 101 Pa. 342.

³¹ *Whitney v. Parker*, 63 N. H. 416. And see *Corrothers v. Jolliffe*, 32 W. Va. 562, 9 S. E. 889, 25 Am. St. Rep. 836.

³² *Town v. Needham*, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; *St. Felix v. Rankin*, 3 Edw. Ch. (N. Y.) 323; *Brookfield v. Williams*, 2 N. J. Eq. 341.

³³ *Abbott v. Berry*, 46 N. H. 369. And see *Colton v. Smith*, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

³⁴ *Hagar v. Wiswall*, 10 Pick. (Mass.) 152.

money divided.³⁵ After voluntary partition, if the title to the part which one cotenant has received fails, such tenant has no remedy against his former cotenants.³⁶ If, however, the partition is compulsory, each cotenant is in the position of a warrantor of the title of the shares of the others, and, in the event of a failure of title, a new partition may be compelled, or there may be a reliance on the warranty.³⁷ It follows, therefore, that one cotenant cannot set up an adverse title against the others after partition.³⁸

COMMUNITY PROPERTY

109. In some of our states, owing to the law of the early French and Spanish settlers, there exists a sort of partnership property between husband and wife, known as "community property." The creation and incidents of this form of joint ownership are now governed by the local statutes.

Nature of System

The general principle underlying the system of community property is that all property acquired during marriage, by the industry and labor of either the husband or the wife, or both, together with the produce and increase thereof, belongs beneficially to both during the continuance of the marital relation.³⁹ The system is established by statute in the states of Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. Having become established in the laws of Spain and France, the system was transplanted by those countries to their American colonies.⁴⁰ Under the system, the property of married persons is either community property or separate property.⁴¹ Community property is

³⁵ *King v. Reed*, 11 Gray (Mass.) 490; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198; *Crowell v. Woodbury*, 52 N. H. 613. But see *Hills v. Dey*, 14 Wend. (N. Y.) 204; *Miller v. Miller*, 13 Pick. (Mass.) 237.

³⁶ *Weiser v. Weiser*, 5 Watts (Pa.) 279, 30 Am. Dec. 313; *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193; *Morrice's Case*, 6 Coke, 12b.

³⁷ But that a new partition cannot be compelled against an alienee after partition, see 1 Washb. Real Prop. (5th Ed.) 723.

³⁸ *Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 74. But cf. *Coleman v. Coleman*, 3 Dana (Ky.) 398, 28 Am. Dec. 86.

³⁹ *Crary v. Field*, 9 N. M. 222, 50 Pac. 342; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Dixon v. Sanderson*, 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801. For a general consideration of this system, see the article *Community Property* in 21 Cyc. 1633, by the author of this present work.

⁴⁰ *Packard v. Arellanes*, 17 Cal. 525; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; *BARNETT v. BARNETT*, 9 N. M. 205, 50 Pac. 337, *Burdick Cas. Real Property*; *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 539; *Cartwright v. Hollis*, 5 Tex. 152.

⁴¹ The statutes of the state in question should be consulted.

of two kinds, legal and conventional. The legal community is fixed by law; the conventional community results from express agreement of the parties.

Separate Property

Property owned by either husband or wife at the time of the marriage remains the separate property of each.⁴² Likewise, property acquired during marriage by devise, bequest, or descent, by either spouse, is separate property,⁴³ as is also, generally, property acquired by either spouse by gift or donation from third persons.⁴⁴ In Louisiana, however, donations made jointly to husband and wife become a part of the community.⁴⁵ In that state, moreover, the wife's separate property is called either dotal or extradotal; dotal property being that which is brought by the wife to the husband to assist in bearing the household expenses.⁴⁶ All other separate property of the wife is extradotal, or, as more frequently called, her paraphernal property.⁴⁷

Community Property

With the exception of such property as is expressly designated as separate, the statutes generally provide that all other property acquired by husband or wife during marriage, whether by purchase (unless purchased with separate property), by profits from business, or by the earnings of either, become a part of the community.⁴⁸ It is a general rule of the system that the husband has the control and management of all the community property,⁴⁹ and he may, in general, sell and dispose of the same, providing no

⁴² *In re Granniss' Estate*, 142 Cal. 1, 75 Pac. 324; *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281; *Nelson v. Frey* (Tex. App.) 16 S. W. 250.

⁴³ *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108; *Troxler v. Colley*, 33 La. Ann. 425; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Stockstill v. Bart*, 47 Fed. 231.

⁴⁴ *Peck v. Vandenberg*, 30 Cal. 11; *Savenat v. Le Breton*, 1 La. 520; *Lake v. Bender*, *supra*; *Hershberger v. Blewett*, 46 Fed. 704.

⁴⁵ Civ. Code La. art. 2402.

⁴⁶ *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. 420, 40 L. Ed. 560; *Fleitas v. Richardson*, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

⁴⁷ *Bouligny v. Fortier*, 16 La. Ann. 209; *Hannie v. Browder*, 6 Mart. O. S. (La.) 14; *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. 420, 40 L. Ed. 560.

⁴⁸ *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; *Pior v. Giddens*, 50 La. Ann. 216, 23 South. 337; *Succession of Manning*, 107 La. 456, 31 South. 862; *Adams v. Baker*, 24 Nev. 375, 55 Pac. 362; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452.

⁴⁹ *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Succession of Boyer*, 36 La. Ann. 506; *Martin v. McAllister*, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585.

fraud be committed upon the rights of the wife.⁵⁰ In Washington, however, the husband cannot sell or encumber the real property unless the wife joins in the execution of the deed.⁵¹ The community property is liable for community debts,⁵² and every debt contracted during marriage is presumed to be a community debt.⁵³ In some of the states, however, the husband alone is primarily liable for all necessities and family expenses.⁵⁴ The community is dissolved by death,⁵⁵ divorce,⁵⁶ and, in Louisiana, by a judicial decree following a suit for a separation of property.⁵⁷ Upon the death of either, the general rule is, in absence of antenuptial agreements to the contrary, that one-half of the community property vests in the surviving spouse, and one-half, in the absence of testamentary disposition, in the heirs of the deceased.⁵⁸ In some jurisdictions, however, the surviving husband takes all,⁵⁹ although the surviving wife takes only a half interest.⁶⁰ If there are no heirs, the survivor is entitled to the entire community.⁶¹ The statutes have varied, however, from time to time, and the rights of the surviving spouse and heirs are governed by the law in force at the time of the other spouse's decease.⁶²

⁵⁰ *Lord v. Hough*, 43 Cal. 581; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Cotton v. Cotton*, 34 La. Ann. 858; *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

⁵¹ *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Wortman v. Vorhies*, 14 Wash. 152, 44 Pac. 129.

⁵² *Succession of Kerley*, 18 La. Ann. 583; *Moor v. Moor*, 31 Tex. Civ. App. 137, 71 S. W. 794; *Barnett v. O'Loughlin*, 14 Wash. 259, 44 Pac. 267.

⁵³ *Kennedy v. Bossiere*, 16 La. Ann. 445; *Brown v. Lockhart*, 12 N. M. 10, 71 Pac. 1086; *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070.

⁵⁴ *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825; *Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71; *Richburg v. McIlwaine, Knight & Co.* (Tex. Civ. App.) 131 S. W. 1166.

⁵⁵ *Thompson v. Vance*, 110 La. 26, 34 South. 112; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *King v. McHendry*, 30 Can. Sup. Ct. 450.

⁵⁶ *Biggi v. Biggi*, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; *Bedal v. Sake*, 10 Idaho, 270, 77 Pac. 638, 66 L. R. A. 60; *BARNETT v. BARNETT*, 9 N. M. 205, 50 Pac. 337, *Burdick Cas. Real Property*; *Moor v. Moor*, 24 Tex. Civ. App. 150, 57 S. W. 992.

⁵⁷ *Nuss v. Nuss*, 112 La. 265, 36 South. 345; *Walmsley v. Theus*, 107 La. 417, 31 South. 869; *Nott v. Nott*, 111 La. 1028, 36 South. 109.

⁵⁸ *Payne v. Payne*, 18 Cal. 291; *McHardy v. McHardy's Ex'r*, 7 Fla. 301; *George v. Delaney*, 111 La. 760, 35 South. 894; *Sims v. Hixon* (Tex. Sup.) 65 S. W. 35; *Wortman v. Vorhies*, 14 Wash. 152, 44 Pac. 129.

⁵⁹ *Ballinger v. Wright*, 143 Cal. 292, 76 Pac. 1108; *Jacobson v. Concentrating Co.*, 3 Idaho, 126, 28 Pac. 396.

⁶⁰ *Burdick's Estate*, 112 Cal. 387, 44 Pac. 734; *Matter of Clark*, 17 Nev. 124, 28 Pac. 238.

⁶¹ *Cartwright v. Moore*, 66 Tex. 55, 1 S. W. 263; *McCown v. Owens*, 15 (Tex. Civ. App.) 346, 40 S. W. 336.

⁶² *Johnston v. Sav. Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

CHAPTER XIII

CONDITIONAL OR QUALIFIED ESTATES

- 110. Estates as to Quality.
- 111. Estates upon Condition.
- 112. Void Conditions.
- 113. Termination of Conditional Estates.
- 114. Who may Enforce Forfeitures.
- 115. Estates upon Limitation.
- 116. Estates upon Conditional Limitation.
- 117. Modified Fees.

ESTATES AS TO QUALITY

110. Estates as to quality are either absolute or qualified.

Absolute estates are estates without modifications or conditions. Qualified estates are estates that are subject to certain modifications or conditions.

Under qualified estates may be classed:

- (a) Estates upon condition,
- (b) Estates upon limitation,
- (c) Estates upon conditional limitation,
- (d) Modified fees, including:
 - (1) Qualified, base, or determinable fees; and
 - (2) Conditional fees.

Estates as to Quality

The estates thus far considered have been distinguished by the limit, or time, prescribed for their duration, or, in other words, by their quantity. Estates, however, may have imposed upon them certain modifications or conditions, by force of which they may be determinable before attaining their regular limits of duration.¹ In other words, estates may be absolute, that is, clear of any condition or restriction, or they may be qualified by the addition of such modifications. For example, the owner of an estate in lands may have his interest modified or destroyed by the happening of an event which may or may not occur. Likewise, the vesting of an estate may depend upon such a contingency. The existence of such a condition does not, however, affect the quantity of the estate, nor the owner's powers of dealing with it. He may use the land, sell or mortgage it, just as if his interest was absolute, instead of qual-

¹ Leake, Land Law, 161.

ified.² Any alienation or incumbrance will be defeated, however, if the estate is terminated by the happening of the contingency on which it depends.³

A strictly logical classification of qualified estates would, perhaps, consist of (1) qualified estates of inheritance, or qualified fees, and (2) qualified estates not of inheritance. Moreover, "estates upon condition" are not, properly speaking, a distinct species of estates in themselves, since any quantity of interest, a fee, a life estate, or a term of years, may have conditions imposed upon it, and thus be qualified.⁴ It is customary, however, to make "estates upon condition" a particular class of qualified estates, and they may, perhaps, be more conveniently considered in this way.

ESTATES UPON CONDITION

111. An estate upon condition is one which is created or defeated, enlarged or diminished, on the happening of some uncertain event.

Estates upon condition are divided into:

- (a) Estates upon condition precedent; and
- (b) Estates upon condition subsequent.

Conditions precedent are conditions which must be fulfilled before the estate to which they are attached can vest or be enlarged.

Conditions subsequent are conditions upon the fulfillment or nonfulfillment of which an estate previously vested is defeated.

An estate upon condition depends upon the happening or not happening of some uncertain event, whereby an estate may be either originally created, or enlarged, or finally defeated.⁵ Estates upon condition, says Blackstone,⁶ are of two sorts: (1) Estates upon condition implied by law; and (2) estates upon condition expressed. Estates upon condition implied by law are where the grant of an estate has a condition annexed to it inseparably from its essence, although no condition be expressed in words.⁷ Thus,

² Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Shattuck v. Hastings, 99 Mass. 23; Chapman v. Pingree, 67 Me. 198. But see Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547.

³ Gray v. Blanchard, 8 Pick. (Mass.) 284.

⁴ 2 Blk. Comm. 152; Leake, Land Law, 161.

⁵ Co. Litt. 201a; 2 Blk. Comm. 152; WARNER v. BENNETT, 31 Conn. 468, Burdick Cas. Real Property.

⁶ 2 Blk. Comm. 152.

⁷ Id.

prior to the statute of *quia emptores*,⁸ the grant of an estate in fee simple to be held of the grantor implied a condition that the tenant should perform certain services.⁹ An estate on condition expressed in the grant, or devise, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate shall either commence, be enlarged, or be defeated upon performance or breach of such qualification or condition.¹⁰

Estates on condition expressed are either precedent or subsequent. Conditions precedent must happen or be performed before the estate to which they apply can arise, or before already existing estates can be enlarged.¹¹ If the contingency does not occur, the grant or devise containing the condition never becomes operative.¹² Such conditions relate only to the time of the commencement of estates, and do not affect estates in respect to their duration: "Conditions precedent occur in contingent remainders,¹³ in limitations by way of springing and shifting uses,¹⁴ and in executory devises."¹⁵ A condition subsequent diminishes or destroys the estate to which it is attached.¹⁶ One of the oldest illustrations of a

⁸ 18 Edw. I, c. 1 (1290).

⁹ Litt. § 378; Co. Litt. 233b; Fearne, *Contingent Remainders* (9th Ed.) p. 382, note.

¹⁰ Co. Litt. 201; 2 Blk. Comm. 154; 4 Kent, Comm. 125; *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*.

¹¹ *Upington v. Corrigan*, 69 Hun, 320, 23 N. Y. Supp. 451; *In re Howard's Estate*, 5 Misc. Rep. 295, 25 N. Y. Supp. 1111; *Richards v. Richards*, 90 Iowa, 606, 58 N. W. 926; *Hurd v. Shelton*, 64 Conn. 496, 30 Atl. 766; *Moore v. Perry*, 42 S. C. 369, 20 S. E. 200; *City of Stockton v. Weber*, 98 Cal. 433, 33 Pac. 332; *Tilley v. King*, 109 N. C. 461, 13 S. E. 936. Examples of conditions precedent are: That a devise shall not vest until the devisee's debts are paid. *Nichol v. Levy*, 5 Wall. 433, 18 L. Ed. 596. That a child shall be born to the grantees. *Karchner v. Hoy*, 151 Pa. 383, 25 Atl. 20. That a devisee shall abstain from the use of intoxicating liquors for five years. *In re Steven's Estate*, 164 Pa. 209, 30 Atl. 243. That the grantee support the grantors during their lives. *Lashley v. Souder* (N. J. Ch.) 24 Atl. 919. That a grant is conditioned upon the payment of the purchase price on or before a certain day. *Brannan v. Mesick*, 10 Cal. 95.

¹² *Donohue v. McNichol*, 61 Pa. 73; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744.

¹³ See chapter XV.

¹⁴ *Id.*

¹⁵ *Leake*, Land Law, 161. As to executory devises, see chapter XV.

¹⁶ *Rice v. Railroad Corp.*, 12 Allen (Mass.) 141; *Harrison v. Foote*, 9 Tex. Civ. App. 576, 30 S. W. 838; *Mills v. Railway Co.*, 10 Wash. 520, 39 Pac. 246; *Reichenbach v. Railway Co.*, 10 Wash. 357, 38 Pac. 1126; *Bank of Suisun v. Stark*, 106 Cal. 202, 39 Pac. 531; *Ritchie v. Railway Co.*, 55 Kan. 36, 39 Pac. 718; *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612. But see *Baker v. Mott*, 78 Hun, 141, 28 N. Y. Supp. 968; *Kilpatrick v. Baltimore*, 81 Md. 179, 31 Atl.

condition subsequent is the defeasance clause in a common-law mortgage deed.¹⁷ The distinction between conditions precedent and subsequent depends on the intention of the parties as gathered from the whole instrument, and the attendant circumstances.¹⁸ The courts, however, construe conditions as subsequent, rather than as precedent,¹⁹ and it is held, in cases of doubt, that an estate vests at once, subject to its defeat by nonperformance of conditions, rather than that the grantee must perform before he is entitled to the estate.²⁰ The time within which the condition must be performed is usually expressly stated; but, if it is not, the grantee has for its performance a reasonable time,²¹ or his whole life, according to the circumstances of the case and the intention of the parties.²² No particular words are required to create a condition. Such phrases as "upon condition," "on condition that," "provided always," or "if it shall happen," are customarily used;²³ but they

805, 27 L. R. A. 643, 48 Am. St. Rep. 509; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201; *Elyton Land Co. v. South & North Alabama R. Co.*, 100 Ala. 396, 14 South. 207. The following are conditions subsequent: Devise of real estate to a town for the purpose of building a school house, "provided it is built within 100 rods of the place where the meetinghouse now stands." *HAYDEN v. STOUGHTON*, 5 Pick. (Mass.) 528, *Burdick Cas. Real Property*. Devise to A. and his heirs, if he live to 21. *Edwards v. Hammond*, 3 Lev. 132. Devise to one provided he supports the grantor for life. *Spaulding v. Hallenbeck*, 39 Barb. (N. Y.) 79. That the land conveyed shall not be used for certain purposes, *Hayes v. Railway Co.*, 51 N. J. Eq. 345, 27 Atl. 648; *Odessa Imp. & Irr. Co. v. Dawson*, 5 Tex. Civ. App. 487, 24 S. W. 576; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122 (but see *Jenks v. Pawlowski*, 98 Mich. 110, 56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522); or shall be built upon only in a certain manner, *Ogontz Land & Imp. Co. v. Johnson*, 168 Pa. 178, 31 Atl. 1008; *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854.

¹⁷ Litt. § 332 et seq. As to the defeasance clause of a mortgage deed, see chapter XVIII, post.

¹⁸ *FRANK v. STRATFORD-HANDCOCK*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, *Burdick Cas. Real Property*; *Underhill v. Railway Co.*, 20 Barb. (N. Y.) 455; *Burnett v. Strong*, 26 Miss. 116; *Jones v. Railway Co.*, 14 W. Va. 514.

¹⁹ *Martin v. Ballou*, 13 Barb. (N. Y.) 119; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. And see *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510; *Taylor v. Mason*, 9 Wheat. 325, 6 L. Ed. 101; *Sackett v. Mallory*, 1 Metc. (Mass.) 355; *Tallman v. Snow*, 35 Me. 342.

²⁰ *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701.

²¹ *Hamilton v. Elliott*, 5 Serg. & R. (Pa.) 375; *Allen v. Howe*, 105 Mass. 241. As in a case where he is to pay off a mortgage, no time being expressed. *Rowell v. Jewett*, 69 Me. 293.

²² *Marshall, C. J.*, in *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701.

²³ *Co. Litt.* 203b, 204b; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Bigelow, C. J.*, in *Rawson v. School Dist.*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*; *Hooper v. Cummings*, 45 Me. 359.

are not essential, provided the instrument shows an intent to create a condition.²⁴ Moreover, "it is to be observed that many words in a will do make a condition in law that make no condition in a deed."²⁵

SAME—VOID CONDITIONS

112. Conditions which are illegal or impossible of performance are void. When precedent, void conditions prevent estates depending on them from vesting. When subsequent, they are inoperative and of no effect.

A condition to be effective must be lawful,²⁶ and not all conditions which may be imposed are so. A condition may be invalid because its performance is impossible,²⁷ or because it is illegal or contrary to public policy.²⁸ The illegal conditions most frequently imposed are those in restraint of alienation and of marriage. Conditions in restraint of alienation are discussed in a subsequent chapter.²⁹ Conditions in general restraint of marriage are void. Partial restrictions, however, on marriage, such as not to marry a

²⁴ *Hapgood v. Houghton*, 22 Pick. (Mass.) 480; *Attorney General v. Merimack Manuf'g Co.*, 14 Gray (Mass.) 586; *Watters v. Bredin*, 70 Pa. 235; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Worman's Lessee v. Teagarden*, 2 Ohio St. 380; *Wheeler v. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Bacon v. Huntington*, 14 Conn. 92. But see *Packard v. Ames*, 16 Gray (Mass.) 327; *Jennings v. O'Brien*, 47 Iowa, 392; *Gadberry v. Sheppard*, 27 Miss. 203. Nor does the use of the words given in all cases raise a condition. *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Sohier v. Trinity Church*, 109 Mass. 1; *Chapin v. Harris*, 8 Allen (Mass.) 594. Estates on condition may be created by will or deed. *Wheeler v. Walker*, 2 Conn. 196, 7 Am. Dec. 264. In some states it is provided by statute that conditions merely nominal shall be disregarded. 1 Stim. Am. St. Law, § 1361.

²⁵ Co. Litt. 236b; 2 Jarman, Wills, 841.

²⁶ Co. Litt. 206b.

²⁷ A condition may become impossible by act of God, *Thomas v. Howell*, 1 Salk. 170; or by act of law, *Board of Com'rs of Mahoning Co. v. Young*, 59 Fed. 96, 8 C. C. A. 27; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350.

²⁸ *MANN v. JACKSON*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358, *Burdick Cas. Real Property*; *Conrad v. Long*, 33 Mich. 78; *Hawk v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Brown v. Peck*, 1 Eden, 140, 28 Eng. Reprint, 637.

²⁹ See chapter XXV, post. See, also, *Jenner v. Gurner*, 16 Ch. Div. 188; *Hodgson v. Halford*, 11 Ch. Div. 959; *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78; *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244; *Kelly v. Monck*, 3 Ridg. App. 205; *Maddox v. Maddox's Adm'r*, 11 Grat. (Va.) 804.

named person, or any one of a named family, are generally sustained, even without a limitation over, but are narrowly interpreted.⁸⁰ The same is true with reference to conditions against marrying without the consent of parents, or of those who stand in loco parentis.⁸¹ A condition may also be void for uncertainty,⁸² as, likewise, because repugnant to the estate limited.⁸³ Conditions may also, it is said,⁸⁴ be possibly invalid if they violate the rule against perpetuities.⁸⁵ On the other hand, it is contended that common-law conditions are older than the rule against perpetuities, and, for that reason, do not fall within its application.⁸⁶ A void condition, if precedent, prevents the estate depending on it from vesting at all;⁸⁷ but, if subsequent, the condition is of no effect, and the estate becomes absolute, discharged of the condition.⁸⁸

SAME—TERMINATION OF CONDITIONAL ESTATES

113. An estate on condition subsequent may come to a natural termination without a breach of the condition. Moreover, in general, an estate on condition subsequent is not determined by a breach of condition until there has been an entry or claim, except as follows:

- (a) Commencing an action of ejectment is equivalent to an entry.
- (b) If the grantor is in possession, the forfeiture is complete when a breach occurs.
- (c) An estate for years can, at common law, be defeated by the breach itself.

⁸⁰ *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78.

⁸¹ *Denfield, Petitioner*, 156 Mass. 265, 30 N. E. 1018.

⁸² *Sheppard's Touchstone*, by Preston, 128; *Fearne, Contingent Remainders*, 255.

⁸³ *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

⁸⁴ See *Laws of England*, vol. 24, p. 170; *In re Hollis' Hospital Trustees*, [1899] 2 Ch. 540; *In re Da Costa*, [1912] 1 Ch. 337.

⁸⁵ See, post, chapter XVI.

⁸⁶ See *Challis, Law of Real Property* (3d Ed.) 187, 207.

⁸⁷ *Stockton v. Weber*, 98 Cal. 433, 33 Pac. 332; *Roundel v. Curren*, 2 Brown, Ch. 67; *Priestley v. Holgate*, 3 Kay & J. 286. But see *In re Moore*, 39 Ch. Div. 116.

⁸⁸ *Jones v. Doe*, 2 Ill. 276; *Parker v. Parker*, 123 Mass. 584; *Thomas v. Howell*, 1 Salk. 170; *Lowther v. Cavendish*, 1 Eden, 99; *Peyton v. Bury*, 2 P. Wms. 626; *Collett v. Collett*, 35 Beav. 312; *Booth v. Meyer*, 38 Law T. (N. S.) 125; *O'Brien v. Barkley*, 78 Hun, 609, 28 N. Y. Supp. 1049; *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. 255.

Estates may be subjected to conditions without losing their distinctive character,³⁹ as, for example, estates in fee simple, estates for life, or estates for years. Consequently an estate on condition subsequent may expire under the form of the limitation, the same as an absolute estate. For example, where a life estate is given on condition, the death of the life tenant puts an end to the estate, although the condition has never been broken. Moreover, the breach of a condition subsequent does not, of itself, defeat, as a rule, the estate, not even if the instrument expressly provides that the estate shall thereupon terminate and be void.⁴⁰ The estate, upon the breach, is not void, but voidable only by entry,⁴¹ or claim equivalent to entry,⁴² at the option of the grantor or his heirs.⁴³

This rule applies, however, at common law, only to estates of freehold.⁴⁴ It does not apply to incorporeal hereditaments,⁴⁵ nor to estates for years.⁴⁶ A freehold estate, created, at common law, by livery of seisin, cannot be divested under a condition without a resumption of the seisin by entry.⁴⁷ A lease for years, however, does not, upon condition broken, require an actual entry, unless there is an express stipulation to that effect.⁴⁸ In case of a reversion or a remainder, which do not lie in livery of seisin, there must

³⁹ Leake, *Land Law*, 161.

⁴⁰ Co. Litt. 214b, 218a; Leake, 169.

⁴¹ *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*; *Bowen v. Bowen*, 18 Conn. 535; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Guild v. Richards*, 16 Gray (Mass.) 309; *Adams v. Lindell*, 5 Mo. App. 197; *Kenner v. Contract Co.*, 9 Bush (Ky.) 202; *Tallman v. Snow*, 35 Me. 342; *Sperry v. Sperry*, 8 N. H. 477; *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Phelps v. Chesson*, 34 N. C. 194. But see *Schlesinger v. Railroad Co.*, 152 U. S. 444, 14 Sup. Ct. 647, 38 L. Ed. 507. A right of entry need not be expressly reserved. *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500.

⁴² *Infra*.

⁴³ *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*. It is not necessary that any damage to the grantor has been caused by the breach. *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 354. The grantee cannot insist that he has forfeited his estate by a breach. *Davenport v. Reg.*, 3 App. Cas. 115; *Rede v. Farr*, 6 Maule & S. 121. As to what constitutes a breach, see *Razor v. Razor*, 142 Ill. 375, 31 N. E. 678; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335; *City of Quincy v. Attorney General*, 160 Mass. 431, 35 N. E. 1066; *Hurto v. Grant*, 90 Iowa, 414, 57 N. W. 899; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Madigan v. Burns*, 67 N. H. 319, 29 Atl. 454.

⁴⁴ *Laws of England*, vol. 24, p. 169, note.

⁴⁵ *A. G. v. Cummins*, [1906] 1 I. R. 406, 408.

⁴⁶ Co. Litt. 214b.

⁴⁷ Co. Litt. 214b; *Pennant's Case*, 3 Co. 64a; Leake, *Land Law*, 169.

⁴⁸ Co. Litt. 214b; *Doe v. Baker*, 8 Taunt. 241; Leake, *Land Law*, 170.

be a claim before the estate can be revested, and the claim must be made upon the land.⁴⁹ The common-law rule that an estate for years can be made ipso facto void by a breach of condition⁵⁰ has been changed, however, under the doctrine of the later cases, which hold that, even in leases, a condition broken gives the lessor merely an option to terminate the lease, and that notice on his part of such intention is necessary.⁵¹ The exceptions to the rule requiring an entry, namely, the bringing of an action in ejectment, or the possession of the land by the grantor at the time a breach of condition occurs, together with certain statutory remedies for the recovery of the land, are considered elsewhere in this volume, to which the reader is referred.⁵² The questions of waiver of conditions, and equitable relief from forfeiture for their breach, are also taken up in the same connection.⁵³

SAME—WHO MAY ENFORCE FORFEITURES

114. An entry to enforce a forfeiture for a breach of condition can usually be made only by the grantor, or his heirs.

EXCEPTION—The assignee of a reversion after a leasehold estate can, however, enforce covenants which run with the land.

At common law, since the grant of an estate exhausts the fee, the right of entry for breach of condition, to defeat an estate, cannot by way of remainder be limited to a third person, but can only be reserved as a possibility of reverter to the grantor and his heirs.⁵⁴ Nor, at common law, can it be assigned or transferred with a grant

⁴⁹ Co. Litt. 218a.

⁵⁰ Co. Litt. 214b.

⁵¹ *Moore v. Ulcoats Mining Co.*, [1908] 1 Ch. 575; *Liddy v. Kennedy*, L. R. 5 H. L. 134; *Walker v. Engler*, 30 Mo. 130; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85.

⁵² See post, chapter XXVIII.

⁵³ *Id.*

⁵⁴ *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*; *Fonda v. Sage*, 46 Barb. (N. Y.) 109; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Marwick v. Andrews*, 25 Me. 525. Contra, *McKissick v. Pickle*, 16 Pa. 140. And see *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N. W. 550. Nor can a stranger raise the question of a forfeiture. *Board of Education of Normal School Dist. v. Trustees of First Baptist Church of Normal*, 63 Ill. 204; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551; *Rector, etc., of King's Chapel v. Pelham*, 9 Mass. 501; *Smith v. Brannan*, 13 Cal. 107; *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708; *Norris v. Milner*, 20 Ga. 563. Holding that a devisee of the grantor cannot enforce a forfeiture, see *Den ex dem. Southard v. Railroad Co.*, 26 N. J. Law, 13. Contra, *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215.

of the reversion.⁵⁶ These rules, however, do not apply to leasehold estates; for in such cases the assignee of the reversion can enforce covenants which run with the land.⁵⁶

ESTATES UPON LIMITATION

115. An estate upon limitation is one which is collaterally limited by the words of its creation to endure until the happening of a certain contingency. The estate ends as soon as the contingency happens, although, otherwise, it would continue for its natural duration.

The word "limitation" in the law of real property is used in several senses. Primarily, it means marking out, or defining, the quantity of an estate, as illustrated in the phrase, "words of limitation," as, for example, "to A. and his heirs," or to "A. and the heirs of his body," or when we say that, at common law, a grant of land "without words of limitation" will convey only a life estate.

The word limitation is also used in the sense of "estate," as, for example, "a limitation to A. for life, remainder to B.," or, in case of the determination of a preceding estate, "a limitation over to B." As used, however, in the phrase "estates upon limitation," the word means a termination upon the happening of a contingency. It defines the time when an estate will end, namely, ipso facto upon the event of the expressed contingency, regardless of whether it would otherwise continue as a fee, an estate for life, or an estate for years. To distinguish the use of the word "limitation" in defining estates, some writers use the words "direct" and "collateral," designating such phrases as "heirs" and "heirs of the body" as "words of direct limitation," and the words used in estates upon limitation as "words of collateral limitation."⁵⁷ The term "special limitation" has also been applied to estates upon limitation.⁵⁸

⁵⁶ *Vermont v. Society for Propagation of Gospel*, 2 Paine, 545, Fed. Cas. No. 16,920; *Rice v. Railroad Co.*, 12 Allen (Mass.) 141; *Nicoll v. Railroad Co.*, 12 N. Y. 121; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455; *WARNER v. BENNETT*, 31 Conn. 468, *Burdick Cas. Real Property*. Under statutes, however, a right of re-entry may be transferred. See Conditions, post, chapter XXVIII.

⁵⁶ See chapter X, ante. See, also, Conditions, chapter XXVIII, post, for further discussion of persons affected by breach of conditions.

⁵⁷ 1 Preston on Estates, 42. See Challis, *Real Property* (3d Ed.) 252.

⁵⁸ See Tiffany, *Real Prop.* p. 188. There is considerable divergence among the writers in the designation of estates which are usually, in this country at

An estate on limitation is, therefore, one which is determined, rather than defeated, by the happening of a contingency, "as when land" (quoting Coke and Blackstone) "is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made five hundred pounds, and the like."⁵⁹ The words used to create an estate on limitation all refer to time; for example, "until," "while," "during," "as long as," etc.⁶⁰ However, neither the use of these words, nor their absence, is conclusive;⁶¹ and the distinction between estates upon limitation and estates upon condition lies, not in the exact terms used, but upon the intention of the parties and the effect of the language.⁶² Estates upon limitation are distinguished from estates upon condition, in that in the former the estate ends absolutely as soon as the contingency happens, no entry being necessary as in case of an estate upon condition, but the next vested remainder, or reversion, takes effect in immediate possession.⁶³ The limitation specifies the utmost time of continuance, and the condition marks some event upon which the estate may be defeated.⁶⁴

least, called "estates upon limitation." Some call them "determinable fees," when the words of direct limitation create a fee. See *Laws of England*, vol. 24, p. 170. Littleton calls the qualification "a condition in law." Section 380. Coke calls such an estate, when a fee, "a fee simple, limited and qualified." *Seymour's Case*, 10 Co. Rep. 95b. Butler calls it "a limited fee." *Fearne, Contingent Remainders* (9th Ed.) 382n. Leake calls the limitation "a conditional limitation." *Digest of the Law of Property in Land* (2d Ed.) 168. Challis speaks of "determinable limitations." *Real Prop.* (3d Ed.) 252. See, further, *Base or Determinable Fees*, *infra*.

⁵⁹ 2 Bk. Comm. 155; *Portington's Case*, 10 Co. Rep. 41.

⁶⁰ Co. Litt. 234b; Challis, *Real Prop.* (3d Ed.) 255-260; *In re Machu*, 21 Ch. Div. 838, 843; *Henderson v. Hunter*, 59 Pa. 335; *Bennett v. Robinson*, 10 Watts (Pa.) 348; *Vanatta v. Brewer*, 32 N. J. Eq. 268.

⁶¹ *Chapin v. Harris*, 8 Allen (Mass.) 594; *Owen v. Field*, 102 Mass. 90; *Wheeler v. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Camp v. Cleary*, 76 Va. 140; *Stearns v. Godfrey*, 16 Me. 158.

⁶² *Portington's Case*, 10 Co. Rep. 41; Leake, *Land Law*, 168.

⁶³ Leake, *Land Law*, 168; *Scheetz v. Fitzwater*, 5 Pa. 126; *Henderson v. Hunter*, 59 Pa. 335; *Ashley v. Warner*, 11 Gray (Mass.) 43; *Miller v. Levi*, 44 N. Y. 489; *Stearns v. Godfrey*, 16 Me. 158. An example of the importance of this distinction arises in connection with conditions in restraint of marriage. Thus an estate to A. until she marries is valid as an estate on limitation. But an estate to A. provided she does not marry is void because it is an estate on condition, and the condition is in restraint of marriage. *Bennett v. Robinson*, 10 Watts (Pa.) 348; *MANN v. JACKSON*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358, *Burdick Cas. Real Property*; *Jones v. Jones*, 1 Q. B. Div. 279.

⁶⁴ 4 Kent, Comm. 126; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real-Property*.

ESTATES UPON CONDITIONAL LIMITATION

116. A conditional limitation is an estate limited to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate upon condition.

"Conditional limitations," as the term is here used,⁶⁵ were unknown to the common law, since such future estates could not be created prior to the statute of uses.⁶⁶ They arise, however, since that statute, under the forms of shifting uses,⁶⁷ and also, since the statute of wills, under the forms of executory devises.⁶⁸ As defined in the headnote,⁶⁹ estates on conditional limitation are limitations over⁷⁰ to a third person upon the termination of an estate upon condition caused by the breach of the condition.⁷¹ They combine, therefore, the qualities of a condition and a limitation.⁷² When the condition is broken, the next particular estate passes to the person in whose favor the limitation is made.⁷³ Such estates are, however, subject to the rule against perpetuities.⁷⁴

MODIFIED FEES

117. Estates in fee are subject at common law to certain special modifications. When thus modified, or qualified, they are variously known as qualified, conditional, base, or determinable fees.

⁶⁵ The phrase "conditional limitations" is used in various senses by different writers. See Gray, *Restraints on Alienation*, § 22, note.

⁶⁶ *Horton v. Sledge*, 29 Ala. 478; *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420. See *Estates in Expectancy*, chapter XV, post.

⁶⁷ See chapter XV, post.

⁶⁸ *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*. See, post, chapter XV, as to executory devises.

⁶⁹ See *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420. For other definitions, see *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*; *Horton v. Sledge*, 29 Ala. 478.

⁷⁰ See the explanation of this term in *Estates on Limitation*, supra.

⁷¹ 4 Kent, Comm. 127; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁷² 4 Kent, Comm. 127; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, supra, *Burdick Cas. Real Property*.

⁷³ *Fowlkes v. Wagoner* (Tenn.) 46 S. W. 586; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, supra, *Burdick Cas. Real Property*.

⁷⁴ 4 Kent, Comm. 267; 1 *Jarman, Wills*, 221; *Nightingale v. Burrell*, 15 Pick. (Mass.) 111.

Qualified fees are obsolete. Conditional fees were turned into estates tail by the statute de donis.

A base or determinable fee is a fee simple, which may be terminated by the happening of a contingency specified in its creation.

Estates upon condition, as also estates upon limitation, may be created in connection with estates of any quantity, as already pointed out.⁷⁵ There are, however, various modifications of estates that apply peculiarly to estates in fee, and these remain to be considered.

Qualified Fees

Instead of limiting an estate to a man and his heirs, an estate may be limited to a man and the heirs of an ancestor whose heir he is, for the purpose, it is said, of tracing the descent, when required, from such ancestor.⁷⁶ Such an estate is called a qualified fee simple.⁷⁷ They are also said, however, to be either obsolete in England, or, at least, too rare to be of importance.⁷⁸ In a number of cases in this country, however, the term "qualified fee" is used synonymously with base or determinable fee.⁷⁹

Conditional Fees

In connection with estates tail⁸⁰ it was explained that at the early common law, prior to the passage of the statute de donis conditionalibus,⁸¹ estates limited to particular heirs were known as "conditional fees," or fees conditional at common law.⁸² It was also stated that, by force of that statute, such fees were turned into estates tail.⁸³ The statute affected, however, only freehold lands, and conditional fees may still exist, particularly in England, with reference to other hereditaments, as, for example, in case of copyhold land or customary tenure, where there is no custom of entail, or to an annuity in fee.⁸⁴

⁷⁵ Supra.

⁷⁶ Litt. § 354.

⁷⁷ Laws of England, vol. 24, p. 172; Challis, Real Prop. (3d Ed.) c. XIX.

⁷⁸ Laws of England, vol. 24, p. 173, note.

⁷⁹ 2 Blk. Comm. 109; Wiggins Ferry Co. v. Ohio, etc., R. Co., 94 Ill. 83.

⁸⁰ Supra.

⁸¹ 13 Edw. I, c. 1 (1285).

⁸² 2 Blk. Comm. 110; 4 Kent, Comm. 11; Frazer v. Peoria Co., 74 Ill. 282; Owings v. Hunt, 53 S. C. 187, 31 S. E. 237; Kirk v. Furgeson, 6 Cold. (Tenn.) 479; Orndoff v. Turman, 2 Leigh (Va.) 200, 21 Am. Dec. 608.

⁸³ See chapter VI, ante.

⁸⁴ Laws of England, vol. 24, p. 172; Stafford v. Buckley, 2 Ves. Sr. 170; 2 Blk. Comm. 154; Challis, Real Prop. (3d Ed.) 62; Leake, p. 26.

Base or Determinable Fees

In connection with estates tail we have seen that one method of barring the entail was by fine.⁸⁵ A fine, however, barred only the issue in tail, and not the remaindermen.⁸⁶ The grantee, in such a case, took what was called a base fee, a fee determinable by failure of the issue in tail; the land passing, in such event, to the remaindermen. A determinable fee is an estate in fee simple, which, however, may be terminated by the happening of some contingency expressed in the instrument creating the estate.⁸⁷ In many cases, and by many writers, the terms "base fee," and "qualified fee" are used interchangeably with "determinable fee."⁸⁸

A determinable fee is, however, only a form of an estate upon limitation.⁸⁹ The future event must, however, be of such a nature that it may possibly never happen at all.⁹⁰ No remainder can, however, be limited upon such an estate, and since the fee is granted there is merely a possibility of reverter in the grantor.⁹¹ A determinable fee during its continuance has all the incidents of a fee simple absolute.⁹² It is descendible⁹³ and assignable.⁹⁴ Upon the determination, however, of the estate, the land reverts to the grantor.⁹⁵ If, on the other hand, the happening of the contingency becomes impossible, the determinable fee will be converted

⁸⁵ Chapter VI, ante.

⁸⁶ Leake, Land Law, 28; Seymour's Case, 10 Co. Rep. 95b.

⁸⁷ For definitions, see *Farnsworth v. Perry*, 83 Me. 447, 22 Atl. 373; *HALL v. TURNER*, 110 N. C. 292, 14 S. E. 791, *Burdick Cas. Real Property*; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *LYFORD v. CITY OF LACONIA*, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680, *Burdick Cas. Real Property*.

⁸⁸ *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 94 Ill. 83; *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; *HALL v. TURNER*, 110 N. C. 292, 14 S. E. 791, *Burdick Cas. Real Property*; *LYFORD v. CITY OF LACONIA*, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680, *Burdick Cas. Real Property*.

⁸⁹ See note 58, supra.

⁹⁰ 1 Preston on Estates, 479.

⁹¹ Co. Litt. 18a; Challis, Real Prop. (3d Ed.) 83; *Laws of England*, vol. 24, p. 171; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*; *Slegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547.

⁹² *Whiting v. Whiting*, 4 Conn. 179; *State (Morris Canal & Banking Co., Prosecutor) v. Brown*, 27 N. J. Law, 13.

⁹³ *Farnsworth v. Perry*, 83 Me. 447, 22 Atl. 373; *HALL v. TURNER*, 110 N. C. 292, 14 S. E. 791, *Burdick Cas. Real Property*.

⁹⁴ *Farnsworth v. Perry*, supra; *Grout v. Townsend*, 2 Denio (N. Y.) 336.

⁹⁵ 2 Blk. Comm. 109; *Slegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547.

into a fee simple absolute.⁹⁶ It is also held that the rule against perpetuities does not apply to such an estate,⁹⁷ on the ground, it is suggested, that the limitation determines, instead of originating, an estate.⁹⁸ The most familiar cases, in modern times, of such estates, are the granting of land in fee for a specified use, to revert, however, to the grantor when the use ceases.⁹⁹

⁹⁶ *In re Leach*, [1912] 2 Ch. 422, 427; 1 *Preston on Estates*, 432, 442; *Challis, Real Prop.* (3d Ed.) 256.

⁹⁷ *A. G. v. Cummins*, [1906] 1 I. R. 406; *Gray, Perp.* (2d Ed.) p. 312.

⁹⁸ *Laws of England*, vol. 24, p. 171, note.

⁹⁹ As for school purposes, *Board of Education of Incorporated Village of Van Wert v. Inhabitants of Village of Van Wert*, 18 Ohio St. 221, 98 Am. Dec. 114, or for public streets, *Gebhardt v. Reeves*, 75 Ill. 301; *Helm v. Webster*, 85 Ill. 116. And see *People v. White*, 11 Barb. (N. Y.) 26; *Morris Canal & Banking Co. v. Brown*, 27 N. J. Law, 13; *Henderson v. Hunter*, 59 Pa. 335; *Bolling v. Mayor, etc.*, 8 Leigh (Va.) 224; *Thayer v. McGee*, 20 Mich. 195. It is asserted by authorities of great weight that since the statute of *quia emptores* a valid determinable fee cannot be created, since a grant of a fee puts an end to any right of reverter. For a discussion of this view, see *Gray, Perp.* (2d Ed.) 31, 556; 1 *Sanders, Uses and Trusts* (5th Ed.) 208; *Pollock, Land Laws*, 213. Contrary, however, to this view, see *Challis, Real Prop.* (3d Ed.) 437; also 2 L. Q. R. 394, article by Sir Howard Elphinstone. In practice, however, it is said in *Laws of Eng.* vol. 24, p. 171, determinable fees are obsolete, the same object being obtained by shifting uses and executory devises, thereby allowing a limitation to third persons. In this country, at least, the validity of such limitations has been accepted as settled in a number of decisions, and it has been held that such limitations were not affected by the statute of *quia emptores*. See cases in preceding notes. See, also, *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; *LYFORD v. CITY OF LACONIA*, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680, *Burdick Cas. Real Property*; *Slegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547; *Scheetz v. Fitzwater*, 5 Pa. 126; *Pennsylvania R. Co. v. Parke*, 42 Pa. 31; *Rowland v. Warren*, 10 Or. 129; *Stuart v. Easton*, 170 U. S. 383, 18 Sup. Ct. 650, 42 L. Ed. 1078.

CHAPTER XIV

EQUITABLE ESTATES—USES AND TRUSTS

- 118. Legal and Equitable Estates.
- 119. Uses—Definition.
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LEGAL AND EQUITABLE ESTATES

118. Estates in land, both as to quantity and quality, may be either legal or equitable.

Legal estates are such as were recognized by the common law.

Equitable estates are interests in land which were originally recognized only in courts of equity.

Estates or interests in land are further classed as legal or equitable. Estates known to the common law and subject to the principles of feudal tenure are known as "legal estates." These we have already considered. In addition to these estates, however, there are estates or interests in land which, although not recognized by the common-law courts, have been from very early times recognized and protected in courts of equity. To such estates or interests the term "equitable estates" is applied.¹ These estates may be of the same quantity and quality as legal estates. For example, an equitable estate may be created in fee simple, in fee tail, for life, or for years.² They descend, in case of intestacy, the same

¹ *McIlvaine v. Smith*, 42 Mo. 45, 56, 97 Am. Dec. 295.

² Digby, *History of Real Property*, c. VII, § 4.

as legal estates. They are subject to the rights of dower and curtesy, as already pointed out.³ Equitable future estates in remainder and executory interests may also be created, and under such limitations, moreover, as would not be possible in common-law estates.⁴ Under the doctrine of equitable estates or interests in land, a very important part of the modern law of real property has been developed, namely, the law relating to trusts.

USES—DEFINITION

119. A use may be defined as an equitable right to the beneficial enjoyment of an estate, the legal title to which is held by another person.

Owing to the strict rules of feudal tenure, including, among other things, military service, forfeitures, escheats, and restraints on alienation, there arose in early times, in England, a desire to create a beneficial ownership in land which should not be subject to these incidents.⁵ One of the chief causes that promoted this desire was the statute against mortmain.⁶ This statute prohibited gifts of land in mortmain; that is, to religious corporations.⁷ It owed its origin to the fact that grants of land to such bodies were not favored by the great lords, since under such alienations the lord got a tenant who never died, who was never under age, who could never marry, and who could never commit felony.⁸ The lords, therefore, were deprived of their escheats, wardships, and forfeitures, the incidents that were to them most profitable under the feudal system.

In order that these various burdens and restrictions might be avoided, the practice of conveying lands to uses was introduced. The religious orders which settled in England at a very early period, especially the mendicant friars of St. Dominic and St. Francis, seem to have been the first to employ this method of transferring and holding land.⁹ The owner of the land conveyed the legal estate to another, upon trust and confidence that the person to whom he so conveyed it would permit either the grantor, or

³ Ante, chapter VIII.

⁴ See Future Uses, post, chapter XV.

⁵ 1 Stephen's Comm. Laws of England (15th Ed.) p. 238.

⁶ De Viris Religiosis, 7 Edw. I, stat. 2, c. 3 (1279).

⁷ Mortmain means, literally, dead hand; ecclesiastics being in the early law deemed to be civilly dead.

⁸ Holds. Hist. Eng. Law, II, 294.

⁹ 1 Stephen's Comm. 238.

other person, to have the beneficial enjoyment of the land, that is, its use,¹⁰ and that the grantee holding the legal title would execute estates according to the direction of the person who had the use, known as the *cestui que use*.¹¹ Such a transfer was originally called a feoffment to uses, and was introduced in England before the end of the thirteenth century.¹²

The person to whom the land was thus conveyed "in trust and confidence" was called the feoffee to uses. In the eyes of the courts of law he was the legal owner, and the only owner. Such conveyances soon met with a very favorable construction, however, from the courts of equity, the chancellor in those days being usually a clergyman, and the clergy thought the statute of mortmain contrary to natural justice.¹³ Consequently equity granted, upon application, a subpoena in chancery by which such confidences were enforced.¹⁴ In this way a dual system of ownership arose; the legal title to the land being held by one person, and all the beneficial rights arising out of it belonging to another. These equitable interests were held free from most of the burdens attached to common-law estates. For example, they could be conveyed without a feoffment, or could be disposed of by will, which was not true of a legal estate.¹⁵

¹⁰ There is some similarity between the *fidei commissum* of the Roman law and the "use" of the English law. From the further fact that the clergy were more or less familiar with the Roman law, it has often been said that the "use" was adopted from the Roman law. See Bacon, *Uses, Tracts*, 314; 4 Kent, *Comm.* 289; Perry, *Trusts* (6th Ed.) § 2; Story, *Eq. Jur.* (13th Ed.) § 965. The weight of later research is, however, against this view. See Scruton, *Roman Law Influence*, 218; Ames, *The Origin of Uses and Trusts*, 21 *Harv. L. Review*, 261; Holmes, *Early English Equity*, 1 *L. Q. R.* 162. In 2 *Pol. & M. Hist. Eng. Law*, 226, it is said: "The English word 'use' when it is employed with a technical meaning in legal documents, is derived, not from the Latin word 'usus,' but from the Latin word 'opus,' which in old French becomes 'os' or 'oes.' True, that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write 'ad opus Johannis' or 'ad usum Johannis' indifferently, or will perhaps adopt the fuller formula 'ad opus et ad usum'; nevertheless the earliest history of 'the use' is the early history of the phrase 'ad opus.'"

¹¹ Co. Litt. 272b; Gilbert, *Law of Uses*, 175; Bacon's *Abridgment*, X, 111.

¹² 1 Stephen's *Comm.* 239.

¹³ Bacon, *Abridgment*, X, 113.

¹⁴ See Dig. *Hist. Real Prop.* (4th Ed.) 313; Anon., *Y. B.* 14 Hen. VIII, 4 Pl. 5; 2 Washb. *Real Prop.* (5th Ed.) 409.

¹⁵ 2 *Pol. & M. Hist. Eng. Law*, 226; *Burgess v. Wheate*, 1 W. Bl. 123; *Chudleigh's Case*, 1 Coke, 120a.

THE STATUTE OF USES

120. The statute of uses enacted that, whenever any person should be seised of any lands to the use, confidence, or trust of another, the latter should be deemed in lawful seisin of a legal estate of a like quantity and quality as he had in the use.

The statute of uses is in force in many of the United States.

So far as the religious orders themselves were concerned, conveyances to uses were of little avail, since they were crushed in their infancy by the mortmain statute of 1391,¹⁶ which provided that uses should be subject to the statutes of mortmain.¹⁷ Uses, however, sprang into favor with all ranks and conditions of men, especially during the civil wars between the Houses of Lancaster and York, in order to protect their possessions, since uses were not forfeitable for treason or felony, as was true of feudal estates.¹⁸

Uses were, however, attended with many inconveniences.¹⁹ They made title uncertain, and were very unpopular with the great landowners of England, because they were deprived of many of the incidents attached to feudal estates. A number of statutes were passed, attempting to prevent these results,²⁰ but they proved ineffectual. Finally the famous statute of uses²¹ was enacted, which provided "that where any person or persons stand, or be seised, or at any time hereafter shall happen to be seised of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use, confidence, or trust of any other person or persons or of any body polittick by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be, that in every such case, all and every such person and persons * * * shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors," etc., "* * *

¹⁶ 15 Ric. II, c. 5.

¹⁷ 1 Stephen's Comm. 239.

¹⁸ Bacon's Abridgment, X, 113. 1 Stephen's Comm. 239.

¹⁹ The inconveniences arising from lands being conveyed to uses are recited in the preamble of the statute of uses. See *Lloyd v. Spillet*, 2 Atk. 148. And see Bacon, *Use of the Law* (Spedding's Ed.) VII, 497.

²⁰ 50 Edw. III, c. 6 (1376); 1 Ric. II, c. 9 (1377); 4 Hen. IV, c. 7 (1402); 11 Hen. VI, c. 3 (1433); 11 Hen. VI, c. 5 (1433); 1 Ric. III, c. 1 (1483); 4 Hen. VII, c. 17 (1488); 19 Hen. VII, c. 15 (1503). And see 1 Stephen's Comm. 242.

²¹ 27 Hen. VIII, c. 10 (1535).

to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have and in use, trust or confidence of or in the same.”²² The statute contained other provisions, all intended to produce the effect that, whenever a person was entitled to the beneficial interest in land, the legal title should be vested in him. An exception was made, however, so that wives on whom a jointure had been settled would not be entitled to dower in equitable estates of their husbands which should be executed by the statute.²³ The statute of uses had a very important effect on conveyancing, because it became possible to convey the legal title to lands by methods unknown to the common law.²⁴

Statute of Uses in the United States

The statute of uses has been re-enacted in a number of our states, either in terms or in substance, and in some others it is held to exist as part of the common law.²⁵ In other states, however, by virtue of statutory provisions or judicial decisions, the statute is not recognized.²⁶ Some states, moreover, following the lead of New York, have abolished, by statute, all uses and trusts, except in certain specified cases.²⁷

²² *Broughton v. Langley*, 2 Salk. 679; *Lord Altham v. Earl of Anglesey*, Gilb. Cas. 16. The possession passes immediately. *Anon.*, Cro. Eliz. 46; *Heelis v. Blain*, 18 C. B. (N. S.) 90. But see *Orme's Case*, L. R. 8 C. P. 281.

²³ 27 Hen. VIII, c. 10, § 6.

²⁴ *Lutwich v. Milton*, Cro. Jac. 604; *Roe v. Tranmer*, 2 Wils. 75. See, also, *Sammes' Case*, 13 Coke, 54. See chapter XXII, post.

²⁵ 2 Washb. Real Prop. (5th Ed.) p. 465; 1 Stim. Am. St. Law, § 1702; 1 Perry, Trusts, § 299, note; *Kay v. Scates*, 37 Pa. 31, 78 Am. Dec. 399, note. *Webster v. Cooper*, 14 How. (U. S.) 488, 14 L. Ed. 510; *Morgan v. Rogers*, 79 Fed. 577, 25 C. C. A. 97; *Tindal v. Drake*, 51 Ala. 574; *Bryan v. Bradley*, 16 Conn. 474; *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309; *Moore v. Shultz*, 13 Pa. 98, 53 Am. Dec. 446; *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. 658; *Sullivan v. Chambers*, 18 R. I. 799, 31 Atl. 167; *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*.

²⁶ See *McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 748; *Farmers' & Merchants' Ins. Co. v. Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861; *Helfenstine's Lessee v. Garrard*, 7 Ohio, 275, pt. 1; *Gorham v. Daniels*, 23 Vt. 600. And see 1 Perry, Trusts, § 299, note.

²⁷ See the statutes of New York, Michigan, Minnesota, South Dakota and Wisconsin. For trusts not within the statute, see *Cowen v. Rinaldo*, 82 Hun, 479, 31 N. Y. Supp. 554. See, also, *In re Fair's Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948; *Beekman v. People*, 27 Barb. (N. Y.) 260.

SAME—RESTRICTIONS UPON THE OPERATION OF THE STATUTE

121. By reason of the terms of the statute of uses, and also by judicial constructions, the statute of uses was held not to apply to:

- (a) Chattel interests.
- (b) Active uses.
- (c) Estates for the separate use of married women.
- (d) A use upon a use.
- (e) Uses to grantees of legal estates.

"The statute of uses was made with the object of converting uses into legal estates, and so far as it operated it was effectual; but the operation of the statute was restricted by the terms in which it was framed, and further by the judicial construction with which it was applied."²⁸ The uses to which the statute was held not to apply, and, therefore, not executed by it, were so many and so important that the statute fell far short of what had been expected of it. Thus it was held that the statute did not apply to chattel interests,²⁹ that is, to interests or estates for a term of years, because the language of the statute is "where any person or persons stand or be seised," and a tenant for years is not "seised"; seisin being possible only in connection with the legal possession of a freehold.³⁰ Consequently a use declared upon a term of years is not within the statute,³¹ although a use for a term of years declared upon a seisin of freehold would be.³² The language of the statute likewise, according to one theory, excluded contingent uses,³³ because the grantee to uses could not have more than a fee simple to uses, and, when that was spent in serving the prior vested uses, there was no seisin to serve future contingent uses when they should arise.³⁴ According to another view, how-

²⁸ Leake, *Digest of Law of Property in Land*, 97.

²⁹ *Williams v. McConico*, 36 Ala. 22; *Merrill v. Brown*, 12 Pick. (Mass.) 216; *Galliers v. Moss*, 9 Barn. & C. 267; *Hopkins v. Hopkins*, 1 Atk. 581; *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087; *Slevin v. Brown*, 32 Mo. 176.

³⁰ Ante, chapter IV, Seisin.

³¹ *Anon.*, *Dyer*, 369a; *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*.

³² *Heyward's Case*, 2 Coke, 35a.

³³ See, post, *Future Uses*, chapter XV.

³⁴ See *Wyman v. Brown*, 50 Me. 139; *Proprietors of Town of Shapleigh v. Pilsbury*, 1 Greenl. (Me.) 271; *Savage v. Lee*, 90 N. C. 320, 47 Am. Rep.

ever, it was said that a possibility of seisin remained in the grantees to uses, and that this was sufficient to serve or execute contingent uses.⁸⁵

A very important restriction upon the operation of the statute was that a use was not executed if the first taker had any active duties to perform in regard to the estate.⁸⁶ In other words, a distinction was made by the courts between active and passive uses. Where the feoffee to uses had no duties to perform, but merely held the legal title for the benefit of the cestui que use, the statute was held to operate.⁸⁷ When, however, anything was to be done by the feoffee to uses in relation to the trust property, such as collecting the rents and profits, or selling the property, the statute did not operate, because the first taker could not perform these duties unless he held the title to the land.⁸⁸ The former was called a passive, and the latter an active, use, and very slight duties imposed on the trustee were sufficient to raise an active use, and prevent the operation of the statute.⁸⁹

Lands conveyed to the separate use of a married woman are also held not within the scope of the statute, because, if the legal title should vest in her, her husband would thereupon become entitled to the control of the estate, thus producing an effect contrary to the intention with which such uses were created.⁴⁰ Un-

523; Gilbert, Uses, by Sugden, 78, 79; Leake, Digest Law of Property in Land, 90.

⁸⁵ See Chudleigh's Case, 1 Coke, 120a; Fearne, Contingent Remainders, 300; Gilbert, Uses, by Sugden, 296 note. The statute 23 & 24 Vict. c. 38, s. 7, removed all controversy, in England, over this question, by providing that all uses, including contingent uses, should take effect out of the original seisin, and that scintilla juris shall not be deemed necessary for the support of future, contingent, or executory uses.

⁸⁶ Perry, Trusts (6th Ed.) § 6; Story, Eq. Juris. (13th Ed.) § 970; KIRKLAND v. COX, 94 Ill. 400, Burdick Cas. Real Property.

⁸⁷ Posey v. Cook, 1 Hill (S. C.) 413; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Sullivan v. Chambers, 18 R. I. 799, 31 Atl. 167.

⁸⁸ Fay v. Taft, 12 Cush. (Mass.) 448; Appeal of Barnett, 46 Pa. 392, 86 Am. Dec. 502; Gott v. Cook, 7 Paige (N. Y.) 521; Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575; Posey v. Cook, 1 Hill (S. C.) 413; Schley v. Lyon, 6 Ga. 530; KIRKLAND v. COX, 94 Ill. 400, Burdick Cas. Real Property.

⁸⁹ Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575. As soon as the active duties of the trustee are performed, the statute vests the legal estate in the cestui que trust. Felgner v. Hooper, 80 Md. 262, 30 Atl. 911.

⁴⁰ Steacy v. Rice, 27 Pa. 75, 67 Am. Dec. 447; Pullen v. Rianhard, 1 Whart. (Pa.) 514; Bowen v. Chase, 94 U. S. 812, 24 L. Ed. 184; Richardson v. Stodder, 100 Mass. 528; Appeal of Bush, 33 Pa. 85; Nevil v. Saunders, 1 Vern. 415; Harton v. Harton, 7 Term R. 653; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233; Pittsfield Sav. Bank v. Berry, 63 N. H. 109; Dean v. Long, 122 Ill. 447, 14 N. E. 34.

der modern statutes, however, which give married women full rights of disposition over their property, freed from the common-law marital rights of their husbands, the reason for this rule does not obtain, and it has been held that the statute does apply in such cases, unless the property is conveyed under an active trust.⁴¹ The most important decision of the courts on the statute of uses, however, and the decision which had the greatest influence in nullifying the statute, was in *Tyrrell's Case*,⁴² decided, in 1557, by the common-law judges, twenty-two years after the statute was passed. It was held, in this case, that a use upon a use was not within the terms of the statute; that is, where an estate was conveyed to A. for the use of B. for the use of C. Before the enactment of the statute, under such a conveyance, the use to C. would be void. A use could not be engendered of a use, it was said. After the statute, however, it was held that the legal title would be executed in B., but that then the force of the statute would be exhausted, and the use limited to C. remained unexecuted.⁴³ In other words, the courts of law treated the first use as executed by the statute, and the second as void. Such a construction evidently defeated the intention of the grantor, and consequently equity interposed, and gave effect to the second use. Therefore all that was necessary to avoid the effect of the statute was to add a second use.⁴⁴ This result caused a lord chancellor⁴⁵ to say: "A statute made upon great consideration, introduced in a solemn and pompous manner, by a strict construction, has had no effect than to add at most three words to a conveyance."

The statute of uses, moreover, did not operate upon uses limited to the grantee of a legal estate. It seems to have been common practice, in early times, for men to intrust their lands to feoffees to their own use,⁴⁶ as, for example, a grant to A. and his heirs,

⁴¹ *Bratton v. Massey*, 15 S. C. 277; *Sutton v. Aiken*, 62 Ga. 733; *Bayer v. Cockerill*, 3 Kan. 282; *Georgia, C. & N. Ry. Co. v. Scott*, 38 S. C. 34, 16 S. E. 185, 839.

⁴² *Dyer*, 155a.

⁴³ 1. *Sanders, Uses*, 275. See *Doe v. Passingham*, 6 Barn. & C. 305; *Cooper v. Kynock*, L. R. 7 Ch. 398; *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*.

⁴⁴ *Durant v. Ritchie*, Fed. Cas. No. 4,190; *Hutchins v. Heywood*, 50 N. H. 491; *Reid v. Gordon*, 35 Md. 183; *Croxall v. Shererd*, 5 Wall. (U. S.) 268, 18 L. Ed. 572; *Jackson ex dem. White v. Cary*, 16 Johns. (N. Y.) 302; *Jackson ex dem. Ludlow v. Myers*, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; *Guest v. Farley*, 19 Mo. 147. This rule has been abolished by statute in Georgia, and the use is executed to the last beneficiary. See 1 Stim. Am. St. Law, § 1701; Code Ga. 1882, § 2315.

⁴⁵ Lord Hardwicke, in *Hopkins v. Hopkins*, 1 Atk. 591.

⁴⁶ Bacon on Uses, 21, 22.

to the use of A. and his heirs. This was an express declaration of a use. The statute of uses, however, in its terms is restricted to the cases of a person or persons being seised to the use "of another person"; consequently a use to the grantee seised of the legal estate is not within the statute.⁴⁷

In addition to uses expressly declared, there was another class of uses, known as resulting uses, or uses by implication.⁴⁸ For example, if a feoffment were made without declaring any use, and without any consideration, a use arose by implication in the feoffor's, or grantor's favor.⁴⁹ On the other hand, if the feoffee, or grantee, did give some consideration, no express use being declared, the law raised an implied use in the feoffee's favor.⁵⁰ In the first case, the legal estate being in the feoffee and the implied use in the feoffor, the statute of uses executed the use, and the feoffor got back instantly all that he gave. The use was said to result to himself.⁵¹ In the second case, the legal estate and the use were both in the feoffee, in one and the same person, and such cases, as we have seen, are not within the statute, the law being the same with reference to implied uses as of uses expressly declared.⁵²

ORIGIN OF TRUSTS

122. Modern trusts are, practically, uses not within, or not executed by, the statute of uses. Such uses courts of equity continued to enforce under the name of "trusts."

TRUST DEFINED

123. A trust has been defined as an obligation under which a person who has the legal title to property is bound, in equity, to deal with the beneficial interests, or use, therein in a particular manner, in favor of another person.

As shown in the preceding paragraph, there were many uses which were excluded from the operation of the statute of uses, and

⁴⁷ 1 Sanders, Uses, 89. Leake, Digest of Law of Property in Land, 92; Meredith v. Joans, Cro. Car. 244; Peacock v. Eastland, L. R. 10 Eq. 17.

⁴⁸ Bacon, Abridgment, X, 176.

⁴⁹ Bacon, Abridgment, X, 176; Litt. §§ 463, 464; Y. B. 11 Hen. IV, 52, pl. 30.

⁵⁰ 1 Sanders, Uses, 61, 62.

⁵¹ 1 Sanders, Uses, 96, 352; Leake, Digest of Law of Property in Land, 83; Beckwith's Case, 2 Coke, 58a; Williams, Real Prop. (19th Ed.) 206; Armstrong v. Wolsey, 2 Wils. 19; Van der Volgen v. Yates, 9 N. Y. 219.

⁵² See Williams, Real Prop. (19th Ed.) 206.

which by the courts of law were rejected as "uses."⁵³ Courts of equity, however, held that, although they were not uses at law, yet they were "trusts," which must be carried out by the persons, the "trustees," who had the legal estate.⁵⁴ Consequently a trust was, practically, a use not executed by the statute of uses.⁵⁵ The term "trust" was not, however, a new word, since, in the creation of "uses," the terms "use," "trust," and "confidence" were synonymously employed.⁵⁶

A trust has been variously defined, and many writers have defined a trust in the same terms employed for the definition of a use.⁵⁷ It would seem, however, that a "use" is the beneficial interest enjoyed by a beneficiary, or the *cestui que trust*, while a "trust" is the equitable obligation imposed upon the trustee; in other words, the terms are not identical, but correlative. Accordingly, others have more accurately defined a trust as an obligation under which a person who has the legal estate to property is bound, in equity, to deal with the beneficial interest, or use, therein for the benefit of another, called the "beneficiary," or the "*cestui que trust*."⁵⁸

CLASSIFICATION OF TRUSTS

124. Trusts, according to the manner of their creation, are divided into:

- (a) Express trusts.
- (b) Implied trusts.

Trusts are usually, and properly, divided into two classes, express and implied.⁵⁹ There is, however, much variance and confusion in the books and cases in regard to the terms used in the

⁵³ 1 Stephen's Comm. 247.

⁵⁴ *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Farmers' Loan & Trust Co. v. Carroll*, 5 Barb. (N. Y.) 613; 4 Kent, Comm. 302.

⁵⁵ 4 Kent, Comm. 303. *Fisher v. Fields*, 10 Johns. (N. Y.) 495; *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714.

⁵⁶ *Teller v. Hill*, 18 Colo. App. 509, 72 Pac. 811; *Nease v. Capehart*, 8 W. Va. 95.

⁵⁷ *Supra*. And see *Farmers' Loan & Trust Co. v. Carroll*, 5 Barb. (N. Y.) 613. See, also, *Smith, Eq. § 224*; *Story, Eq. Juris. § 964*.

⁵⁸ See *Underhill, Trusts*, 1; *Eaton, Equity*, 346; *Willard Eq. Juris.* 186; *Carter v. Gibson*, 29 Neb. 324, 45 N. W. 634, 26 Am. St. Rep. 381.

⁵⁹ *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31; *Rice v. Dougherty*, 148 Ill. App. 368; *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85; *Jones v. Wadsworth*, 11 Phila. (Pa.) 227; *Kaphan v. Toney* (Tenn. Ch. App.) 58 S. W. 909.

classification of trusts.⁶⁰ This has arisen principally from the varying use of the word "implied." Some courts, as well as text-writers, recognize four classes of trusts, namely, "express," "implied," "resulting," and "constructive."⁶¹ They use the term "implied" to designate certain express trusts, in the creation of which the language of the settlor is obscure, and his intention has to be inferred by the courts from the words used.⁶² Such trusts, however, can in no proper sense be termed "implied," because the only question that arises is one of construction. It is sufficient to call attention at this point to the confusion which has arisen from the improper use of this word.⁶³ In examining the cases, however, it should be borne in mind that the language of the courts in many cases cannot be relied upon in determining the kind of trust in question. However, "it makes no difference in the decision of any given case by a court of equity," as said by the Tennessee Court of Chancery Appeals,⁶⁴ "what designation shall be given to the particular trust, nor that the subdivisions thereof be kept clearly in view. If a given case comes within the definition of any of these, or even if the elements of all be blended, the right of recovery is no less complete."

SAME—EXPRESS TRUSTS

125. Express trusts are those which are created by the direct and positive acts of the parties. They are usually divided into:

- (a) Executed trusts; and
- (b) Executory trusts.

126. EXECUTED AND EXECUTORY TRUSTS—An executed trust is one in which the terms and limitations of the trust estate are definitely and completely declared by the instrument creating it.

An executory trust is one in which the limitations are not completely declared, the donor's intention being expressed only in general terms, and something remains to be done by the trustee, by way, usually, of some future conveyance, in order to perfect the trust.

⁶⁰ *Currence v. Ward*, 43 W. Va. 367, 369, 27 S. E. 329.

⁶¹ *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Weer v. Gand*, 88 Ill. 490; *Bateman v. Ward* (Tex. Civ. App.) 93 S. W. 508; *Gottstein v. Wist*, 22 Wash. 581, 61 Pac. 715.

⁶² *Burks v. Burks*, 7 Baxt. (Tenn.) 353; *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985. See, also, *Stevens v. Fitzpatrick*, 218 Mo. 708, 118 S. W. 51.

⁶³ *Currence v. Ward*, *supra*.

⁶⁴ *Kaphan v. Toney* (Tenn. Ch. App. 1899) 58 S. W. 909, 913.

SAME—IMPLIED TRUSTS

127. Implied trusts are those which, without being expressed, are created by implication or in order to do justice between the parties. They are either:

- (a) Resulting trusts; or
- (b) Constructive trusts.

128. **RESULTING TRUSTS**—Resulting trusts are those which arise by implication or construction of law, in order to carry out the presumed intention of the parties. The principal classes of resulting trusts are:

- (a) Those where the grantor conveys only the legal estate.
- (b) Those where the object of the trust fails in whole or in part, or is not declared.
- (c) Those where a conveyance is taken in the name of another than the one paying the consideration. This class is the most frequent of resulting trusts.

129. **CONSTRUCTIVE TRUSTS**—Constructive trusts arise entirely by construction of equity, independently of any actual or presumed intention of the parties, and often contrary to their intention, for the purpose of promoting justice, or frustrating fraud.

SAME—PASSIVE AND ACTIVE TRUSTS

130. Trusts are also classified as passive and active trusts. A passive trust is one where the trustee has no duties to perform. He is the mere passive depositary of the legal title. An active trust is one in which the trustee has active duties to perform for the benefit of the cestui que trust.

SAME—PRIVATE AND PUBLIC TRUSTS

131. A further classification of trusts is that of private and public trusts. Private trusts are those in which the beneficial interest is vested absolutely in some individual, or individuals, who are, or who may be, definitely ascertained.

Public trusts, also called "charitable trusts," are those in which the public at large, or some descriptive part of the public, have the beneficial interest.

Express Trusts—In General

Express trusts are sometimes called direct,⁶⁵ or declared, trusts.⁶⁶ They are created by the positive acts of the parties, by express declarations in some written instruments, as a deed, or a will,⁶⁷ or by words showing an intention, either expressly or impliedly, to create a trust.⁶⁸

Executed Trusts

The term "executed," as applied to trusts, does not have any reference to the statute of uses,⁶⁹ or to the fact that no duties are to be performed by the trustee.⁷⁰ The term refers to the completeness of the creation of the trust.⁷¹ In an executed trust the limitations and terms of the trust estate are fully declared.⁷² In other words, a trust is executed when the instrument creating it contains all the terms of the trust, and is in its final form, nothing remaining to be done but to carry out the terms as therein declared.⁷³

Executory Trusts

In an executed trust the full intention of the donor is contained in the instrument creating it,⁷⁴ but in executory trusts the donor's intentions are imperfectly declared, being expressed only in general terms, so that something remains to be done in order to complete the trust.⁷⁵ Thus they may direct the trustee to settle or dispose of the land for the estates and interests required by the

⁶⁵ See *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329.

⁶⁶ *Id.*

⁶⁷ *Caldwell v. Matthewson*, 57 Kan. 258, 45 Pac. 614; *Lafferty v. Turley*, 3 Sneed (Tenn.) 157; *Kaphan v. Toney* (Tenn. Ch. App.) 58 S. W. 909; *Jones v. Byrne* (C. C.) 149 Fed. 457. As to the necessity of writing, see *Creation of Express Trusts*, Statute of Frauds, post.

⁶⁸ *Tennant v. Tennant*, 43 W. Va. 547, 27 S. E. 334; *Currence v. Ward*, supra.

⁶⁹ *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203.

⁷⁰ *Miles v. Miles*, 78 Kan. 382, 96 Pac. 481; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536; *Cushing v. Blake*, 30 N. J. Eq. 689; *Smith's Estate*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; *Tillinghast v. Coggeshall*, 7 R. I. 383.

⁷¹ *Cornwell v. Orton*, supra; *Laguerenne v. Farrar*, 25 Tex. Civ. App. 404, 61 S. W. 953; *Perry, Trusts* (6th Ed.) § 359.

⁷² *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203.

⁷³ In *re Fair's Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Cornwell v. Orton*, supra; *Cushing v. Blake*, supra.

⁷⁴ *Wright v. Pearson*, 1 Eden, 125; *Austen v. Taylor*, *Id.* 361; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559.

⁷⁵ *Gaylord v. Lafayette*, 115 Ind. 423, 17 N. E. 899; *Morris v. Linton*, 74 Neb. 411, 104 N. W. 927; *Austen v. Taylor*, 1 Eden, 361; *Neves v. Scott*, 9 How. (U. S.) 196, 13 L. Ed. 102; *Cushing v. Blake*, 30 N. J. Eq. 689; *Tallman v. Wood*, 26 Wend. (N. Y.) 9; In *re SMITH'S ESTATE*, 144 Pa. 428, 22 Atl.

trust.⁷⁶ They are so called because they have to be executed by some other instrument, conveying or settling the land for the estates and limitations intended, as distinguished from trusts directing the trustee to hold the property upon trusts then executed, in the sense of being then perfectly limited and defined.⁷⁷ In other words, "they are called executory, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator."⁷⁸ They are often expressed in general or abridged terms, by way of instructions for the limitations directed to be made, without setting out the limitations at length, as by directing that the property shall be conveyed or settled in some particular way.⁷⁹ Even where an executory trust is expressed in technical terms of limitation, the terms are not necessarily construed with the same strictness as is applied to ordinary legal limitations; but, having regard to the directory character of the trust, the technical meaning is held subordinate to the general object required to be carried out.⁸⁰ In the construction of executed trusts the legal operation of the words used in the instrument controls, while in executory trusts the courts seek to give effect to the intentions of the creator.⁸¹

CREATION OF EXPRESS TRUSTS

132. No particular or technical words are necessary to create an express trust. Any language which shows with reasonable certainty an intention to create a trust, and which designates the property, the beneficiary, and the purpose of the trust, is sufficient. Under the statute of frauds, an express trust must be evidenced by writing. The parties to the creation of a trust are:

916, 27 Am. St. Rep. 641, *Burdick Cas. Real Property*; *Wright v. Pearson*, 1 Eden, 125; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559.

⁷⁶ *Wiley v. Smith*, 3 Ga. 551, 559.

⁷⁷ *Carradine v. Carradine*, 33 Miss. 698, 729.

⁷⁸ *Perry*, *Trusts* (6th Ed.) § 359.

⁷⁹ *Neves v. Scott*, 9 How. (U. S.) 196, 211, 13 L. Ed. 102; *Morris v. Linton*, 74 Neb. 411, 416, 104 N. W. 927.

⁸⁰ *Tallman v. Wood*, 26 Wend. (N. Y.) 9; *McElroy v. McElroy*, 113 Mass. 509; *Cushing v. Blake*, 30 N. J. Eq. 689; *Wight v. Leigh*, 15 Ves. 564; *Stamford v. Hobart*, 3 Bro. P. C. 33.

⁸¹ *Houston v. Bryan*, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252; *McNew v. Vert*, 43 Ind. App. 83, 86 N. E. 969; *Collins v. Phillips*, 91 Iowa, 210, 59 N. W. 40; *Bliss v. Fosdick* (Sup.) 24 N. Y. Supp. 939; *McCandless v. Warner*, 26 W. Va. 754.

- (a) The feoffor, creator, or settlor.
- (b) The feoffee, or trustee, who holds the legal title.
- (c) The cestui que trust, or beneficiary.

It has been said that in the creation of an express trust three things are necessary, namely, sufficient words, a definite subject, and a certain ascertained object.⁸² While, however, there must be clear evidence of the declaration of a trust,⁸³ no formal or technical words are necessary, since if the intention to create a trust, the subject-matter, the purpose, and the beneficiary are set forth with reasonable certainty, it will be sufficient.⁸⁴ It is not necessary to use the words "use, confidence, or trust," or in fact any technical expression.⁸⁵ It is sufficient if from the whole instrument an intention appears to create a trust.⁸⁶ In fact, the intention of the settlor may be shown by what are called "precatory words"; that is, by such expressions as "desire," "request," "entreat," "trust and confide."⁸⁷ No definite rule can be laid down as to when the use of such words will be sufficient to create a trust, but

⁸² *Floyd v. Smith*, 59 Fla. 485, 51 South. 537, 37 L. R. A. (N. S.) 651, 138 Am. St. Rep. 133, 21 Ann. Cas. 318; *Harris Banking Co. v. Miller*, 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790; *Gough v. Satterlee*, 32 App. Div. 33, 52 N. Y. Supp. 492; *In re SMITH'S ESTATE*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, *Burdick Cas. Real Property*.

⁸³ *O'Neil v. Greenwood*, 106 Mich. 572, 64 N. W. 511; *McKee v. Allen*, 204 Mo. 655, 103 S. W. 76; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531.

⁸⁴ *Plaut v. Plaut*, 80 Conn. 673, 70 Atl. 52; *Anderson v. Crist*, 113 Ind. 65, 15 N. E. 9; *Carpenter v. Cushman*, 105 Mass. 417; *Chadwick v. Chadwick*, 59 Mich. 87, 26 N. W. 288; *Putnam v. Safe Deposit Co.*, 191 N. Y. 166, 83 N. E. 789.

⁸⁵ *Johnson v. Cook*, 122 Ga. 524, 50 S. E. 367; *Wright v. Douglass*, 7 N. Y. 564; *Raybold v. Raybold*, 20 Pa. 308; *Ready v. Kearsley*, 14 Mich. 215; *White v. Fitzgerald*, 19 Wis. 480; *Zuver v. Lyons*, 40 Iowa, 510.

⁸⁶ *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814; *Taft v. Taft*, 130 Mass. 461; *McElroy v. McElroy*, 113 Mass. 509; *Kintner v. Jones*, 122 Ind. 148, 23 N. E. 701; *In re SMITH'S ESTATE*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, *Burdick Cas. Real Property*.

⁸⁷ *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; *McRee's Adm'rs v. Means*, 34 Ala. 349; *Erickson v. Willard*, 1 N. H. 217; *Collins v. Carlisle's Heirs*, 7 B. Mon. (Ky.) 13; *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86; *Hunter v. Stembridge*, 12 Ga. 192. But see, for expressions held not to raise a trust, *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183; *Burt v. Herron's Ex'rs*, 66 Pa. 400; *Bowlby v. Thunder*, 105 Pa. 173; *Colton v. Colton (C. C.)* 10 Sawy. 325, 21 Fed. 594; *Sears v. Cunningham*, 122 Mass. 538.

it will depend in each case on the construction of the whole instrument, and the intention of the settlor appearing therefrom.⁸⁸

Consideration

A completely executed trust requires no consideration to support it.⁸⁹ Equity, however, will not enforce an executory agreement to create a trust in the absence of a consideration.⁹⁰ Some cases, however, hold that such an agreement will be enforced in favor of a wife or child, though not for other relatives.⁹¹ Even where a consideration is necessary in order to support an executory trust, it is not necessary that it should be recited in the instrument creating the trust,⁹² yet the fact that a consideration is stated may be of weight in determining whether or not a trust was intended to be created.⁹³ Moreover, the presence or absence of a consideration is an important element in the case of resulting trusts, because, if the legal title is conveyed to one who pays no consideration, a presumption may arise that such grantee was not intended to take the beneficial interest.⁹⁴ It should also be noted that conveyances in trust made without consideration

⁸⁸ 1 Perry, *Trusts* (4th Ed.) § 114. See cases cited in last note. Of this same nature are "trusts for maintenance." When property is given to a parent, or to one standing in that relation, and expressions as to support and education of the grantee's children are used, the property will be impressed with a trust, if it appears that such was the grantor's or testator's intention. *Whiting v. Whiting*, 4 Gray (Mass.) 240; *Andrews v. President, etc.*, 3 Allen (Mass.) 313; *Rittgers v. Rittgers*, 56 Iowa, 218, 9 N. W. 188; *Babbitt v. Babbitt*, 26 N. J. Eq. 44. But there will be no trust if the expressions as to maintenance were used merely to show the motive. *Rhett v. Mason's Ex'x*, 18 Grat. (Va.) 541.

⁸⁹ *Hall v. Hall*, 76 Kan. 806, 93 Pac. 177; *Bennett v. Littlefield*, 177 Mass. 294, 58 N. E. 1011; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Owens v. Owens*, 23 N. J. Eq. 60; *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Anon.*, *Brooke*, 89. But see *Beeman v. Beeman*, 88 Hun, 14, 34 N. Y. Supp. 484; *Hamilton v. Downer*, 152 Ill. 651, 38 N. E. 733. The instrument of creation must be executed and delivered. *Govin v. De Miranda*, 9 Misc. Rep. 684, 30 N. Y. Supp. 550.

⁹⁰ *Moore v. Ransdel*, 156 Ind. 658, 59 N. E. 936, 60 N. E. 1068; *Fisher v. Transportation Co.*, 136 Mich. 218, 98 N. W. 1012, 112 Am. St. Rep. 358; *Brannock v. Magoon*, 141 Mo. App. 316, 125 S. W. 535; *Beeman v. Beeman*, 88 Hun, 14, 34 N. Y. Supp. 484; *Bennett v. Fulmer*, 49 Pa. 155.

⁹¹ *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Buford's Heirs v. McKee*, 1 Dana (Ky.) 107. See *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953.

⁹² *Arms v. Ashley*, 4 Pick. (Mass.) 71; *Jackson v. Fish*, 10 Johns. (N. Y.) 456; *Sprague v. Woods*, 4 Watts & S. (Pa.) 192.

⁹³ *Appeal of Selden*, 31 Conn. 548; *Hayward v. Cain*, 110 Mass. 273; *Kelly v. Babcock*, 49 N. Y. 318.

⁹⁴ *Infra*.

may be fraudulent and void as against creditors and subsequent purchasers.⁹⁵

Subject-Matter

Any property, real or personal, legal or equitable, may be the subject of a trust.⁹⁶ The requirements as to the description of the property conveyed are matters, however, of conveyancing, and they are discussed in a subsequent chapter. The subject-matter of a trust must, however, be designated with certainty in the creation of the trust.⁹⁷

Extent of Trustee's Estate

When the subject-matter of the trust is real property, and the transfer of the property to the trustee is made by deed, the general rules governing the execution of deeds apply,⁹⁸ and the deed must contain operative words of conveyance.⁹⁹ In limiting the legal estate, however, to a trustee, the strict requirements as to the use of technical words in conveying legal estates are relaxed, and the trustee takes an estate sufficient to carry out the purposes of the trust.¹ For example, if the cestui que trust is given the beneficial interest in fee, and only a life estate is given to the trustee, the latter's estate will be enlarged to a fee, if it is necessary to carry out the settlor's intention.² In other words, the trustee, in any case, will take the fee, without words of limitation or inheritance, when necessary for the trust.³ Thus, an absolute power to sell

⁹⁵ See post, Restrictions upon Alienation, chapter XXV.

⁹⁶ *Leland v. Collver*, 34 Mich. 418; 1 Perry, Trusts (4th Ed.) §§ 67-69; 2 Washb. Real Prop. (5th Ed.) p. 416. But a trust cannot be created in a mortgage, where it is only a lien, though there may be a trust in the mortgage debt. *Merrill v. Brown*, 12 Pick. (Mass.) 216.

⁹⁷ *Roth v. Michalis*, 125 Ill. 325, 17 N. E. 809; *McCandless v. McCandless' Adm'rs*, 33 Ky. Law Rep. 790, 111 S. W. 302; *Seabrook v. Grimes*, 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400; *Renz v. Stall*, 94 Mich. 377, 54 N. W. 276, 34 Am. St. Rep. 358; *In re Eshbach's Estate*, 197 Pa. 153, 46 Atl. 905.

⁹⁸ See Deeds, post, chapter XXVII.

⁹⁹ *Viser v. Bertrank*, 240 Ill. 492; *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615; *Becker v. Stroeher*, 167 Mo. 306, 66 S. W. 1083.

¹ *Drake v. Steele*, 242 Ill. 301, 89 N. E. 1018; *Brown v. Reeder*, 108 Md. 653, 71 Atl. 417; *Neilson v. Lagow*, 12 How. (U. S.) 98, 13 L. Ed. 909; *Fisher v. Fields*, 10 Johns. (N. Y.) 495; *Gould v. Lamb*, 11 Metc. (Mass.) 84, 45 Am. Dec. 187; *Newhall v. Wheeler*, 7 Mass. 189; *Angell v. Rosenbury*, 12 Mich. 241. But see *Cooper v. Franklin*, Cro. Jac. 400.

² *Newhall v. Wheeler*, 7 Mass. 189.

³ *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Packard v. Railroad Co.*, 168 Mass. 92, 46 N. E. 433; *Angell v. Rosenbury*, 12 Mich. 241; *Wright v. Delafeld*, 23 Barb. (N. Y.) 498; *Webster v. Cooper*, 14 How. (U. S.) 488, 14 L. Ed. 510; *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*.

real property gives the trustee the fee, although no words of inheritance are used in the conveyance to him.⁴

A trustee, on the other hand, takes no greater estate than the purposes of the trust require,⁵ even though granted in fee to the trustee,⁶ and the estate conveyed to him will be cut down to what is sufficient for the purposes of the trust. In most cases, the object or purpose of the trust being executed, the trustee's estate, if greater than was required, terminates, and the legal title becomes vested in the beneficiary.⁷ In case, however, the trust should fail for any reason, a resulting trust in favor of the creator, or his heirs, would arise.⁸

Designating the Beneficiary

In the creation of a trust, the beneficiary must be clearly and definitely designated.⁹ A deed of trust, for example, for the benefit of certain persons, or either of them, is void for uncertainty.¹⁰ Beneficiaries may, however, be designated as a class, if clearly defined, instead of pointing them out by name.¹¹

Purpose or Object of Trust

The purpose or object of a trust should be stated with reasonable certainty. The purpose need not be stated, however, in the

⁴ *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Merritt v. Disney*, 48 Md. 344; *Cornwell v. Wulff*, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53; *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713; *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*.

⁵ *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927; *Olcott v. Tope*, 115 Ill. App. 121; *Haydel v. Hurck*, 5 Mo. App. 267; *Brown v. Richter*, 25 App. Div. 239, 49 N. Y. Supp. 368; *Smith v. Proctor*, 139 N. C., 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172.

⁶ *Brillhart v. Mish*, 99 Md. 447, 58 Atl. 28; *Numsen v. Lyon*, 87 Md. 31, 39 Atl. 533; *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044.

⁷ *Brown v. Reeder*, 108 Md. 653, 71 Atl. 417; *Temple v. Ferguson*, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. Rep. 791; *Norton v. Norton*, 2 Sandf. (N. Y.) 296; *Appeal of Bush*, 33 Pa. 85; *Renzlehausen v. Keyser*, 48 Pa. 351. But see *Lewis v. Rees*, 3 Kay & J. 132. And see *KIRKLAND v. COX*, 94 Ill. 400, *Burdick Cas. Real Property*, where it is held that where the legal title is vested in the trustee, nothing short of a reconveyance can place the legal title back in the grantor or his heirs, subject to the qualification that, under certain circumstances, such reconveyance will be presumed.

⁸ See *Resulting Trusts*, *infra*.

⁹ *Christian v. Highlands*, 32 Ind. App. 104, 69 N. E. 266; *Filkins v. Severn*, 127 Iowa, 738, 104 N. W. 346; *Chamberlain v. Stearns*, 111 Mass. 267; *Guental v. Guental*, 113 App. Div. 310, 98 N. Y. Supp. 1002; *Appeal of Dyer*, 107 Pa. 446.

¹⁰ *Wright v. Pond*, 10 Conn. 255.

¹¹ *Turner v. Improvement Co.*, 77 Mich. 603, 43 N. W. 1062; *Cathcart v. Nelson's Adm'r*, 70 Vt. 317, 40 Atl. 826; *Heermans v. Schmaltz* (C. C.) 7 Fed. 566. And see *Cestui que Trust, or Beneficiary*, *infra*.

exact words of the statute in a state where trusts are allowed only for certain specified purposes, providing the language used shows clearly that the purpose is one within the statutory permission.¹²

Unless prohibited by statute, a trust may be created for almost any purpose the creator desires,¹³ providing it would not be contrary to public policy.¹⁴ In some states, however, trusts can be created only for such purposes as are specified by the statutes.¹⁵ Thus, in New York,¹⁶ and also in several other states adopting similar statutes,¹⁷ trusts in real property are prohibited except for the following purposes: (1) To sell real property for the benefit of creditors;¹⁸ (2) to sell, mortgage, or lease real property for the benefit of annuitants or other legatees,¹⁹ or for the purpose of satisfying any charge thereon;²⁰ (3) to receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provision of law relating thereto;²¹ (4) to receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by law; that is, for the benefit of minors then in being, and during their minority.²²

In such states, a trust for a purpose not enumerated by statute is invalid,²³ although it is also provided by some of the statutes that where a trust is created for a purpose otherwise lawful, yet

¹² *Morse v. Morse*, 85 N. Y. 53; *Donovan v. Van De Mark*, 78 N. Y. 244.

¹³ *Ross v. Vertner*, Freem. Ch. (Miss.) 587; *Link v. Link*, 90 N. C. 235; *In re Spring's Estate*, 216 Pa. 529, 66 Atl. 110; *Wells v. McCall*, 64 Pa. 207.

¹⁴ *Lemmond v. Peoples*, 41 N. C. 137.

¹⁵ *McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 748; *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948; *Beekman v. People*, 27 Barb. (N. Y.) 260; *Murphey v. Cook*, 11 S. D. 47, 75 N. W. 387.

¹⁶ See Real Property Law (Laws 1896, c. 547; Consol. Laws, c. 50) art. 4, § 99.

¹⁷ See the statutes of Michigan, Wisconsin, Minnesota, California, and the Dakotas.

¹⁸ *Cooper v. Whitney*, 3 Hill (N. Y.) 95.

¹⁹ *Savage v. Burnham*, 17 N. Y. 561; *Russell v. Hilton*, 80 App. Div. 178, 80 N. Y. Supp. 563.

²⁰ *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814; *Becker v. Becker*, 13 App. Div. 342, 43 N. Y. Supp. 17; *Rogers v. Tilley*, 20 Barb. (N. Y.) 639.

²¹ *In re Heywood's Estate*, 148 Cal. 184, 82 Pac. 755; *Salisbury v. Slade*, 160 N. Y. 278, 54 N. E. 741; *Staples v. Hawes*, 39 App. Div. 548, 57 N. Y. Supp. 452; *Simmons v. Morgan*, 25 R. I. 212, 55 Atl. 522.

²² *Boynton v. Hoyt*, 1 Denio (N. Y.) 53.

²³ *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219; *Weeks v. Cornwell*, 104 N. Y. 325, 10 N. E. 431; *Hagerty v. Hagerty*, 9 Hun (N. Y.) 175.

not within the statutory authorization, such a trust, while not valid, may nevertheless be upheld as a power in trust.²⁴

Statute of Frauds

In the absence of a statute to the contrary, it is not necessary that an express trust should be in writing,²⁵ since, at common law, an express trust may be created by parol.²⁶ The statute of frauds,²⁷ however, provides that all creations of trusts in lands shall be manifested and proved by some writing signed by the creator of the trust, or by his last will in writing, or else they shall be utterly void. In states, therefore, where this statute prevails, either as part of the common law or by re-enactment, trusts must be evidenced in writing, not necessarily created in writing, but their existence, if denied, proved by some writing.²⁸

For this purpose any writing signed by the person against whom the trust is so to be enforced will be sufficient, if it clearly shows the existence of the trust.²⁹ If, however, the statute of frauds is not set up, and the trust is admitted, it can be enforced, although created by parol, since no evidence of its existence is necessary in such case.³⁰ In some states, however, it is provided by statute that trusts in or concerning real property must be created and declared in writing.³¹ When a trust is created by will,

²⁴ Consol. Laws N. Y. c. 50, art. 4, § 99. The California statute to this effect was repealed in 1874, and consequently, if an instrument is invalid as a trust, it is also invalid as a power in this jurisdiction. In re Fair's Estate, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000. See Powers, post, chapter XXVI.

²⁵ Pierson v. Pierson, 5 Del. Ch. 11; Smith v. Smith (Ky.) 121 S. W. 1002; Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028; Harvey v. Gardner, 41 Ohio St. 642; Henderson v. Rushing, 47 Tex. Civ. App. 485, 105 S. W. 840.

²⁶ Fleming v. Donahue, 5 Ohio, 255.

²⁷ St. 29 Car. II, c. 3, § 7.

²⁸ Throckmorton v. O'Reilly (N. J. Ch.) 55 Atl. 56; 29 Car. II. c. 3, § 7; Moore v. Horsley, 156 Ill. 36, 40 N. E. 323; Callard v. Callard, Moore, 687; Movat v. Hays, 1 Johns. Ch. (N. Y.) 339; Sherley v. Sherley, 97 Ky. 512, 31 S. W. 275; Acker v. Priest, 92 Iowa, 610, 61 N. W. 235; Ranney v. Byers, 219 Pa. 332, 68 Atl. 971, 123 Am. St. Rep. 660.

²⁹ Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Nolan v. Garrison, 151 Mich. 138, 115 N. W. 58; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; Barrell v. Joy, 16 Mass. 221; McClellan v. McClellan, 65 Me. 500; Appeal of Dyer, 107 Pa. 446.

³⁰ Whiting v. Gould, 2 Wis. 552; Thornton v. Vaughan, 2 Scam. (Ill.) 219; Trustees of Schools v. Wright, 12 Ill. 432; Woods v. Dille, 11 Ohio, 455.

³¹ Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593; Thacher v. Churchill, 118 Mass. 108; Hutchison v. Hutchison, 84 Hun, 482, 32 N. Y. Supp. 390; 1 Stim. Am. St. Law, § 1710; Whiting v. Gould, 2 Wis. 552; Bibb v. Hunter, 79 Ala. 351; Dunn v. Zwilling, 94 Iowa, 233, 62 N. W. 746. But see Pinnock v. Clough, 16 Vt. 508, 42 Am. Dec. 521; Jenkins v. Eldredge, 3 Story, 181, Fed. Cas. No. 7,266; McClellan v. McClellan, 65 Me. 500.

the same formalities in the execution of the will are required as for a valid devise of lands.³² The statute of frauds applies to public or charitable trusts, as well as to private,³³ although it does not apply to resulting,³⁴ or constructive,³⁵ trusts.

Parties

The person who creates or establishes a trust is variously called the "feoffor," "settlor,"³⁶ "donor," "grantor," "creator," "trustor,"³⁷ or "founder."³⁸ Any person owning land, who has capacity to make a contract or a will, can create a trust.³⁹ A state⁴⁰ or a corporation, if the latter is permitted by its charter, may be a feoffor.⁴¹ The capacity of married women, infants, and aliens to create trusts is the same as their capacity to deal with real property.⁴²

The person who holds the legal estate for the use or benefit of another is known as the "trustee."⁴³ There must be a trustee in every trust; but a court of equity will not permit a trust to fail, if otherwise sufficiently declared, for want of a trustee, since the court will appoint a trustee.⁴⁴ Any one may be a trustee who

³² 1 Perry, Trusts (4th Ed.) §§ 90-94; Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753.

³³ Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753.

³⁴ De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; Culp v. Price, 107 Iowa, 133, 77 N. W. 848; Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; McMurray v. McMurray, 180 Mo. 526, 79 S. W. 701; Helms v. Goodwill, 64 N. Y. 642; Stafford v. Wheeler, 93 Pa. 462; Hendrichs v. Morgan, 167 Fed. 106, 92 C. C. A. 558; McDONOUGH v. O'NIEL, 113 Mass. 92, Burdick Cas. Real Property.

³⁵ Hilt v. Simpson, 230 Ill. 170, 82 N. E. 588; Catalani v. Catalani, 124 Ind. 54, 24 N. E. 375, 19 Am. St. Rep. 73; Pratt v. Clark, 57 Mo. 189; Brannin v. Brannin, 18 N. J. Eq. 212; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Schrager v. Cool, 221 Pa. 622, 70 Atl. 889.

³⁶ Lewin, Trusts, 21.

³⁷ Dillenbeck v. Pinnell, 121 Iowa, 201, 203, 96 N. W. 860; Black, Law. Dict.

³⁸ Anderson, Law Dict.

³⁹ Reiff v. Horst, 52 Md. 255; Skeen v. Marriott, 22 Utah, 73, 61 Pac. 296; 1 Perry, Trusts (4th Ed.) § 28.

⁴⁰ Commissioners of Sinking Fund v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; Buchanan v. Hamilton, 5 Ves. 722.

⁴¹ Dana v. Bank, 5 Watts & S. (Pa.) 223; Barry v. Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Hopkins v. Turnpike Co., 4 Humph. (Tenn.) 403; State v. Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

⁴² See post, chapter XXV.

⁴³ See Glengary Consol. Min. Co. v. Boehmer, 28 Colo. 1, 3, 62 Pac. 839.

⁴⁴ Appeal of Treat, 30 Conn. 113; Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470; In re Freeman's Estate, 146 Iowa, 38, 124 N. W. 804; Neville v. Association, 104 Mich. 149, 62 N. W. 169; Burrill v. Sheil, 2 Barb. (N. Y.) 457; Ash v. Ash, 1 Phila. (Pa.) 176.

is capable of taking the legal title to realty.⁴⁵ The United States and the states may be trustees, although they cannot be sued, without their consent, for the enforcement of the trust.⁴⁶ Corporations, unless prohibited by statute, may, within their corporate objects, hold lands as trustees,⁴⁷ and many trust companies now do so.⁴⁸ A married woman may be a trustee, and cannot plead her incapacity to deal with the title to land when a trust is sought to be enforced against her.⁴⁹ The appointment of a married woman as trustee, however, is often attended with inconveniences, owing to her limited power, in some states, of dealing with property. For similar reasons, an infant cannot act effectively as a trustee, although a trust may be enforced against him, and his infancy will not furnish a means of defrauding his beneficiary.⁵⁰ Even an insane person may take title as a trustee.⁵¹ An alien may act as a trustee in jurisdictions where he is permitted to hold realty, and where he is not he may act until "office found," upon which the legal title would escheat to the state, but would still be held for the benefit of the cestui que trust.⁵² A bankrupt or insolvent person may be a trustee,⁵³ and, if he became a trustee before his

⁴⁵ *STEARNS v. FRALEIGH*, 39 Fla. 603, 23 South. 18, 39 L. R. A. 705, Burdick Cas. Real Property; *Commissioners of Sinking Fund v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433; 1 Perry, Trusts (4th Ed.) § 39.

⁴⁶ *Briggs v. Light Boat Lower Cedar Point*, 11 Allen (Mass.) 157; *Appeal of Yale College*, 67 Conn. 237, 34 Atl. 1036; 1 Perry, Trusts (4th Ed.) § 41; *McDonogh v. Murdoch*, 15 How. (U. S.) 367, 14 L. Ed. 732; *Shoemaker v. Commissioners*, 36 Ind. 175. By statute, a city may be a trustee to administer a public trust. *CITY OF OWATONNA v. ROSEBROCK*, 88 Minn. 318, 92 N. W. 1122, Burdick Cas. Real Property.

⁴⁷ *Commissioners of Sinking Fund v. Walker*, supra; *Columbia Bridge Co. v. Kline*, 6 Pa. Law J. 317; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

⁴⁸ *Trustees of Phillips Academy v. King*, 12 Mass. 546. So municipal corporations may be trustees. *Vidal v. Girard*, 2 How. (U. S.) 127, 187, 11 L. Ed. 205. It was formerly held that a corporation could not be a trustee, because the subpoena of the chancellor operates only upon the conscience of the trustee, and corporations were said to have no souls. 1 Perry, Trusts (4th Ed.) § 42. A mere voluntary association, however, has no power to act as a trustee. *Guild v. Allen*, 28 R. I. 430, 67 Atl. 855. And see *Childs v. Waite*, 102 Me. 451, 67 Atl. 311.

⁴⁹ *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537; *Clarke v. Saxton*, 1 Hill, Eq. (S. C.) 69; *Berry v. Norris*, 1 Duv. (Ky.) 302. With reference to married women acting as trustees, see *Husband and Wife*, 21 Cyc. 1305, article by author of this work.

⁵⁰ *Jevon v. Bush*, 1 Vern. 342.

⁵¹ *Eyrick v. Hetrick*, 13 Pa. 488; *Caswell v. Sheen*, 69 L. T. Rep. N. S. 854.

⁵² 1 Perry, Trusts (4th Ed.) § 55.

⁵³ *Rankin v. Bancroft*, 114 Ill. 441, 3 N. E. 97; *Shryock v. Waggoner*, 28 Pa. 430; *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41.

insolvency, an assignment by him of his property for the benefit of creditors would not carry with it any right to the enjoyment of the property, unless the assignor had also some beneficial interest in it.⁵⁴ A creator of a trust may make himself a trustee.⁵⁵ Public officers are not infrequently made trustees, and the cases hold that, when designated as trustees, they hold as individuals,⁵⁶ and that the trust does not devolve upon their successors in office.⁵⁷

The person for whose benefit the trust is created is called the "cestui que trust," or the "beneficiary."⁵⁸ It is necessary in the creation of a trust that there should be a living beneficiary,⁵⁹ or one who comes into being during the life of the trustee.⁶⁰ In general, any person who has capacity to take a legal title to lands may be a beneficiary.⁶¹ The statutes, however, in some states, restrict trusts to certain classes of beneficiaries, as, for example, to persons who are not sui juris.⁶² Unless the statute forbids trusts for the sole benefit of the creator of them,⁶³ a trust may be created by one for his own benefit.⁶⁴

⁵⁴ *Carpenter v. Marnell*, 3 Bos. & P. 40; *Kip v. Bank*, 10 Johns. (N. Y.) 63; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596.

⁵⁵ *Yokem v. Hicks*, 93 Ill. App. 667; *Compo v. Iron Co.*, 49 Mich. 39, 12 N. W. 901; *Emery v. Chase*, 5 Greenl. (Me.) 232; *Brewer v. Hardy*, 22 Pick. (Mass.) 376, 33 Am. Dec. 747; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258; *IN RE SMITH'S ESTATE*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, *Burdick Cas. Real Property*; *Adams v. Adams*, 21 Wall. (U. S.) 185, 22 L. Ed. 504.

⁵⁶ *Dunbar v. Soule*, 129 Mass. 284; *Delaplaine v. Lewis*, 19 Wis. 476; *Inglis v. Sailors' Snug Harbor*, 3 Pet. (U. S.) 99, 7 L. Ed. 617.

⁵⁷ *Id.*

⁵⁸ *Gindrat v. Gas-Light Co.*, 82 Ala. 596, 2 South. 327, 60 Am. Rep. 769; *Dillenbeck v. Pinnell*, 121 Iowa, 201, 96 N. W. 860; *Larkin v. Wikoff*, 75 N. J. Eq. 462, 72 Atl. 98, 79 Atl. 365.

⁵⁹ *Festorazzi v. Church*, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48; *Thompson v. Womack*, 9 La. Ann. 555; *Haxtun v. Corse*, 2 Barb. Ch. (N. Y.) 506.

⁶⁰ *Ashhurst v. Given*, 5 Watts & S. (Pa.) 323; *Salem Capital Flour Mills Co. v. Canal Co. (C. C.)* 33 Fed. 146.

⁶¹ 1 *Perry, Trusts* (4th Ed.) § 60; *Neilson v. Lagow*, 12 How. (U. S.) 107, 13 L. Ed. 909.

⁶² *Lester v. Stephens*, 113 Ga. 495, 39 S. E. 109; *First Nat. Bank v. Trust Co. (Tenn. Ch. App.)* 62 S. W. 392.

⁶³ *Carpenter v. Cook*, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118; *Sargent v. Burdett*, 96 Ga. 111, 22 S. E. 667; *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 38.

⁶⁴ *LAWRENCE v. LAWRENCE*, 181 Ill. 248, 54 N. E. 918, *Burdick Cas. Real Property*; *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89; *Appeal of Ashhurst*, 77 Pa. 464; *Heermans v. Schmaltz (C. C.)* 7 Fed. 566.

NATURE OF IMPLIED TRUSTS

133. As previously stated, implied trusts are created by operation of law. They are deducible from the transactions of the parties, either as presumed matters of intent, although unexpressed, or, regardless of any intent, construed as trusts as a matter of justice and equity, in order to prevent, or to counteract, fraud.

Implied trusts arise by operation of law.⁶⁵ As stated in the headnote, they are deducible from the transactions of the parties,⁶⁶ either as presumed matters of intent, although not expressed, or, regardless of the intention of the parties, construed as trusts as matters of justice, in order to prevent, or to protect against, fraud.⁶⁷ Trusts created by operation of law are not executed by the statute of uses, nor are they within the statute of frauds,⁶⁸ because from their nature they must be established by evidence outside of the instrument by which the legal title is transferred.⁶⁹ In implied trusts there is no element of permanency, as in the case of express trusts, since there is a certain hostility between the person who is entitled to the beneficial use of the property and the person who has the legal title.⁷⁰ Strictly speaking, they are not trusts in the ordinary sense,⁷¹ since the beneficiary is entitled at once to the legal estate.⁷²

Implied trusts are divided into two classes, resulting and constructive.

⁶⁵ *Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647; *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85; *Cook v. Fountain*, 3 Swanst. 585, 36 Eng. Reprint, 984.

⁶⁶ *Caldwell v. Matthewson*, 57 Kan. 258, 262, 45 Pac. 614.

⁶⁷ *Cone v. Dunham*, *supra*; *Boskowitz v. Davis*, 12 Nev. 446; *Gorrell v. Alspaugh*, *supra*.

⁶⁸ *Supra*. The original Statute of Frauds, § 8, expressly exempts trusts "which may arise or result by implication or construction of law." This clause has been re-enacted in many of our states.

⁶⁹ *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Kennedy's Heirs v. Kennedy's Heirs*, 2 Ala. 571; *Connolly v. Keating*, 102 Mich. 1, 60 N. W. 289; *Cooksey v. Bryan*, 2 App. D. C. 557; *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270.

⁷⁰ *Butts v. Cooper*, 152 Ala. 375, 384, 44 South. 616.

⁷¹ 1 *Perry*, *Trusts* (4th Ed.) § 166; 2 *Pom. Eq. Jur.* (2d Ed.) § 1058; *Appeal of Greenwood*, 92 Pa. 181; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Hammond v. Pennock*, 61 N. Y. 145; *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61.

⁷² *Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

Resulting Trusts—Nature and Classification

Resulting trusts are founded upon the presumed intention of the parties.⁷³ They never arise out of contract, or expressed intention of the parties,⁷⁴ but are implied by law from their conduct, or from facts and circumstances existing at the time the legal estate is conveyed.⁷⁵ In every case in which a resulting trust arises, there is a transfer of the legal title to land to one who is presumably not intended to hold the beneficial interest, or at least not all of it.⁷⁶

The classes into which resulting trusts are divided are variously enumerated by the different text-writers and the courts.⁷⁷ Some authorities, for example, include cases where one standing in a fiduciary relation uses fiduciary funds to purchase property in his own or in another's name.⁷⁸ Also, in other instances, it is said that a resulting trust will arise in connection with certain fraudulent dealings with property.⁷⁹

While the mere form of classification is unimportant, so far as the legal consequences are concerned, nevertheless such transactions as above referred to are generally treated as constructive trusts.⁸⁰

The principal classes of resulting trusts, as more correctly enumerated, are those where the grantor conveys only the legal estate, there being no reason to infer that he intended to part with the beneficial interest; those where the object or purpose of the trust

⁷³ *Cook v. Patrick*, 135 Ill. 499, 26 N. E. 658, 11 L. R. A. 573; *Klump v. Klump*, 51 Neb. 17, 70 N. W. 525; 2 Pom. Eq. Jur. (2d Ed.) § 1031. Fraud is not a necessary element. *Talbott v. Barber*, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491. And see *Thompson v. Marley*, 102 Mich. 476, 60 N. W. 976.

⁷⁴ *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Byers v. McEniry*, 117 Iowa, 499, 91 N. W. 797; *Stevens v. Fitzpatrick*, 218 Mo. 708, 118 S. W. 51.

⁷⁵ *Sanders v. Steele*, 124 Ala. 415, 26 South. 882; *Cunningham v. Cunningham*, 125 Iowa, 681, 101 N. W. 470; *Potter v. Clapp*, *supra*; *Portland Trust Co. v. Coulter*, 23 Or. 131, 31 Pac. 280; *Feely v. Hoover*, 130 Pa. 107, 18 Atl. 611; *Engstrom v. Livingston* (C. C.) 11 Fed. 370.

⁷⁶ *Lloyd v. Spillet*, 2 Atk. 150; 1 Perry, Trusts (4th Ed.) § 125; 2 Pom. Eq. Jur. (2d Ed.) § 1031.

⁷⁷ See *Lloyd v. Spillet*, *supra*, where Lord Chancellor Hardwicke names two classes; *Pomeroy*, Eq. Jur. § 7; *Eaton*, Eq. 399; *Bishop*, Eq. 125; 1 Perry, Trusts, § 125.

⁷⁸ *Perry*, Trusts, § 125; *Williams v. Williams*, 108 Iowa, 91, 78 N. W. 792; *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776.

⁷⁹ *Trapnall's Adm'x v. Brown*, 19 Ark. 39; *Walker v. Bruce*, 44 Colo. 109, 97 Pac. 250; *Lloyd v. Spillet*, 2 Atk. 148, 26 Eng. Reprint, 493.

⁸⁰ 2 Pom. Eq. Jur. (2d Ed.) § 1053; *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; *Dewey v. Moyer*, 72 N. Y. 70; *Huxley v. Rice*, 40 Mich. 73; *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803. And see *infra*.

fails entirely or in part; and those where one person pays the purchase money, but the title is taken in the name of another person.

Same—Grantor Disposing of Legal Title Only

When a conveyance is made without consideration, and it appears that it was intended that the grantee should take only the legal estate, a resulting trust arises⁸¹ in favor of the grantor. The mere fact that there was no consideration will not in itself raise a resulting trust,⁸² but if the circumstances are such that a gift is not to be presumed, a resulting trust will ordinarily be created.⁸³ A conveyance, however, to a wife or child, or to one to whom the grantor is under legal or moral obligation, will be presumed, as a rule, to convey the beneficial interest also, and no resulting trust arises.⁸⁴ If, however, one transfers the legal title to land to one who is not entitled to the beneficial interest, the equitable title remains in the grantor, and the grantee is a mere trustee for him.⁸⁵ Such cases were frequent, even before the statute of uses, and were called "resulting uses."⁸⁶ The reason for the rule is that a court of equity will not presume an intention to convey the beneficial interest in lands to a stranger without any consideration. If, however, there is any consideration,⁸⁷ or

⁸¹ *Williams v. Williams*, 108 Iowa, 91, 78 N. W. 792; *Hogan v. Strayhorn*, 65 N. C. 279; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Levet v. Needham*, 2 Vern. 138; *Cooke v. Dealey*, 22 Beav. 196.

⁸² *McClenahan v. Stevenson*, 118 Iowa, 106, 91 N. W. 925; *Philbrook v. Delano*, 29 Me. 410.

⁸³ *Bennett v. Hutson*, 33 Ark. 762; *Russ v. Mebius*, 16 Cal. 350; *McDermith v. Voorhees*, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286; *Giffen v. Taylor*, 139 Ind. 573, 37 N. E. 392. This rule may be changed by statute, in some states. See *Campbell v. Noble*, 145 Ala. 233, 41 South. 745.

⁸⁴ *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143; *In re Camp*, 56 Hun, 647, 10 N. Y. Supp. 141; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Hill v. Bishop of London*, 1 Atk. 620.

⁸⁵ 1 Perry, *Trusts* (4th Ed.) § 150; *Armstrong v. Wolsey*, 2 Wils. 19. And see *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142.

⁸⁶ *Farrington v. Barr*, 36 N. H. 86; *Philbrook v. Delano*, 29 Me. 410.

⁸⁷ An actual consideration will prevent a trust resulting. *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644. The consideration need not be expressed in the instrument of conveyance. *Bank of U. S. v. Housman*, 6 Paige (N. Y.) 526; *Miller v. Wilson*, 15 Ohio, 108. A good consideration is sufficient. *Groff v. Rohrer*, 35 Md. 327; *Sharington v. Strotton*, 1 Plow. 298. Cf. *Mildmay's Case*, 1 Coke, 175. But not friendship. *Warde v. Tuddingham*, 2 Rolle, Abr. 783, pl. 5. The earlier cases hold a mere nominal consideration sufficient to rebut the presumption. *Barker v. Keete*, Freem. 249. And see *Sandes' Case*, 2 Rolle, Abr. 791. The recital of a valuable consideration in the deed, even if the consideration is not paid, will prevent a resulting trust. *Verzier v. Convard*, 75 Conn. 1, 52 Atl. 255; *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822; *Farrington v. Barr*, 36 N. H. 86.

in the conveyance the use is declared to be to the grantee, as in the case of modern conveyances operating under the statute of uses, the beneficial interest passes to the grantee.⁸⁸ A use is held to result, however, only in cases where the fee is conveyed. If any less estate is transferred, the presumption that the grantor did not intend to benefit the stranger is rebutted, and the grantee takes the beneficial interest.⁸⁹

Same—Failure of Trust

Where lands are conveyed upon an express trust for declared purposes, and the trust fails, either in whole or in part, by reason of illegality, or of some defect in the instrument declaring it, or the trust is otherwise terminated, a resulting trust arises in favor of the creator, or his heirs, or residuary devisee, of so much of the property as remains at the time of the failure or termination.⁹⁰

Likewise, where the instrument disposing of the property, either a deed or a will, fails to declare the purpose of the trust, or the trust is only partially declared, as where, for example, property is conveyed to a person "in trust," or "upon the trusts hereafter to be declared," or "for the purpose I have before named,"⁹¹ and no trusts are in fact declared, or where trusts are declared as to only a part of the estate so conveyed,⁹² a resulting trust arises in favor of the creator or those claiming under him.⁹³

Same—Purchase Price Paid by Another

The most frequent illustration of a resulting trust is where the consideration or purchase price of property is paid by one person, but the title thereto is taken in the name of another person.⁹⁴ For

⁸⁸ See post. Cf. *Dillaye v. Greenough*, 45 N. Y. 438; *Squire v. Harder*, 1 Paige (N. Y.) 494, 19 Am. Dec. 446; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Blodgett v. Hildreth*, 103 Mass. 484; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *McKinney v. Burns*, 31 Ga. 295.

⁸⁹ *Shortridge v. Lamplugh*, 2 Salk. 678; *Anon.*, Brooke, 89.

⁹⁰ *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rép. 294; *Hargadine v. Henderson*, 97 Mo. 375, 11 S. W. 218; *Blount v. Walker*, 31 S. C. 13, 9 S. E. 804; *Appeal of Gumbert*, 110 Pa. 496, 1 Atl. 437; *Stevens v. Ely*, 16 N. C. 493; *Hawley v. James*, 5 Paige (N. Y.) 318; *Russell v. Jackson*, 10 Hare, 204; *Pilkington v. Boughbey*, 12 Sim. 114; *Williams v. Coade*, 10 Ves. 500.

⁹¹ *Mayor of Gloucester v. Wood*, 3 Hare, 131. And see *In re Schmucker's Estate v. Reel*, 61 Mo. 592.

⁹² *Vander Volgen v. Yates*, 9 N. Y. 219; *Robinson v. McDiarmid*, 87 N. C. 455.

⁹³ *Sturtevant v. Jaques*, 14 Allen (Mass.) 523; *Morice v. Bishop of Durham*, 10 Ves. 521; *Dawson v. Clarke*, 18 Ves. 247. And see cases in preceding note.

⁹⁴ *Costa v. Silva*, 127 Cal. 351, 59 Pac. 695; *Worrell v. Torrance*, 242 Ill.

example, "if A, purchases an estate with his own money, and takes the deed in the name of B., a trust results to A., because he paid the money."⁹⁵ In such cases equity presumes that it was the intention that the one who paid the money should hold the beneficial estate.⁹⁶ In order, however, that this presumption may arise, the payment must be actually made,⁹⁷ or a present obligation to pay incurred, at the time of the conveyance,⁹⁸ and the payment must be made as a purchase, and not as a loan.⁹⁹ A payment of part of the purchase price will also raise a resulting trust, in proportion to the amount paid.¹

An important application of this third class of resulting trusts is made in cases of joint purchase, where the title is taken in the name of one only.² Even if the title is taken in the name of them all jointly, yet if they contributed unequally to the purchase price, a trust results to each purchaser in proportion to his contribu-

64, 89 N. E. 693; *Howe v. Howe*, 199 Mass. 598, 85 N. E. 945, 127 Am. St. Rep. 516; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Evans v. McKee*, 152 Pa. 89, 25 Atl. 148; *McDONOUGH v. O'NIEL*, 113 Mass. 92, *Burdick Cas. Real Property*.

⁹⁵ *Chancellor Kent in Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 408.

⁹⁶ *Galbraith v. Galbraith*, 190 Pa. 225, 42 Atl. 683; *Sayre v. Townsend*, 15 Wend. (N. Y.) 647; *Kendall v. Mann*, 11 Allen (Mass.) 15; *Latham v. Henderson*, 47 Ill. 185; *Mathis v. Stufflebeam*, 94 Ill. 481; *Moss v. Moss*, 95 Ill. 449; *McLenan v. Sullivan*, 13 Iowa, 521; *Rogan v. Walker*, 1 Wis. 527; *Gashe v. Young*, 51 Ohio St. 376, 38 N. E. 20; *Lee v. Patten*, 34 Fla. 149, 15 South. 775; *Hews v. Kenney*, 43 Neb. 815, 62 N. W. 204. When a co-tenant takes the legal title to the whole tract, a resulting trust arises. *Rogers v. Donnellan*, 11 Utah, 108, 39 Pac. 494. For evidence held insufficient to establish this form of trust, see *Throckmorton v. Throckmorton*, 91 Va. 42, 22 S. E. 162.

⁹⁷ *Barnet v. Dougherty*, 32 Pa. 371; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Alexander v. Tams*, 13 Ill. 221; *Whiting v. Gould*, 2 Wis. 552; *Sullivan v. McLennans*, 2 Iowa, 442, 65 Am. Dec. 780; *Howell v. Howell*, 15 N. J. Eq. 75.

⁹⁸ *Gilchrist v. Brown*, 165 Pa. 275, 30 Atl. 839; *Whaley v. Whaley*, 71 Ala. 159; *Pain v. Farson*, 179 Ill. 185, 53 N. E. 579; *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645; *Midmer v. Midmer's Ex'rs*, 26 N. J. Eq. 299.

⁹⁹ *Davis v. Davis*, 88 Ga. 191, 14 S. E. 194; *Smith v. Wildman*, 194 Pa. 294, 45 Atl. 136; *Bell v. Edwards*, 78 S. C. 490, 59 S. E. 535; *Francestown v. Deering*, 41 N. H. 438. Cf. *McGowan v. McGowan*, 14 Gray (Mass.) 119, 74 Am. Dec. 668; *Cramer v. Hoose*, 93 Ill. 503; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

¹ *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Chadwick v. Felt*, 35 Pa. 305; *Miller v. Miller*, 99 Va. 125, 37 S. E. 792; *Smith v. Smith*, 85 Ill. 189; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Sayre v. Townsend*, 15 Wend. (N. Y.) 647; *Latham v. Henderson*, 47 Ill. 185.

² *Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799. And see cases in the preceding note.

tion.³ It will be presumed, however, in absence of evidence to the contrary, that joint purchasers contributed equally.⁴

In a number of states statutes have been passed abolishing resulting trusts, where the consideration is paid by one person and the title is taken by another.⁵ In such jurisdictions the beneficial interest as well as the legal title vests in the person named as the grantee, except where the title is taken in the name of another person without the consent of the person paying the purchase price,⁶ or where the grantee has taken the title in violation of some trust.⁷ It is also provided that the creditors of the person paying the consideration may, in case of fraud upon them, enforce against the property a resulting trust in favor of themselves, to the extent of their legal demands.⁸

Same—Deed to Member of Family

An exception to the general rule that a resulting trust occurs when the title is taken in the name of a person other than the person paying the consideration often arises where a conveyance is made to a member of the family of the person paying the consideration; the presumption being in such cases that a gift or an advancement was intended.⁹ For example, where the legal title is taken in the name of the wife¹⁰ or a child¹¹ of the purchaser, usually no trust in favor of the husband or parent results.

³ *Lewis v. Association*, 70 Ala. 276; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Baker v. Baker*, 75 N. E. Eq. 305, 72 Atl. 1000; *Union College v. Wheeler*, 61 N. Y. 88; *Speer v. Burns*, 173 Pa. 77, 34 Atl. 212.

⁴ *Shoemaker v. Smith*, 11 Humph. (Tenn.) 81.

⁵ *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52; *Smith v. Smith* (Ky.) 121 S. W. 1002; *Waldron v. Merrill*, 154 Mich. 203, 117 N. W. 631; *Leary v. Corvin*, 181 N. Y. 222, 73 N. E. 984, 106 Am. St. Rep. 542, 2 Ann. Cas. 664; *Tobin v. Tobin*, 139 Wis. 494, 121 N. W. 144.

⁶ 1 Stim. Am. St. Law, § 1706; *Haaven v. Hoaas*, 60 Minn. 313, 62 N. W. 110; *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905; *Ball v. Weatherford*, 12 Bush (Ky.) 505; *Connolly v. Keating*, 102 Mich. 1, 60 N. W. 289; *Schierloh v. Schierloh*, 148 N. Y. 103, 42 N. E. 409.

⁷ *Toney v. Wendling*, 138 Ind. 228, 37 N. E. 598; *Linsley v. Sinclair*, 24 Mich. 380; *Angermiller v. Ewald*, 133 App. Div. 691, 118 N. Y. Supp. 195; *Nelson v. Nelson* (Ky.) 96 S. W. 794.

⁸ *Chantland v. Bank*, 66 Kan. 549, 72 Pac. 230; *McGraw v. Daly*, 82 Mich. 500, 46 N. W. 671; *Connelly v. Sheridan*, 41 Minn. 18, 42 N. W. 595, 1 Stim. Am. St. Law, § 1706. But see *McCahill v. McCahill*, 11 Misc. Rep. 258, 32 N. Y. Supp. 836; *Gage v. Gage*, 83 Hun, 362, 31 N. Y. Supp. 903.

⁹ *Cartwright v. Wise*, 14 Ill. 417; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Seibold v. Christman*, 75 Mo. 308; *Bailey v. Dobbins*, 67 Neb. 548, 93 N. W. 687; *Hamilton v. Steele*, 22 W. Va. 348.

¹⁰ *Wright v. Wright*, 242 Ill. 71, 89 N. E. 789, 26 L. R. A. (N. S.) 161; *Staples v. Bowden*, 105 Me. 177, 73 Atl. 999; *Cairns v. Colburn*, 104 Mass. 274; *Scott v. Calladine*, 79 Hun, 79, 29 N. Y. Supp. 630.

¹¹ *Wright v. Wright*, *supra*; *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599;

The presumption, however, in favor of a gift or an advancement may be rebutted, and in this way a resulting trust may be established.¹²

Where on the other hand, the purchase money is furnished by a wife or child, and the title is taken in the name of the husband or father, a resulting trust does usually arise, in favor of the wife¹³ or of the child,¹⁴ in absence of evidence showing a contrary intention. Moreover, there is no presumption in favor of a gift when the purchase price is paid by a sister or brother, and the property is conveyed to another sister or brother.¹⁵

Same—What Law Governs

In connection with resulting trusts in general, whether a resulting trust arises or not is a question to be determined by the law of the state in which the land is situated.¹⁶

Constructive Trusts—In General

The second class of implied trusts is known as "constructive trusts." As previously stated, they arise entirely by construction of law, independently of any actual or presumed intention of the parties, and often directly contrary to their intention.¹⁷ They are raised by courts of equity in order to do justice, or for the purpose of frustrating fraud.¹⁸ In fact, fraud, or misrepresentation, or concealment, or abuse of fiduciary relations is always a necessary

Waterman v. Seeley, 28 Mich. 77; *Partridge v. Havens*, 10 Paige (N. Y.) 618; *Wheeler v. Kidder*, 105 Pa. 270.

¹² *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Jackson ex dem. Benson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; *Persons v. Persons*, 25 N. J. Eq. 250; *Taylor v. Taylor*, 4 Gilm. (Ill.) 303; *Butler v. Insurance Co.*, 14 Ala. 777; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Cooley v. Cooley*, 172 Mass. 476, 52 N. E. 631; *McMurray v. McMurray*, 180 Mo. 526, 79 S. W. 701.

¹³ *Wright v. Wright*, 242 Ill. 71, 89 N. E. 789, 26 L. R. A. (N. S.) 161; *Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114; *Hayward v. Cain*, 110 Mass. 273; *Lloyd v. Woods*, 176 Pa. 63, 34 Atl. 926.

¹⁴ *Champlin v. Champlin*, 136 Ill. 309, 26 N. E. 526, 29 Am. St. Rep. 323; *Stevens v. Fitzpatrick*, 218 Mo. 708, 118 S. W. 51; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *O'Neill v. O'Neill*, 227 Pa. 334, 76 Atl. 26.

¹⁵ *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Camden v. Bennett*, 64 Ark. 155, 41 S. W. 854; *Wilson v. Owens*, 26 Grant, Ch. (U. S.) 27. But see *Printup v. Patton*, 91 Ga. 422, 18 S. E. 311.

¹⁶ *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Pensenneau v. Pensenneau*, 22 Mo. 27.

¹⁷ *Robinson v. Pierce*, 118 Ala. 273, 24 South. 984, 45 L. R. A. 66, 72 Am. St. Rep. 160; *Williams v. Williams*, 108 Iowa, 91, 78 N. W. 792; *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776.

¹⁸ *Scadden Flat Gold-Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Williams v. Williams*, *supra*; *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765; *Springer v. Young*, 14 Or. 280, 12 Pac. 400.

element of constructive trusts.¹⁹ Their forms are much more numerous than resulting trusts, and are as various as the frauds by which property may be obtained.²⁰ The fraud, however, need not be actual,²¹ but may be implied, such as fraud which is presumed from the relation of the parties.²² Where, for example, property which is held in trust is acquired by a purchaser who has notice of the trust,²³ or by one who pays no consideration for the transfer, the transferee will hold the property subject to a constructive trust in favor of the one beneficially entitled.²⁴ This same result obtains where the title is transferred by operation of law, as where it descends to the heirs of the trustee.²⁵ In this class of constructive trusts no actual fraud is necessary. Moreover, in general, whenever any person acquires property by fraud, concealment, or imposition, or under circumstances which would make it unjust or inequitable for him to retain it, he will be deemed, in equity, to hold it in trust for the person who is equitably entitled to it.²⁶ For example, where a trustee or other fiduciary purchases property with fiduciary funds, and takes title in his own name, or in the name of a third person, he holds the property

¹⁹ *Alexander v. Spaulding*, 160 Ind. 181, 66 N. E. 694; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Pierce v. Pierce*, 55 Mich. 629, 22 N. W. 81; 1 *Perry, Trusts* (4th Ed.) § 166. See *Frick Co. v. Taylor*, 94 Ga. 683, 21 S. E. 713; *Farris v. Farris* (Ky.) 29 S. W. 618; *Lawson v. Hunt*, 153 Ill. 232, 38 N. E. 629; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067.

²⁰ *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480; *Barnes v. Thuet*, 116 Iowa, 359, 89 N. W. 1085; *Frick Co. v. Taylor*, 94 Ga. 683, 21 S. E. 713; *Smith v. Wright*, 49 Ill. 403; *Cook v. Bason*, 164 Mo. 594, 65 S. W. 227; *Luse v. Rankin*, 57 Neb. 632, 78 N. W. 258; *Reynolds v. Insurance Co.*, 160 N. Y. 635, 55 N. E. 305; *Appeal of Danzeisen*, 73 Pa. 65.

²¹ *Barnes v. Thuet*, 116 Iowa, 359, 89 N. W. 1085. See, also, cases in preceding notes.

²² See *Fetter*, Eq. p. 142; 1 *Perry, Trusts* (4th Ed.) § 194; *Roggenkamp v. Roggenkamp*, 15 C. C. A. 600, 68 Fed. 605; *Cobb v. Trammell*, 9 Tex. Civ. App. 527, 30 S. W. 482; *Haight v. Pearson*, 11 Utah, 51, 39 Pac. 479. But see *Brown v. Brown*, 154 Ill. 35, 39 N. E. 983.

²³ *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 5 L. Ed. 651; *Oliver v. Piatt*, 3 How. (U. S.) 333, 11 L. Ed. 622; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86, 9 L. Ed. 60; *James v. Cowing*, 17 Hun (N. Y.) 256; *Ryan v. Doyle*, 31 Iowa, 53; *Smith v. Walser*, 49 Mo. 250; *Smith v. Jeffreys* (Miss.) 16 South. 377.

²⁴ *Caldwell v. Carrington*, 9 Pet. (U. S.) 86, 9 L. Ed. 60.

²⁵ *Randall v. Phillips*, 3 Mason, 378, Fed. Cas. No. 11,555; *Caines v. Grant's Lessee*, 5 Bin. (Pa.) 119.

²⁶ *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433; *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015; *Newell v. Newell*, 14 Kan. 302; *Dime Sav. Bank v. Fletcher*, 158 Mich. 162, 122 N. W. 540, 35 L. R. A. (N. S.) 858; *Putnam v. Safe Deposit Co.*, 191 N. Y. 166, 83 N. E. 789; *Tetlow v. Rust*, 227 Pa. 292, 76 Atl. 22.

so purchased in trust for the person or persons entitled to the funds with which the property was purchased.²⁷

Many writers and cases treat this foregoing form of trust as a "resulting trust," although it would seem more appropriate to class it as a constructive trust, since some element of fraud, either actual or implied, is usually present.²⁸ However, where a fiduciary, whether a trustee, guardian, corporation director, agent, partner, administrator, executor, or any other person occupying a position of confidence and trust with relation to another person, takes advantage of the information obtained by him by reason of such position, and by fraud acquires title to any property connected with his trust, it is generally agreed that a constructive trust arises in favor of the person beneficially interested.²⁹ Thus, if one holding a fiduciary position renews a lease to lands held by his beneficiary, the renewal will operate to the latter's benefit, as where leases are renewed by trustees or partners.³⁰ Likewise, if a man appropriates another's property, or wrongfully converts it into a changed form, the person wronged may treat the other as holding the property in trust for him. This is the case where an agent embezzles money and invests it in land. So long as the money can be traced, a trust may be established in favor of the one defrauded.³¹

Another class of cases where constructive trusts are raised is where the trustee acquires the trust property by purchase at his own sale of the property,³² or by purchase or gift from the cestui que trust.³³ Moreover, if any person fraudulently causes a judi-

²⁷ *Buffalo, N. Y. & E. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533; *Barker v. Barker*, 14 Wis. 131; *Rice v. Rice*, 108 Ill. 199; *Weaver v. Fisher*, 110 Ill. 146; *Murphy v. Murphy*, 80 Iowa, 740, 45 N. W. 914; *Everly v. Harrison*, 167 Pa. 355, 31 Atl. 668; *Morgan v. Fisher's Adm'r*, 82 Va. 417; *Pillars v. McConnell*, 141 Ind. 670, 40 N. E. 689; *Merket v. Smith*, 33 Kan. 66, 5 Pac. 394; *Thompson v. Hartline*, 105 Ala. 263, 16 South. 711.

²⁸ 1 Pom. Eq. Jur. § 1049, note; *Eaton*, Eq. 413.

²⁹ *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774; *Phipps v. Phipps*, 39 Kan. 495, 18 Pac. 707; *King v. Remington*, 36 Minn. 15, 29 N. W. 352; *Peck v. Peck*, 110 N. Y. 64, 17 N. E. 383; *Barrett v. Bamber*, 81 Pa. 247.

³⁰ *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & P. 376.

³¹ *Foote v. Colvin*, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; *Oliver v. Piatt*, 3 How. (U. S.) 333, 11 L. Ed. 622; *Grouch v. Lumber Co. (Miss.)* 16 South. 496.

³² *Sypher v. McHenry*, 18 Iowa, 232; *Bush v. Sherman*, 80 Ill. 160. Cf. *Hawley v. Cramer*, 4 Cow. (N. Y.) 717.

³³ *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Kern v. Chalfant*, 7 Minn. 487 (Gil. 393); 2 Pom. Eq. Jur. (2d Ed.) § 1053.

cial sale, and becomes a purchaser at such sale, he may be charged with a constructive trust.³⁴

Another form of constructive trust may arise where a testator or an ancestor leaves property to a devisee or an heir, induced by a false and fraudulent promise of the devisee or heir that he will hold the property for the benefit of another person. The courts will enforce such a promise by making the devisee a trustee of the property for such person.³⁵ Also, if one by fraud or other inequitable conduct induces another not to acquire certain land, promising that he will purchase and hold the land for such other person, but, on the contrary, purchases the land for himself, he will be treated as a trustee for such other person.³⁶ Likewise, where one at a judicial sale falsely represents that he is buying for another, who has an interest in the property, the land so purchased may be charged with a constructive trust.³⁷ This class of cases is illustrated by one who falsely claims to be purchasing for the mortgagor at a foreclosure sale.³⁸ A mere verbal promise, accompanied with no fraud, to buy and hold land for another, will not raise, however, a constructive trust in the land so purchased.³⁹

Constructive trusts may also arise through mistake, as where one by reason of some mistake obtains title to land belonging to another.⁴⁰ Equity will give relief in such cases, in order to do justice between the parties, since otherwise it would work a fraud upon the rightful owner of the property.

³⁴ *Huxley v. Rice*, 40 Mich. 73; *Massey v. Young*, 73 Mo. 260; *Peck v. Peck*, 110 N. Y. 64, 17 N. E. 383; *Uzzle v. Wood*, 54 N. C. 226.

³⁵ *Gemmel v. Fletcher*, 76 Kan. 577, 92 Pac. 713, 93 Pac. 339; *In re O'Hara's Will*, 95 N. Y. 403, 47 Am. Rep. 53; *Church v. Ruland*, 64 Pa. 432; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Dowd v. Tucker*, 41 Conn. 197. And see *Trustees of Amherst College v. Ritch*, 10 Misc. Rep. 503, 31 N. Y. Supp. 885.

³⁶ *Wheeler v. Reynolds*, 66 N. Y. 227; *Bardon v. Hartley*, 112 Wis. 74, 87 N. W. 809. See, also, *Eimer v. Wellsand*, 93 Minn. 444, 101 N. W. 612.

³⁷ *McRae v. Huff*, 32 Ga. 681; *Roach v. Hudson*, 8 Bush (Ky.) 410; *McNew v. Booth*, 42 Mo. 189; *Marlatt v. Warwick*, 18 N. J. Eq. 108.

³⁸ *Sheriff v. Neal*, 6 Watts (Pa.) 534; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Dennis v. McCagg*, 32 Ill. 429; *Vanbever v. Vanbever*, 97 Ky. 344, 30 S. W. 983, 17 Ky. Law Rep. 242.

³⁹ *Taylor v. Kelley*, 103 Cal. 178, 37 Pac. 216; *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451; *Wheeler v. Reynolds*, 66 N. Y. 227; *Shallcross v. Mawhinny*, 8 Sadler (Pa.) 142, 7 Atl. 734.

⁴⁰ *Cole v. Fickett*, 95 Me. 265, 49 Atl. 1066; *Smith v. Walser*, 49 Mo. 250; *Lamb v. Schiefner*, 129 App. Div. 684, 114 N. Y. Supp. 34; *School Directors of Tyrone Tp. v. Dunkleberger*, 6 Pa. 29.

INCIDENTS OF EQUITABLE ESTATES

134. A trustee is the holder of the legal title. The beneficiary or the cestui que trust is the beneficial owner.

The rights and duties of the trustee and the beneficiary depend, largely, upon the nature and terms of the trust.

The beneficial estate is subject to the same incidents as attach to similar legal estates.

The distinction between a trustee and a beneficiary or cestui que trust has been previously pointed out.⁴¹ In every active trust there is a separation of the legal and equitable estate;⁴² the legal estate being in the trustee, and the equitable estate being vested in the beneficiary. In the case, however, of passive trusts, otherwise called "dry or naked trusts," in which the trustee is charged with no duties,⁴³ and which are executed by the statute of uses,⁴⁴ the legal and equitable estates unite in the cestui que trust. On the other hand, active trusts, which require the performance of duties by the trustee in order to carry out the purposes of the trust,⁴⁵ are not executed by the statute of uses,⁴⁶ and the legal title remains in the trustee until the duties of his trust are completed.⁴⁷ Whenever the legal and equitable titles are united in the same person, there is a merger, if the estates are of the same quantity.⁴⁸ No merger takes place, however, if it is contrary to

⁴¹ See Creation of Express Trusts, Parties, *supra*.

⁴² *Allen v. Rees*, 136 Iowa, 423, 110 N. W. 583, 8 L. R. A. (N. S.) 1137; *Sims v. Morrison*, 92 Minn. 341, 100 N. W. 88; *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118.

⁴³ *Drake v. Steele*, 242 Ill. 301, 89 N. E. 1018; *Everts v. Everts*, 80 Mich. 222, 45 N. W. 88; *Cornwell v. Wulff*, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53; *Verdin v. Slocum*, 71 N. Y. 345; *Appeal of Rodrigue* (Pa.) 15 Atl. 680.

⁴⁴ *Prince v. Prince*, 162 Ala. 114, 49 South. 873; *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104; *Wolters v. Shraft*, 69 N. J. Eq. 215, 66 Atl. 398; *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676; *Wilson v. Heilman*, 219 Pa. 237, 68 Atl. 674; *Milton v. Pace*, 85 S. C. 373, 67 S. E. 458. See, also, *supra*.

⁴⁵ *Harris v. Ferguy*, 207 Ill. 534, 69 N. E. 844; *Hunt v. Hunt*, 124 Mich. 502, 83 N. W. 371; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *In re Forney's Estate*, 161 Pa. 209, 28 Atl. 1086.

⁴⁶ *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Lima v. Cook*, 197 Mass. 11, 83 N. E. 12; *Parker v. McMillan*, 55 Mich. 265, 21 N. W. 305; *Dyett v. Trust Co.*, 140 N. Y. 54, 35 N. E. 341; *Appeal of Barnett*, 46 Pa. 392, 86 Am. Dec. 502.

⁴⁷ *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Danahy v. Noonan*, 176 Mass. 467, 57 N. E. 679; *In re Forney's Estate*, 161 Pa. 209, 28 Atl. 1086; *Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760.

⁴⁸ *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Mason v. Mason's*

the intention of the parties, or would work a wrong.⁴⁹ In passive trusts the beneficiary is entitled to the possession of the premises, and the exercise of all the rights of an actual owner.⁵⁰ The legal estate vests immediately and directly in the beneficiary,⁵¹ and he may in his own name bring and defend actions relating to it.⁵² In active or special trusts, on the other hand, the various duties imposed upon trustees, such as those to convey lands held in trust to a certain person or persons, to sell the lands, to invest the trust funds, and to hold the property and receive the rents and profits for the benefit of the cestuis que trustent, require that the legal estate remain in the trustees. Moreover, it is often necessary that a trustee should retain the possession in order that he may perform the duties of his trust.⁵³

Rights and Duties of Trustees

The extent of the estate taken by a trustee has been previously considered,⁵⁴ and this is to be determined by the terms of the instrument creating the trust.⁵⁵ Likewise the rights and powers of a trustee,⁵⁶ as well as his duties,⁵⁷ are measured and limited by the special terms and provisions of the trust instrument. At law, the trustee is regarded as the real owner of the property, since

Ex'rs, 2 Sandf. Ch. (N. Y.) 432; *Healey v. Alston*, 25 Miss. 190; *Den ex dem. Wills v. Cooper*, 25 N. J. Law, 137. But see, where the estates are not equal, *Donalds v. Plumb*, 8 Conn. 447.

⁴⁹ *NELLIS v. RICKARD*, 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227, *Burdick Cas. Real Property*; *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53, 8 Am. Dec. 465; *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 393; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Lewis v. Starke*, 10 Smedes & M. (Miss.) 120.

⁵⁰ *Campbell v. Prestons*, 22 Grat. (Va.) 396; *Harris v. McElroy*, 45 Pa. 216; *Stevenson v. Lesley*, 70 N. Y. 512. Retention of possession by the grantor does not invalidate the trust. *Williams v. Evans*, 154 Ill. 98, 39 N. E. 698.

⁵¹ *Silverman v. Kristufek*, 162 Ill. 222, 44 N. E. 430; *Bayer v. Cocherill*, 3 Kan. 282; *Thompson v. Conant*, 52 Minn. 208, 53 N. W. 1145; *McGoon v. Scales*, 9 Wall. (U. S.) 23, 19 L. Ed. 545.

⁵² *Welch v. Allen*, 21 Wend. (N. Y.) 147; *Holmes v. Pickett*, 51 S. C. 271, 29 S. E. 82.

⁵³ *Matthews v. McPherson*, 65 N. C. 189; *Young v. Miles' Ex'rs*, 10 B. Mon. (Ky.) 290; *Appeal of Shankland*, 47 Pa. 113; *Appeal of Barnett*, 46 Pa. 392, 86 Am. Dec. 502; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329.

⁵⁴ *Extent of Trustee's Estate*, *supra*.

⁵⁵ *Paddock v. Wallace*, 117 Mass. 99; *Hawkins v. Chapman*, 36 Md. 83; *Southern Pac. R. Co. v. Doyle* (C. C.) 11 Fed. 253.

⁵⁶ *Floyd v. Davis*, 98 Cal. 591, 33 Pac. 746; *Hattie v. Gehin*, 76 N. J. Eq. 340, 76 Atl. 4; *In re Riley's Estate*, 4 Misc. Rep. 338, 24 N. Y. Supp. 309; *In re Markle's Estate*, 182 Pa. 378, 38 Atl. 612.

⁵⁷ *Russell v. Peyton*, 4 Ill. App. 473; *Murphy v. Delano*, 95 Me. 229, 49 Atl. 1053, 55 L. R. A. 727; *In re Fish*, 45 Misc. Rep. 298, 92 N. Y. Supp. 394.

the legal estate, the only one recognized at law, is vested in him,⁵⁸ and as the legal owner he must bring and defend all actions affecting the legal title.⁵⁹ If the cestui que trust is in possession, he may, however, maintain trespass.⁶⁰ Likewise, under the law theory, the trustee may sell or devise the property as his own.⁶¹ In equity, however, the beneficiary is regarded as the real owner, and any dealings with the property by the trustee for other than trust purposes are disregarded,⁶² and all assignees of the trustee's title take it subject to the rights of the beneficiary, if they have notice of the trust, or do not pay a valuable consideration.⁶³ The general duties imposed upon trustees are to manage and control the trust property and to collect the rents and profits. Generally, moreover, a trustee has the right of possession, even against the beneficiary.⁶⁴ A trustee may also be given power to sell, mortgage, or to lease the property. In the absence, however, of an express or implied power to sell, a trustee has usually no power to sell,⁶⁵ without an order of a court of equity.⁶⁶ Likewise a trustee has generally no power to mortgage property in absence of such authority in the trust instrument.⁶⁷ There is, however,

⁵⁸ *Martin v. Poague*, 4 B. Mon. (Ky.) 524; *Denton's Guardians v. Denton's Ex'rs*, 17 Md. 403; *Chapin v. Society*, 8 Gray (Mass.) 580.

⁵⁹ *Mackey's Adm'r v. Coates*, 70 Pa. 350; *Warland v. Colwell*, 10 R. I. 369; *Stearns v. Palmer*, 10 Metc. (Mass.) 32; *Second Congregational Soc. v. Waring*, 24 Pick. (Mass.) 309.

⁶⁰ *Cox v. Walker*, 26 Me. 504.

⁶¹ *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45; *Den ex dem. Canoy v. Troutman*, 29 N. C. 155; *Perry, Trusts*, § 321. As to the words which, in a general devise, will carry estates of which the testator holds the legal title as trustee, see *Taylor v. Benham*, 5 How. (U. S.) 233, 12 L. Ed. 130; *Jackson ex dem. Livingston v. De Lancy*, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; *Merritt v. Loan Co.*, 2 Edw. Ch. (N. Y.) 547; *Ballard v. Carter*, 5 Pick. (Mass.) 112, 16 Am. Dec. 377.

⁶² *Perry, Trusts*, § 321; *Spratt v. Livingston*, 32 Fla. 507, 14 South. 160, 22 L. R. A. 453; *Stearns v. Palmer*, 10 Metc. (Mass.) 32; *Arnold v. Lumber Co.* (Tex. Civ. App.) 123 S. W. 1162.

⁶³ *Cruger v. Jones*, 18 Barb. (N. Y.) 468; *Lahens v. Dupasseur*, 56 Barb. (N. Y.) 266. See *Constructive Trusts*, ante.

⁶⁴ *Thieme v. Zumpe*, 152 Ind. 359, 52 N. E. 449; *Mee v. Fay*, 190 Mass. 40, 76 N. E. 229; *Simmons v. Hadley*, 63 N. J. Law, 227, 43 Atl. 661; *Appeal of Alsop*, 9 Pa. 374.

⁶⁵ *Moll v. Gardner*, 214 Ill. 248, 73 N. E. 442; *Berner v. Bank*, 125 Iowa, 438, 101 N. W. 156; *Bremer v. Hadley*, 196 Mass. 217, 81 N. E. 961; *Lahens v. Dupasseur*, 56 Barb. (N. Y.) 266; *McCreary v. Bomberger*, 11 Pa. Co. Ct. R. 68.

⁶⁶ *Burwell v. Bank*, 119 Ga. 633, 46 S. E. 885; *Murray v. Rodman*, 76 S. W. 854, 25 Ky. Law Rep. 978; *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, 725.

⁶⁷ *Tuttle v. Bank*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420;

an implied power to lease premises customarily leased, in order to carry out the purpose of the trust.⁶⁸

Upon the death of a trustee, his legal title to trust property in lands descends to his heirs.⁶⁹ Under statutes, however, the title may vest in the courts of equity until a new trustee is appointed.⁷⁰ Trust estates are often given to two or more trustees jointly, and when the instrument creating the trust is obscure such a construction is favored.⁷¹ Joint trustees, however, cannot have partition,⁷² and upon the death of one the title remains in the survivor or survivors,⁷³ and statutes abolishing the rule of survivorship in joint tenancies usually except trust estates.⁷⁴

A trust will never be allowed to fail, however, for want of a trustee, for the court will appoint one to carry out the trust.⁷⁵ Questions relating to appointment and removal of trustees relate more properly to treatises on equity, and are not considered here.⁷⁶

Interest and Rights of Beneficiaries

In a court of law, as distinguished from a court of equity, the beneficiary under a trust has no standing in his own person. Since the legal title is in the trustee, the beneficiary can assert his rights only in a court of equity.⁷⁷

As shown, however, in the preceding section, in equity, and under the doctrine now generally prevailing, a beneficiary is re-

Cruger v. Jones, 18 Barb. (N. Y.) 467; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. 450.

⁶⁸ *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108; *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640; *Geer v. Bank*, 132 Mich. 215, 93 N. W. 437; *Corse v. Corse*, 144 N. Y. 569, 39 N. E. 630.

⁶⁹ *LAWRENCE v. LAWRENCE*, 181 Ill. 248, 54 N. E. 918, *Burdick Cas. Real Property*; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, 7 L. R. A. (N. S.) 407; *Appeal of Carlisle*, 9 Watts (Pa.) 331.

⁷⁰ *Lecroix v. Malone*, 157 Ala. 434, 47 South. 725; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Collier v. Blake*, 14 Kan. 250; *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386.

⁷¹ *Saunders v. Schmaelzle*, 49 Cal. 59.

⁷² *Baldwin v. Humphrey*, 44 N. Y. 609.

⁷³ *Reichert v. Coal Co.*, 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307; *Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 367; *Lewine v. Gerardo*, 60 Misc. Rep. 261, 112 N. Y. Supp. 192; *Appeal of Carlisle*, *supra*.

⁷⁴ *Boyer v. Sims*, 61 Kan. 593, 60 Pac. 309; *Oxley Stave Co. v. Butler County*, *supra*.

⁷⁵ *Adams v. Adams*, 21 Wall. (U. S.) 185, 22 L. Ed. 504; *Tainter v. Clark*, 5 Allen (Mass.) 66; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561.

⁷⁶ See *Fetter*, Eq. p. 200; 1 *Perry, Trusts*, § 259; 2 *Pom. Eq. Jur.* § 1059.

⁷⁷ *Denton's Guardians v. Denton's Ex'rs*, 17 Md. 403.

garded as the real owner of the trust property. The trustee, in fact, is regarded as having no actual property right, but a duty to be performed for the benefit of the cestui que trust.⁷⁸

The estate or interest of a beneficiary under an express trust is determined by the terms of the instrument creating the trust.⁷⁹ The rules governing the limitations of legal estates apply,⁸⁰ and a beneficiary takes the same equitable estate in duration as he would take if the estate were a legal one.⁸¹ Under a passive trust the beneficiary is, in equity, treated as an absolute owner.⁸² Unless otherwise prohibited by force of statute,⁸³ he may assign his equitable interest, and compel a conveyance by the trustee,⁸⁴ and some cases hold that the beneficiary may convey the property and give good title thereto without the intervention of the trustee.⁸⁵ Under a special or active trust, the rights of the beneficiary consist principally in his power to compel the trustee to perform the trust.

Equitable estates are, in general, subject to the same incidents as attach to similar legal estates.⁸⁶ Ordinarily the beneficiary may alienate or mortgage his interest⁸⁷ without the consent of the trustee,⁸⁸ unless such rights are forbidden by the instrument

⁷⁸ *Spratt v. Livingston*, 32 Fla. 507, 14 South. 160, 22 L. R. A. 453; *Arnold v. Lumber Co.* (Tex. Civ. App.) 123 S. W. 1162.

⁷⁹ *Floyd v. Forbes*, 71 Cal. 588, 12 Pac. 726; *Padfield v. Padfield*, 68 Ill. 210; *Codman v. Krell*, 152 Mass. 214, 25 N. E. 90; *In re Knowle's Estate*, 208 Pa. 219, 57 Atl. 518; *Ward v. Funsten*, 86 Va. 359, 10 S. E. 415.

⁸⁰ *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744; *Smith v. Baxter*, 62 N. J. Eq. 209, 49 Atl. 1130; *Vashon's Ex'r v. Vashon*, 98 Va. 170, 35 S. E. 457; *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

⁸¹ *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Reardon v. Reardon*, 192 Mass. 448, 78 N. E. 430; *Hunter v. Hunter*, 17 Barb. (N. Y.) 25; *Appeal of Fowler*, 125 Pa. 388, 17 Atl. 431, 11 Am. St. Rep. 902.

⁸² *Bowditch v. Andrew*, 8 Allen (Mass.) 339.

⁸³ As in New York and a few other states. See 1 *Stim. Am. St. Law*, § 1720.

⁸⁴ *Sherman v. Dodge's Estate*, 28 Vt. 26; *Waring's Ex'r v. Waring*, 10 B. Mon. (Ky.) 331; *Winona & St. P. R. Co. v. Railroad Co.*, 26 Minn. 179, 2 N. W. 489. Where it was the duty of the trustee to convey at the request of his cestui, a conveyance may be presumed, in order to give security to titles, although in fact none has ever been made. *Moore v. Jackson*, 4 Wend. (N. Y.) 58.

⁸⁵ *Witham v. Brooner*, 63 Ill. 344; *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138; *Seidelbach v. Knaggs*, 44 App. Div. 169, 60 N. Y. Supp. 774; *Lamar's Ex'rs v. Simpson*, 1 Rich. Eq. (S. C.) 71, 42 Am. Dec. 345.

⁸⁶ *Badgett v. Keating*, 31 Ark. 400; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536. See, also, *Paine v. Forsaith*, 86 Me. 357, 30 Atl. 11.

⁸⁷ *Beuley v. Curtis*, 92 Ky. 505, 18 S. W. 357; *Hancock v. Ship*, 1 J. J. Marsh. (Ky.) 437.

⁸⁸ *Dibrell v. Carlisle*, 51 Miss. 785; *Foster v. Friede*, 37 Mo. 36; *Burnett v. Hawpe's Ex'r*, 25 Grat. (Va.) 481.

creating the trust,⁸⁹ or unless the statutes otherwise provide.⁹⁰ Equitable estates are also subject to the payment of the debts of the cestui que trust,⁹¹ if he has a vested interest, with right of present enjoyment,⁹² and power of alienation.⁹³ Where, however, the rents and profits are to be applied to the support of the cestui que trust, and he has no power of alienation, his creditors cannot reach his interest.⁹⁴ An equitable estate may also be lost by adverse possession, since the statutory period sufficient to bar the legal estate of the trustee also bars the equitable estate of the cestui que trust.⁹⁵ Possession by the trustee, however, is the possession of the cestui que trust, and the statute will not run in favor of a trustee of an express trust against the beneficiary before the trust terminates,⁹⁶ or before the trustee has repudiated his trust.⁹⁷ The rights of curtesy and dower in equitable estates have been previously considered.⁹⁸

⁸⁹ *Wenzel v. Powder*, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; *Wright v. Leupp*, 70 N. J. Eq. 130, 62 Atl. 464; *Carmichael v. Thompson*, 8 Sadler (Pa.) 120, 6 Atl. 717; *Stratton v. McKinnie* (Tenn. Ch. App.) 62 S. W. 636.

⁹⁰ *Blackburn v. Webb*, 133 Cal. 420, 65 Pac. 952; *Weaver v. Van Akin*, 71 Mich. 69, 38 N. W. 677; *Noyes v. Blakeman*, 6 N. Y. 567.

⁹¹ *Woodward v. Stubbs*, 102 Ga. 187, 29 S. E. 119; *Farmers' Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *Jackson ex dem. Ten Eyck v. Walker*, 4 Wend. (N. Y.) 462; *Hutchins v. Heywood*, 50 N. H. 491.

⁹² *Bronson v. Thompson*, 77 Conn. 214, 58 Atl. 692; *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828; *McKimmon v. Rogers*, 56 N. C. 200; *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

⁹³ *Bergmann v. Lord*, *supra*; *Ullman v. Cameron*, 92 App. Div. 91, 87 N. Y. Supp. 148.

⁹⁴ *Huntington v. Jones*, 72 Conn. 45, 43 Atl. 564; *Russell v. Milton*, 133 Mass. 180; *Harvey v. Brisbin*, 143 N. Y. 151, 38 N. E. 108.

⁹⁵ *Walton v. Ketchum*, 147 Mo. 209, 48 S. W. 924; *Crook v. Glenn*, 30 Md. 55; *Clayton v. Cagle*, 97 N. C. 300, 1 S. E. 523; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; *Hubbell v. Medbury*, 53 N. Y. 98; *Halsey v. Tate*, 52 Pa. 311; *Neel v. McElhenny*, 69 Pa. 300; *Robertson v. Wood*, 15 Tex. 1, 65 Am. Dec. 140.

⁹⁶ *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579.

⁹⁷ *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29; *Kansas City Inv. Co. v. Fulton*, 4 Kan. App. 115, 46 Pac. 188; *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328; *Zacharias v. Zacharias*, 23 Pa. 452; *Seymour v. Freer*, 8 Wall. (U. S.) 203, 19 L. Ed. 306; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388; *Oliver v. Piatt*, 3 How. (U. S.) 333, 11 L. Ed. 622; *Davis v. Coburn*, 128 Mass. 377. But see *Halsey v. Tate*, 52 Pa. 311; *Neel v. McElhenny*, 69 Pa. 300.

⁹⁸ *Ante*, chapter VIII.

CHARITABLE OR PUBLIC TRUSTS

135. Charitable or public trusts are trusts created for the benefit of the public at large, or of some descriptive part of it. They are established for the benefit of an indefinite number of persons, and the individuals to be benefited are uncertain.

The general purposes for which public trusts are created are:

- (a) The relief of poverty and distress.
- (b) Religion.
- (c) The promotion of education.

Charitable trusts, as distinguished from private trusts, differ principally in that:

- (a) Less certainty of description in designating the object and beneficiaries is required.
- (b) A public trust may be perpetual, and a gift from one charity to another may be valid, although on a contingency which would be too remote, under the rule against perpetuities, in the case of a private trust.
- (c) By the *cy pres* doctrine, adopted in some states, trust funds, in case the original purpose is impracticable or fails, may be applied to some other object as near to the original plan as may be practicable.

Definition

Charitable or public trusts are also frequently designated by the technical term "charities." This term, however, does not mean charity in its narrow or popular sense, the relief of poverty and distress, but means charity in its legal sense. Lord Camden, one of the Lord Chancellors of England, defined a charity to be: "A gift to a general public use, which extends to the poor as well as to the rich."⁹⁹ Mr. Binney, in his celebrated argument in the *Girard Will Case*,¹ defined a charitable gift to be: "Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish."²

⁹⁹ *Jones v. Williams*, Ambl. 651, quoted in the following cases: *Appeal of Strong*, 68 Conn. 527, 37 Atl. 395; *Troutman v. Association*, 66 Kan. 1, 71 Pac. 286; *Dexter v. College*, 176 Mass. 192, 57 N. E. 371; *People ex rel. New York Institution for the Blind v. Fitch*, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591; *Perin v. Carey*, 24 How. (U. S.) 465, 16 L. Ed. 701.

¹ *Vidal v. Philadelphia*, 2 How. (U. S.) 127, 11 L. Ed. 205.

² Quoted in the following cases: *Garrison v. Little*, 75 Ill. App. 402; *Ford*

Perhaps, however, the most frequently approved definition of a public trust, or a charity, at least in this country, is the definition given by Mr. Justice Gray, in a leading Massachusetts case.³ The definition therein given is as follows: "A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."⁴

Origin

Gifts for charitable or pious purposes were well known to the Roman or civil law,⁵ and English law derived its law of charities from that source.⁶ It was, however, at one time assumed that trusts for charities took their origin from the English statute of 43 Elizabeth,⁷ known as the "Statute of Charitable Uses."⁸ It has been established, however, that courts of equity, in England, exercised jurisdiction in such matters before the passage of this statute,⁹ and it is now held by the great weight of authority that equity has original and inherent jurisdiction over charities independently of the statute.¹⁰ The preamble of the statute con-

v. *Ford's Ex'r*, 91 Ky. 572, 16 S. W. 451; *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, Burdick Cas. Real Property; *Miller v. Porter*, 53 Pa. 292; *Ould v. Hospital*, 95 U. S. 303, 24 L. Ed. 450.

³ *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, Burdick Cas. Real Property.

⁴ *PEOPLE EX REL. ELLERT v. COGSWELL*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269, Burdick Cas. Real Property; *Hoeffler v. Clogon*, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; *Livesey v. Jones*, 55 N. J. Eq. 204, 35 Atl. 1064; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; *Stuart v. Easton*, 74 Fed. 854, 21 C. C. A. 146.

⁵ They took the name of "pious uses." See *Sohm's Inst. Rom. Law* (2d Ed.) 208-210; *Poth. Pand. lib. 30-32*, Nos. 57-62; *Code*, lib. 1, tit. 2, cc. 15, 19; 2 *Kent. Comm.* (6th Ed.) 257; 2 *Story, Eq. Jur.* §§ 1137-1141.

⁶ *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, Burdick Cas. Real Property; *White v. White*, 1 Bro. Ch. 12; *Fielding v. Bound*, 1 Vern. 230.

⁷ See 1 *Spence, Eq.* 539; *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; *Gallego's Ex'rs v. Attorney General*, 3 Leigh (Va.) 450, 24 Am. Dec. 650.

⁸ 43 Eliz. c. 4.

⁹ *Vidal v. Girard*, 2 How. (U. S.) 128, 11 L. Ed. 205. See *Bispham, Eq.* (7th Ed.) 188; *Protestant Episcopal Education Soc. v. Churchman's Representatives*, 80 Va. 718; *Trustees of General Assembly of Presbyterian Church v. Guthrie*, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321.

¹⁰ *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Levy v. Levy*, 33 N. Y. 97; *Vidal v. Girard*, 2 How. (U. S.) 127, 11 L. Ed. 205; *Going v. Emery*, 16

tains, however, an enumeration of many charitable uses,¹¹ and has often been cited for the purpose of determining the scope of charities,¹² yet by the prevailing American doctrine the enumeration therein is not conclusive, and charitable trusts may be created for other purposes than those specified by the statute.¹³

Beneficiaries

Charitable trusts are created for the benefit of the public in general, or of some descriptive part or class of it, as, for example, seamen, laborers, or "the poor" of a certain place.¹⁴ Thus, a gift "to the poor" generally,¹⁵ or to the poor of a particular town, city, or of a particular age, sex, or race, may be a good charitable gift;¹⁶ a bequest "to the poor" of a certain county meaning those whom the county is legally liable to support.¹⁷

Charitable trusts may also be created for such other special classes as widows, orphans, children, and abandoned wives.¹⁸ In this country, moreover, as a rule, unincorporated or voluntary societies may be the beneficiaries of a public trust.¹⁹ In some states, however, this is not true, since in some jurisdictions the beneficiary must be definitely ascertained.²⁰

Other classes of beneficiaries enumerated by the statute of 43

Pick. (Mass.) 107, 26 Am. Dec. 645; Gilman v. Hamilton, 16 Ill. 225; Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

¹¹ See Eaton, Eq. p. 386; Bispham, Eq. (7th Ed.) 189.

¹² See Drury v. Natick, 10 Allen (Mass.) 169, 177.

¹³ Garrison v. Little, 75 Ill. App. 402; Everett v. Carr, 59 Me. 325; Town of Hamden v. Rice, 24 Conn. 350; Stuart v. Easton, 74 Fed. 854, 21 C. C. A. 146; Heiskell v. Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

¹⁴ Butbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; KENT v. DUNHAM, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, Burdick Cas. Real Property.

¹⁵ Nash v. Morley, 5 Beav. 177, 6 Jur. 520; Attorney General v. Peacock, Finch, 425; Attorney General v. Matthews, 2 Lev. 167.

¹⁶ JACKSON v. PHILLIPS, 14 Allen (Mass.) 539, Burdick Cas. Real Property; Saltonstall v. Sanders, 11 Allen (Mass.) 455-461; Chambers v. St. Louis, 29 Mo. 543; Attorney General v. Goodell, 180 Mass. 538, 62 N. E. 962; McLoughlin v. McLoughlin, 30 Barb. (N. Y.) 458.

¹⁷ Peter v. Carter, 70 Md. 139, 16 Atl. 450.

¹⁸ Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009; In re Botsford, 23 Misc. Rep. 388, 52 N. Y. Supp. 238; Burd Orphan Asylum v. School Dist., 90 Pa. 21; Heiss v. Murphey, 40 Wis. 276.

¹⁹ Tomlin v. Blunt, 31 Ill. App. 234; Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; White v. Rice, 112 Mich. 403, 70 N. W. 1024; Hadden v. Dandy, 51 N. J. Eq. 154, 26 Atl. 464, 32 L. R. A. 625.

²⁰ Rizer v. Perry, 58 Md. 112; Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590. And see infra.

Elizabeth, and generally upheld, are the aged and impotent, sick and maimed soldiers and mariners, scholars in universities, tradesmen, handicraftsmen, and persons decayed, and prisoners.²¹

While a charitable trust must be for a general public use, yet it must also be applied for the benefit of an indefinite number of persons, which number may include the rich as well as the poor.²² As a rule, the individuals who may benefit are indefinite in number and uncertain.²³ "If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence."²⁴ Thus a gift to aid free public schools is valid, the beneficiaries being uncertain,²⁵ and the fact that the state has made provision for the maintenance of such schools within the place to be benefited does not affect its validity.²⁶

Purposes

The purposes for which charitable trusts may be created have been, in a general way, already suggested by the classes of their beneficiaries. However, the most usual objects for which charities are established are trusts for the relief of poverty and distress, religion, and the promotion of learning. Among the trusts falling within the first of these classes may be mentioned gifts for the poor and gifts for hospitals, asylums, and orphanages.²⁷ Trusts for the purposes of religion include gifts for the building and repair of churches and the propagation of religious doctrines.²⁸ The re-

²¹ 43 Eliz. c. 4.

²² *Hoeffer v. Cloghan*, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, *Burdick Cas. Real Property*; *Philadelphia v. Fox*, 64 Pa. 169; *Fontain v. Ravenel*, 17 How. (U. S.) 369, 15 L. Ed. 80.

²³ As to the rule in some states, requiring designated and ascertained beneficiaries, see *infra*; *PEOPLE EX REL. ELLERT v. COGSWELL*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269, *Burdick Cas. Real Property*.

²⁴ *Sharswood, J.*, in *Philadelphia v. Fox*, 64 Pa. 169, 182. And see *KENT v. DUNHAM*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, *Burdick Cas. Real Property*.

²⁵ *Hatheway v. Sackett*, 32 Mich. 97; *In re John's Will*, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

²⁶ *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375.

²⁷ *Attorney General v. Society*, 13 Allen (Mass.) 474; *Shotwell v. Mott*, 2 Sandf. Ch. (N. Y.) 46; *Chambers v. St. Louis*, 29 Mo. 543; *In re Trim's Estate*, 168 Pa. 395, 31 Atl. 1071; *Derby v. Derby*, 4 R. I. 414.

²⁸ *Alden v. St. Peter's Parish*, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; *Kelley v. Welborn*, 110 Ga. 540, 35 S. E. 636; *Andrews v. Andrews*, 110 Ill. 223; *Bridges v. Pleasants*, 39 N. C. 26, 44 Am. Dec. 94; *Attorney General v. Wallace's Devises*, 7 B. Mon. (Ky.) 611; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

ligious purpose must be general, however, and a gift for the maintenance of a private chapel is not a public trust.²⁹

Gifts for the promotion of learning, science, and the useful arts are charities.³⁰ In this class are included free public libraries,³¹ and the establishment of scholarships in a college.³² Trusts for education may be created, also, for a particular class of persons, as, for example, the education of young women,³³ or for the education of the children of a certain locality.³⁴

Distinguished from Private Trusts

While public trusts are created in the same way as private trusts,³⁵ yet the requisites of private and public trusts are materially different. In a private trust, there must be a certain specified beneficiary; in a public trust, the beneficiaries are uncertain.³⁶ In a private trust, the gift fails and reverts to the donor or his heirs when the beneficiaries cannot be identified; while a public trust is said to begin only when uncertainty in the beneficiary begins.³⁷ In other words, public trusts differ from private trusts in that they are favored by the courts in the construction of instruments creating them, and less certainty of description in designating the purpose of the trust and the persons intended to be benefited is permitted.³⁸ This must necessarily be the case,

²⁹ *Hoare v. Hoare*, 56 L. I. Rep. N. S. 147. And see *Church Extension of M. E. Church v. Smith*, 56 Md. 362.

³⁰ *Price v. School Directors*, 58 Ill. 452; *Dexter v. College*, 176 Mass. 192, 57 N. E. 371; *Taylor's Ex'rs v. College*, 34 N. J. Eq. 101; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414

³¹ *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *Eastman v. Allard*, 149 Mass. 154, 21 N. E. 235; *Maynard v. Woodard*, 36 Mich. 423; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231.

³² *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *KENT v. DUNHAM*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, *Burdick Cas. Real Property*; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

³³ *Appeal of Curran*, 4 Penny. (Pa.) 331; *Curran v. Trust Co.*, 15 Phila. (Pa.) 84.

³⁴ *Van Wagenen v. Baldwin*, 7 N. J. Eq. 211; *Iseman v. Myres*, 26 Hun (N. Y.) 651; *Clement v. Hyde*, 50 Vt. 716, 23 Am. Rep. 522; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

³⁵ *Olliffe v. Wells*, 130 Mass. 221. They are not executed by the statute of uses, because the trustees generally have actual duties to perform, and the beneficiaries are uncertain. *Beckwith v. Rector*, etc., 69 Ga. 564.

³⁶ *Pennoyer v. Wadhams*, 20 Or. 274, 278, 25 Pac. 720, 11 L. R. A. 210; *Troutman v. Association*, 66 Kan. 1, 71 Pac. 286; *KENT v. DUNHAM*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, *Burdick Cas. Real Property*.

³⁷ *Id.*

³⁸ *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, *Burdick Cas. Real Property*; *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Saltonstall v. Sanders*, 11 Allen (Mass.) 446; *Inglis v. Harbor*, 3 Pet. (U. S.) 99, 7 L. Ed. 617.

for those who are to be the cestuis que trustent are generally unknown, and incapable of being pointed out specifically,³⁹ as, for instance, in a trust for the benefit of the "poor" of a certain county.⁴⁰ There must be a clear designation of the class of persons to be benefited; but, when this is done, uncertainty as to the individuals to be benefited is a necessary element of a public trust.⁴¹ In some states, however, greater strictness is required in designating the beneficial class than in other states.⁴² Moreover, in a few states, either by statute or judicial decision, the English law of charitable trusts does not obtain, and in such jurisdictions all beneficiaries in trusts must be definite and certain.⁴³ Formerly, in New York, every perpetual trust was void unless the beneficiary was ascertained;⁴⁴ but the statute of 1893 of that state provides that no gift to religious, charitable, or benevolent uses shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries.⁴⁵

A further distinction between a private and public trust exists in the fact of their perpetuities.⁴⁶ A private trust cannot be created so that it will continue forever.⁴⁷ A public trust, on the other hand, may be made perpetual.⁴⁸ Public trusts must vest within

³⁹ *Burke v. Roper*, 79 Ala. 142; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420.

⁴⁰ *State ex rel. Wardens of Poor of Beaufort County v. Gerard*, 37 N. C. 210.

⁴¹ *PEOPLE EX REL. ELLERT v. COGSWELL*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269, *Burdick Cas. Real Property*; *Newson v. Starke*, 46 Ga. 88; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401. For a designation held sufficiently definite, see *CITY OF OWATONNA v. ROSEBROCK*, 88 Minn. 318, 92 N. W. 1122, *Burdick Cas. Real Property*.

⁴² See *Appeal of Strong*, 68 Conn. 527, 37 Atl. 395; *Hayden v. Hospital*, 64 Conn. 320, 30 Atl. 50.

⁴³ See the statutes of Maryland, Michigan, Minnesota, North Carolina, Virginia, West Virginia, and Wisconsin. See, also, *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; *Wheelock v. Society*, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; *Morris' Ex'r v. Morris' Devises*, 48 W. Va. 430, 37 S. E. 570.

⁴⁴ *Edwards v. Woods*, 131 N. Y. 350, 30 N. E. 237; *Fosdick v. Hempstead*, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715.

⁴⁵ See *Kelly v. Hoey*, 35 App. Div. 273, 55 N. Y. Supp. 94; *In re Scott's Estate*, 31 Misc. Rep. 85, 64 N. Y. Supp. 577.

⁴⁶ See post. And see *Troutman v. Association*, 66 Kan. 1, 71 Pac. 286.

⁴⁷ *In re Bartlett*, 163 Mass. 509, 40 N. E. 899; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231; *KENT v. DUNHAM*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667, *Burdick Cas. Real Property*; *Parks' Adm'r v. Society*, 62 Vt. 19, 20 Atl. 107.

⁴⁸ *Mills v. Davidson*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am.

the time required for private trusts;⁴⁹ but a gift over from one charity to another may be valid, although made on a contingent limitation which in the case of a private trust would be too remote under the rule against perpetuities.⁵⁰ In such a case, the rule against perpetuities does not apply.⁵¹ The oft-repeated statement, however, that charitable trusts are not within the rule against perpetuities, is too general, and is also misleading.⁵²

Doctrine of Cy Pres

Charitable trusts are further distinguished from private trusts in connection with the doctrine of cy pres.⁵³ This doctrine assumed two forms in England; one being a royal prerogative, and the other being the exercise of judicial authority on the part of the chancellor.⁵⁴ Under the former, the chancellor, with delegated royal authority, and by the use of the royal signature (the sign manual), arbitrarily applied charitable gifts to other public beneficiaries when the public trust as originally created was illegal, or designated beneficiaries when gifts were made to charity in general without any trust being specified.⁵⁵ This power of disposal of charitable gifts, in direct opposition, in some cases, to the declared intention of the creator, arose, probably, from the authority vested in the king as head of the church,⁵⁶ or was derived from the doctrine of the Roman law in imperial times, when the emperor was supreme legislator.⁵⁷ This prerogative form of the cy pres doctrine is not recognized, however, by the courts in this country.⁵⁸

St. Rep. 594; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717; *Gray*, *Perp.* c. 18; *Perry*, *Trusts* (5th Ed.) § 384.

⁴⁹ *Christ Church v. Trustees*, 67 Conn. 554, 35 Atl. 552; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739. And see *Rule Against Perpetuities*, post, chapter XVI.

⁵⁰ *Id.*

⁵¹ *Gray*, *Perp.* § 592.

⁵² See, post, chapter XVI.

⁵³ Cy pres is old French, and is pronounced "se pra," meaning "as nearly" (as may be). See *Taylor v. Keep*, 2 Ill. App. 368; *Stratton v. College*, 149 Mass. 505, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442.

⁵⁴ *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, *Burdick Cas. Real Property*.

⁵⁵ *JACKSON v. PHILLIPS*, supra; *In re Payne* (1903) 1 Ch. 83; *Mogridge v. Thackwell*, 1 Ves. Jr. 469.

⁵⁶ *JACKSON v. PHILLIPS*, supra; *Rex v. Portington*, 1 Salk. 162.

⁵⁷ *Digest* 33, 2, 17; 50, 8, 4; *Codex*, 1, 2, 19; *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, *Burdick Cas. Real Property*.

⁵⁸ *Heuser v. Harris*, 42 Ill. 425; *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671; *Johnson v. Johnson*, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am. St. Rep. 104.

The other form of the *cy pres* doctrine, or the judicial form, is stated as follows: When a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible (*cy pres*), to carry out his general charitable intent.⁵⁹ A good illustration of the application of this doctrine is presented by the case of *Jackson v. Phillips*.⁶⁰ In that case a trust was created, having for its object the creating of a public sentiment by means of lectures and publications that would lead to the abolition of negro slavery. After the death of the testator, and while the will in question was being litigated, slavery was abolished. The purpose, therefore, having failed, the income from the trust property was applied to the education of the freed slaves, as carrying out the testator's general intention. The judicial doctrine of *cy pres* is recognized in the federal courts,⁶¹ and in a number of the state courts.⁶² In a number of other states, however, the doctrine is rejected.⁶³ In examining the cases, care is necessary,

⁵⁹ Mr. Justice Gray in *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, Burdick Cas. Real Property. See, also, Mr. Justice Gray in *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397. And see *Attorney General v. Rector*, etc., 9 Allen (Mass.) 422; *Glasgow College v. Attorney General*, 1 H. L. Cas. 800. Cf. *Marsh v. Renton*, 99 Mass. 132.

⁶⁰ *Supra*.

⁶¹ *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; *Perin v. Carey*, 24 How. (U. S.) 465, 16 L. Ed. 701. Cf. *Wheeler v. Smith*, 9 How. (U. S.) 55, 13 L. Ed. 44.

⁶² *JACKSON v. PHILLIPS*, 14 Allen (Mass.) 539, Burdick Cas. Real Property; *Moore's Heirs v. Moore's Devises*, 4 Dana (Ky.) 354, 29 Am. Dec. 417; *Gass v. Wilhite*, 2 Dana (Ky.) 170, 26 Am. Dec. 446; *Curling's Adm'rs v. Curling's Heirs*, 8 Dana (Ky.) 38, 33 Am. Dec. 475; *Marsh v. Renton*, 99 Mass. 132; *Attorney General v. Rector*, etc., 9 Allen (Mass.) 422; *Derby v. Derby*, 4 R. I. 414. The *cy pres* doctrine is recognized by statute in California, Pennsylvania, and New York. See *In re Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *In re Tenth Presbyterian Church*, 8 Pa. Dist. R. 323; N. Y. Laws 1901, c. 291.

⁶³ *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N. W. 207; *Little v. Willford*, 31 Minn. 173, 17 N. W. 282; *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, 2

however, since there exists some confusion as to the real meaning of the doctrine of cy pres. In many cases nothing more is meant by it than that the courts are favorable to the establishment of charitable trusts, and will construe instruments creating them liberally in order to carry out the intention of the one creating the trust.⁶⁴

Am. St. Rep. 420; *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; *Holland v. Peck*, 37 N. C. 255.

⁶⁴ 2 Perry, Trusts (4th Ed.) § 727.

CHAPTER XV

ESTATES IN EXPECTANCY

- 136. Estates as to Time of Enjoyment.
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 - 159. Devise of Future Estates.
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ESTATES AS TO TIME OF ENJOYMENT

136. Estates classified with regard to the time of their enjoyment are divided into:
- (1) Estates in possession; and
 - (2) Estates in expectancy.

ESTATES IN EXPECTANCY

137. Estates in expectancy are divided into:
- (1) Reversions; and
 - (2) Future estates.

REVERSIONS

138. A reversion is the residue of the estate which remains in the grantor after he has granted away part of his estate. The estate granted is called the particular estate. The reversion commences in possession after the termination of the particular estate. There may be a reversion after any estate except a fee.

POSSIBILITIES OF REVERTER

139. After the conveyance of a fee on condition subsequent, or the creation of a qualified fee, the interest remaining in the grantor is called a "possibility of reverter."

FUTURE ESTATES

140. A future estate is an estate limited to commence in possession in the future, either upon the termination of a precedent estate created at the same time, or without any precedent estate. Future estates may be classed as:
- (1) Those known to the common law.
 - (2) Those arising under the statute of uses.
 - (3) Those arising under the statute of wills.

Estates in Possession and Expectancy

The estates previously considered have been, for the most part, estates which entitle their owners to the immediate possession of the land; that is, they have been present estates, or estates in possession. Mention, however, has been made incidentally, in several places, of expectant estates, or estates where the right to their enjoyment in possession is postponed to a future time.¹ For this reason, in modern times, such estates are often called, indiscriminately, "future estates," although we have here distinguished reversions from future estates proper.² To the mediæval common law there were known two kinds of estates in expectancy, namely, reversions and remainders,³ based upon the peculiar English notions of tenure and estate. The Roman law did not recognize separate rights of future

¹ Moore v. Littel, 41 N. Y. 66; Palmer v. Dunham, 52 Hun, 468, 6 N. Y. Supp. 46; Livingston v. N. Y. Life Ins. Co., 59 Hun, 622, 13 N. Y. Supp. 105.

² *Infra*.

³ *Infra*.

and present enjoyment of the same subject-matter existing, at the same time, in different persons, except, perhaps, in the case of "dominium" and "jura in re aliena" (as, for example, "usufructus" or "emphyteusis"), where the interest of the dominus was somewhat analogous to the English reversion.⁴

Reversions—Nature of a Reversion

A reversion is defined as "the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him."⁵ It is also defined as "the return of an estate to the grantor and his heirs, after the grant is over."⁶ A reversion, therefore, is never created by deed or other writing, but arises only by construction of law.⁷ It is true that, at common law, if a "remainder" is limited to the heirs of a grantor or a testator, the "remainder" takes effect as a reversion; but this is not an exception to the rule that a reversion cannot be created by a deed or other writing, since the attempted creation of the "remainder" is no remainder at all,⁸ and, there being no remainder, the land devolves upon the heirs of the grantor, or testator, by descent, creating, therefore, by operation of law, a reversion in the grantor.⁹ A reversion, therefore, is the residue of his estate, which the grantor does not part with, or, as Coke says, "a reversion is where the residue of the estate always doth continue in him that made the particular estate."¹⁰

Origin of Reversions—Feudal Escheat

The statute of quia emptores¹¹ gave the right of free alienation of lands in fee simple, but abolished all mesne tenures, and provided that the feoffee should hold the land of the chief lord. Since the passing of that statute, if a tenant in fee simple dies, leaving no

⁴ See Dig. Hist. Real Prop. c. 5, § 3.

⁵ 2 Blk. Comm. 175; *Alexander v. De Kermel*, 81 Ky. 345, 5 Ky. Law Rep. 382; *Barber v. Brundage*, 50 App. Div. 123, 63 N. Y. Supp. 347; *Powell v. Dayton, etc.*, R. Co., 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251.

⁶ 4 Kent, Comm. (13th Ed.) 353; *HOBSON v. HUXTABLE*, 79 Neb. 340, 116 N. W. 278, *Burdick Cas. Real Property*; *Booth v. Terrell*, 16 Ga. 20, 25. The term "reversion" has two significations: First, as designating the estate left in the grantor during the continuance of a particular estate; and, second, the returning of the land to the grantor or his heirs after the grant is over. *Powell v. Dayton, etc.*, R. Co., 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251.

⁷ 2 Blk. Comm. 175; 4 Kent, Comm. 354; *Alexander v. De Kermel*, 81 Ky. 345, 5 Ky. Law Rep. 382.

⁸ *Infra*.

⁹ *Akers v. Clark*, 184 Ill. 136, 56 N. E. 296, 75 Am. St. Rep. 152; *Fearne, Contingent Remainders*, 50, 51; *Bingham's Case*, 2 Co. 91b; *Godolphin v. Abington*, 2 Atk. 57.

¹⁰ Co. Litt. 22b.

¹¹ 18 Edw. I, c. 1 (1290). See *supra*.

heirs, his land escheats to the lord of whom it is held.¹² If, however, the interest of a tenant of an estate less than fee expires, the land reverts to the donor. The words "escheat" and "revert" were used, therefore, to mean that the land went back to the lord, in one case, and to the donor, in the other. The right of escheat, however, was not an estate, merely a possibility. The right of reversion, on the other hand, was regarded as an estate, an interest in land. It is an expectant estate, becoming an estate in possession upon the termination of the tenant's estate.¹³ This doctrine of feudal escheats, as distinguished from reversions, is of modern interest, since upon it is based the asserted common-law rule that the lands of a dissolved corporation return to the grantor, and do not escheat to the lord; that is, the crown, or state.¹⁴ With reference, however, to stock corporations, this doctrine is held not to apply; the proceeds of the land being divided among the stockholders.¹⁵

From What Estates

A reversion may arise out of any estate, except an estate at will or at sufferance. Out of the latter estates there can be no reversion, because in creating a reversion the grant of a particular estate is necessary, and no alienation is possible of the whole or of part of an estate at will or at sufferance. Any number of particular estates may be created by one owning a fee simple, and still a reversion may remain so long as the fee itself is not disposed of. For example, the owner of a fee may grant a fee tail, and on failure of the specified heirs the estate will revert to the grantor or his heirs. So out of a fee tail a life estate might be granted, and there would be a reversion, or out of a life estate there might be a reversion after an estate for years. The owner of an estate for years may grant to another a term for a shorter time than his own, and the balance may revert to him; but, if he grants an estate of as long duration as his own, it will be an assignment, and there will be nothing to revert.¹⁶ Reversions may exist, also, after estates created by operation of law; for instance, after an estate of dower.¹⁷ So, too,

¹² Holds. Hist. Eng. Law, III, 115.

¹³ Holds. Hist. of Eng. Law, III, 115. 2 Pol. & M. 23, note 1. As to the early use of the word "remainder," in contrast with "reversion," see *infra*.

¹⁴ Co. Litt. 13b; 1 Blk. Comm. 484; *State Bank v. Indiana*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 224.

¹⁵ *Heath v. Barmore*, 50 N. Y. 302; *Owen v. Smith*, 31 Barb. (N. Y.) 641. But see *People v. Trustees*, 38 Cal. 166; 2 Morawetz, Corp. § 1032.

¹⁶ See, as to reversions generally, *Cook v. Hammond*, 4 Mason, 467, Fed. Cas. No. 3,159; *State (Morris Canal & Banking Co., Prosecutor) v. Brown*, 27 N. J. Law, 13; *McKelway v. Seymour*, 29 N. J. Law, 321.

¹⁷ See, *ante*, chapter VIII.

there are reversionary interests in equitable estates, as where there is a resulting trust to the grantor after an equitable life estate in another person.¹⁸ In each case the estate which precedes the reversion is called a "particular estate."

Incidents of a Reversion.

A reversion descends to one's heirs, and may be conveyed by deed, or given by will, the same as an estate in possession.¹⁹ The transfer may be, also, a part of the reversion.²⁰ At common law, a reversion could not be conveyed by feoffment, however, unless the particular estate was less than a freehold;²¹ but at the present time reversions may be conveyed by any form of deed operating under the statute of uses.²² One's interest in a reversion may also be levied upon and sold on execution. A reversion descends to the heirs of the reversioner; but at common law it was subject to the rule that no one could take a reversion as heir, unless he could trace his descent as heir of one last actually seised of the reversion.²³ If the reversion is transferred, the transferee becomes a new stock, from whom subsequent persons claiming the reversion as heirs must trace their descent.²⁴ This rule has been abolished in many states by statute.²⁵ At common law, fealty and rent were the usual incidents of a reversion.²⁶ Thus, it was customary, when a feud was granted to one for life, to reserve rent or service for the benefit of him who had the reversion.²⁷ The feudal incident of fealty is, of course, unknown in this country;²⁸ but the right of the reversioner, or landlord, to rent in case of a lease, that is, after an estate less than a freehold has been granted, is familiar, and has already been considered, as have, likewise, the rights and liabilities of the parties on covenants contained in the lease.²⁹ The rent incident to a reversion may, however, by special words, be granted away, reserving merely the reversion, and the reversion may be granted away, reserving the rent, although a general grant of the reversion

¹⁸ *Loring v. Eliot*, 16 Gray (Mass.) 568; *Read v. Stedman*, 26 Beav. 495.

¹⁹ *Fowler v. Griffin*, 3 Sandf. (N. Y.) 385; *Barber v. Brundage*, 50 App. Div. 123, 63 N. Y. Supp. 347.

²⁰ *Doe v. Cole*, 7 Barn. & C. 243.

²¹ Co. Litt. 48b.

²² See post.

²³ 2 Blk. Comm. 209; *Miller v. Miller*, 10 Metc. (Mass.) 393; *Cook v. Hammond*, 4 Mason, 467, Fed. Cas. No. 3,159.

²⁴ 2 Washb. Real Prop. (5th Ed.) 803; *West v. Williams*, 15 Ark. 682.

²⁵ *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652; *Doe v. Roe*, 2 Har. (Del.) 103, 29 Am. Dec. 336; *Cook v. Hammond*, 4 Mason, 467, Fed. Cas. No. 3,159.

²⁶ 2 Blk. Comm. 176; 4 Kent, Comm. 355.

²⁷ Id.

²⁸ 4 Kent, Comm. 355.

²⁹ Ante, chapter X.

carries the rent with it, as incident thereto.³⁰ Accordingly, the devisee of a reversionary interest is entitled to the rents belonging to it.³¹

Rights and Liabilities of the Reversioner

The reversioner may bring action for any injury done to the inheritance,³² and he has also his equitable remedies to protect his rights.³³ During the term, however, of the tenant of the particular estate, the reversioner has no right of possession, and may be held liable for trespass.³⁴ The disseisin of the tenant does not, however, of itself, affect the reversioner, because he has no immediate right of entry, and the statute of limitation under such disseisin does not begin to run until the reversioner becomes entitled to possession upon the termination of the preceding estate.³⁵

Merger

When both the particular estate and the reversion are united in the same person, they will merge.³⁶ This is true, whether the estates are freehold or leasehold,³⁷ provided the estate in reversion is as large as the preceding estate.³⁸ A particular estate for years consisting of a longer term will merge in a shorter reversion, and the former estate will be destroyed, leaving only the shorter term,³⁹ and any term of years will merge in an estate for life.⁴⁰ By the statute *de donis*, estates in fee tail were exempted from the doctrine of merger, and one may have, as separate rights, an estate tail and a reversion in fee.⁴¹

³⁰ *Burden v. Thayer*, 3 Metc. (Mass.) 76, 37 Am. Dec. 117; *Kimball v. Pike*, 18 N. H. 419; *York v. Jones*, 2 N. H. 454; *Johnston v. Smith*, 3 Pen. & W. (Pa.) 496, 24 Am. Dec. 339; 2 Blk. Comm. 176; 4 Kent, Comm. 356.

³¹ *Lewis v. Wilkins*, 62 N. C. 303.

³² *Randall v. Cleaveland*, 6 Conn. 328; *Ashley v. Ashley*, 4 Gray (Mass.) 197; *Lane v. Thompson*, 43 N. H. 320; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

³³ *Simmons v. McKay*, 5 Bush (Ky.) 25.

³⁴ *Lane v. Thompson*, 43 N. H. 320; *Anderson v. Nesmith*, 7 N. H. 167.

³⁵ *Tilson v. Thompson*, 10 Pick. (Mass.) 359; *Wallingford v. Hearl*, 15 Mass. 471; *Jackson ex dem. Hardenbergh v. Schoonmaker*, 4 Johns. (N. Y.) 390.

³⁶ 2 Washb. Real Prop. (5th Ed.) 806.

³⁷ See *Martin v. Tobin*, 123 Mass. 85.

³⁸ *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; 4 Kent, Comm. 401.

³⁹ *Hughes v. Robotham*, Cro. Eliz. 302; *Stephens v. Bridges*, 6 Madd. 36; Washb. Real Prop. (6th Ed.) 458.

⁴⁰ 3 Preston, Conv. 220.

⁴¹ *Holcomb v. Lake*, 24 N. J. Law, 686; *Roe v. Baldwere*, 5 T. R. 104, 2 Rev. Rep. 550; 2 Blk. Comm. 177.

Possibilities of Reverter

As has been seen, a reversion may exist after any particular estate less than a fee. Where, however, a fee is granted, and a right of entry reserved for the breach of a condition, no reversion exists.⁴² There is only what is called a quasi reversion, or a possibility of reverter.⁴³ The same is true of a qualified fee. It may exist forever, or it may revert to the grantor. This possibility, however, arising in the case of conditional and qualified fees, is not an interest in the land; it is a mere contingency. At common law, there was nothing remaining in the grantor that could be conveyed, although it is held, in modern times, that in equity, or by the doctrine of estoppel, a possibility of reverter may be transferred.⁴⁴ Contrary to the English rule,⁴⁵ it is generally held in this country, however, that a possibility of reverter is a vested right, and that the rule against perpetuities does not apply to it. At common law, before the statute de donis (1285), there was only a possibility of reverter upon a conveyance in fee conditional; the possibility depending upon the failure of heirs of the body of the grantee.⁴⁶ After the passing of that statute, however, and fees conditional became changed into estates tail, a reversion was created by operation of law.⁴⁷

SAME—AT COMMON LAW (REMAINDERS)

141. The only future estates or interests possible under the common law are remainders.

A remainder is a remnant of an estate in land, depending upon a preceding particular estate, created by the same instrument, and limited to arise immediately on the termination of the preceding estate, but not in abridgment of it.

Remainders are either:

- (a) Vested; or
- (b) Contingent.

⁴² 4 Kent, Comm. 353; *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

⁴³ *Slegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547; *Nicoll v. Railroad Co.*, 12 N. Y. 121; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁴⁴ *Slegel v. Lauer*, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547; *Scheetz v. Fitzwater*, 5 Pa. 126. *Contra*, *Nicoll v. Railroad Co.*, 12 N. Y. 126.

⁴⁵ *Minor, Institutes*, § 672.

⁴⁶ See, ante, chapter VI.

⁴⁷ 2 Washb. Real Prop. (5th Ed.) 801.

Estates in Futuro

Future estates have previously been defined ⁴⁸ as estates limited to commence in possession in the future, either without the intervention of a precedent estate, or upon the termination of a precedent estate created at the same time.⁴⁹ This latter class of future estates are called "remainders."⁵⁰ They are, moreover, the only kind of future estates possible under the common law,⁵¹ and, as before stated, they constitute, with reversions, the two common-law forms of estates in expectancy.⁵²

At common law there was a rule that no limitation of an estate was valid which would put the freehold in abeyance; or, as it was otherwise expressed, a freehold could not be created to commence in futuro.⁵³ This was due to the technical doctrine that there must always be some one seised of the freehold.⁵⁴ This rule did not apply, as has been seen,⁵⁵ to the creation of chattel interests, that is, of leaseholds, because for them no seisin was required; the only thing transferred to the tenant being the possession. And there is the further reason that a leasehold to begin in the future is a contract to create an estate for years, which is executed by the lessee taking possession. It was possible, however, at common law, to create remainders, because, although they were future estates, their creation did not put the freehold in abeyance, since the seisin could be delivered to the tenant of a particular life estate; such livery inuring to the benefit of those who took in remainder.⁵⁶ Hence arose the rule that the particular estate which precedes a remainder must be a freehold. By statute, however, in many states, freeholds may now be limited to commence in futuro, with or without a preceding estate,⁵⁷ and freeholds in futuro may be created by conveyances not operating at common law; that is, by conveyances operating under the statute of uses or the statute of wills. Such future estates are known as springing and shifting uses and executory devises.

⁴⁸ *Supra*.

⁴⁹ *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *Moore v. Littell*, 41 N. Y. 66.

⁵⁰ *Id.*

⁵¹ *Buckler v. Hardy*, Cro. Eliz. 585 (1597).

⁵² *Holds. Hist. Eng. Law*, III, 114.

⁵³ *Buckler v. Hardy*, Cro. Eliz. 585; *Barwick's Case*, 5 Co. Rep. 93b, 94b; *Freeman v. West*, 2 Wils. 265; 2 Blk. Comm. 165; 1 *Preston on Estates*, 217, 219, 253.

⁵⁴ See *Seisin*, ante, Ch. IV.

⁵⁵ See *Creation of Estates for Years*, ante.

⁵⁶ *Gray, Rule against Perpetuities*, § 8; 1 *Leake, Digest of Law of Property in Land*, 33, 227; 4 *Kent, Comm.* 234.

⁵⁷ 1 *Stim. Am. St. Law*, § 1421.

They take effect without a particular estate to support them, or in derogation of such an estate. Remainders, however, cannot exist in either of such cases. If limitations of future estates are valid as remainders, they will be so construed;⁵⁸ and if a limitation takes effect as a remainder, it cannot subsequently operate as a springing or shifting use, or an executory devise, when it has failed as a remainder.⁵⁹

Origin of Future Estates in Remainder

As already defined, a remainder is a remnant (not necessarily "the remnant," since there may be successive remainders,⁶⁰ and there may also be a reversion after a remainder) of an estate in land, depending upon a particular preceding estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, but not in derogation (i. e., abridgment) of it.⁶¹ Historically, however, the word "remainder" did not originally signify a residue of an estate, or, in other words, did not convey any notion of a remnant of an estate left over after a particular estate had been subtracted. In early times, the word "revertit" signified what would happen if a lease for life expired. The land "returns" (reverts) to the grantor.⁶² In contrast with the word "revertit," the word "remanet" was used, and this signified that the land, instead of returning, would "remain away" from the grantor, or would "remain to" or "continue for" some other designated person. In time, however, these future interests came to be regarded as "estates," and the terms "reversion" and "remainder" were applied to the expectant interests themselves, and have so been used in this sense for several centuries.⁶³

Essential Characteristics

From the definition of a remainder above given, it will be noted that it differs from a reversion, in that the residue of the estate re-

⁵⁸ *Hawley v. Northampton*, 8 Mass. 3, 5 Am. Dec. 66; *Parker v. Parker*, 5 Metc. (Mass.) 134; *Stehman v. Stehman*, 1 Watts (Pa.) 466; *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312; *Doe v. Selby*, 2 Barn. & C. 926; *Hasker v. Sutton*, 1 Bing. 500.

⁵⁹ *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312; *Crozier v. Bray*, 39 Hun, 121; *Doe v. Howell*, 10 Barn. & C. 191; *Purefoy v. Rogers*, 2 Saund. 380. But see *Doe v. Roach*, 5 Maule & S. 482.

⁶⁰ *Infra*.

⁶¹ *Co. Litt.* 143a; 4 Kent, Comm. 197; *Achorn v. Jackson*, 86 Me. 215, 29 Atl. 989; *Wood v. Griffin*, 46 N. H. 230; *Bennett v. Garlock*, 10 Hun (N. Y.) 328; *HOBSON v. HUXTABLE*, 79 Neb. 349, 116 N. W. 278, *Burdick Cas. Real Property*.

⁶² *Supra*.

⁶³ See 2 Pol. & M. 21; *Holds. Hist. Eng. Law*, III, 114; *Challis, Real Prop.* 73, note.

maining after the particular estate does not, as in the case of a reversion, go back to the grantor or his heirs, but is limited over to a third person.⁶⁴ Remainders, moreover, are always created by express limitation, and can never arise by operation of law.⁶⁵ A remainder must always be created by the same instrument as the particular estate which precedes it.⁶⁶ This is, in effect, an assignment, of the reversion at the time of the creation of the particular estate. But, if the reversion is assigned at a subsequent time, it is still called a reversion, and not a remainder. A remainder must always be so limited as to take effect at once on the termination of the particular estate on which it depends,⁶⁷ although it is held that a child in ventre sa mere at the termination of the preceding estate is capable of taking a remainder which vests then.⁶⁸ A remainder must not take effect in derogation of the particular estate on which it depends; that is, the vesting of the remainder must not cut short the preceding estate.⁶⁹ Such a limitation can take effect only as a shifting use or a shifting devise.⁷⁰ There may, however, be a remainder after an estate on limitation;⁷¹ that is, when an estate is given to determine absolutely on the happening of an event, a valid remainder may be limited to begin on the termination of that estate. For example, an estate may be given to A. and his heirs until B. returns from Rome, and then the remainder given to C. This would be valid, since the remainder does not cut short the prior estate. If, however, the limitation were to A. and his heirs, but, if B. returns from Rome, then to C., the estate could not take effect as a remainder, since the preceding estate, being one on condition, is cut short by the event on which it is attempted to cause the remainder to vest.⁷² Any estate as to quantity may be created in remainder; that is, a fee, fee tail, life estate, or estate for years. In limiting such estates, the technical words to be used are the same as when creating estates in possession.⁷³ A remainder may also be

⁶⁴ *Booth v. Terrell*, 16 Ga. 20; *Phelps v. Phelps*, 17 Md. 120.

⁶⁵ See *Dennett v. Dennett*, 40 N. H. 498.

⁶⁶ 2 Washb. Real Prop. (6th Ed.) § 1526.

⁶⁷ *Hennessy v. Patterson*, 85 N. Y. 91; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 474, 18 L. Ed. 869.

⁶⁸ See *Burdet v. Hopegood*, 1 P. Wms. 486.

⁶⁹ 2 Washb. Real Prop. (5th Ed.) 601. In New York, Michigan, and some other states contingent remainders are not bad because they may defeat the preceding estate. 1 Stim. Am. St. Law, § 1426C. And see *Gillespie v. Allison*, 115 N. C. 542, 20 S. E. 627.

⁷⁰ *Infra*.

⁷¹ See *Estates on Limitation*, ante.

⁷² See *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁷³ *Phelps v. Phelps*, 17 Md. 120, 134; *Nelson v. Russell*, 135 N. Y. 137, 31

created out of an equitable estate;⁷⁴ the term "equitable remainder" being sometimes applied to such an interest.⁷⁵

The Particular Estate

From the very nature of a remainder, there must be a preceding particular estate less than a fee.⁷⁶ Remainders, as before stated, cannot be created to begin in futuro,⁷⁷ and the particular estate and the remainder, the one in possession and the other in expectancy, are regarded as parts of only one estate.⁷⁸ Thus, where there is an estate to A. for life, with remainder to B. in fee, B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession.⁷⁹ At common law, the particular estate must be less than a fee simple,⁸⁰ since there can be no remainder after the whole estate is disposed of,⁸¹ and this rule applies equally to a fee conditional,⁸² or to a base or qualified fee.⁸³ The particular estate may, however, be a fee tail,⁸⁴ or, as is generally the case, an estate for life.⁸⁵ A mere tenancy at will or by

N. E. 1008; *Livingston v. Greene*, 52 N. Y. 118; *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947; *Doren v. Gillum*, 136 Ind. 134, 35 N. E. 1101.

⁷⁴ *Scotfield v. Alcott*, 120 Ill. 362, 11 N. E. 351.

⁷⁵ *Challis*, Real Prop. 111; *Mallory v. Mallory*, 72 Conn. 494, 45 Atl. 164; *Clarkson v. Pell*, 17 R. I. 646, 24 Atl. 110; *Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94.

⁷⁶ *Hudson v. Wadsworth*, 8 Conn. 348; *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; 2 Blk. Comm. 165.

⁷⁷ *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 474, 18 L. Ed. 869; *Brown v. Lawrence*, 3 Cush. (Mass.) 390, 398; *Wilkes v. Lion*, 2 Cow. (N. Y.) 333. And see *IN RE KENYON*, 17 R. I. 149, 20 Atl. 294, *Burdick Cas. Real Property*.

⁷⁸ *Bush v. Bush*, 5 Del. Ch. 144; 2 Blk. Comm. 164; 4 Kent, Comm. 198.

⁷⁹ 2 Blk. Comm. 167.

⁸⁰ *Horton v. Sledge*, 29 Ala. 478; *Macumber v. Bradley*, 28 Conn. 445; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

⁸¹ 2 Blk. Comm. 164; 4 Kent, Comm. 199; *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; *Sayward v. Sayward*, 7 Me. 210, 22 Am. Dec. 191; *IN RE KENYON*, 17 R. I. 149, 20 Atl. 294, *Burdick Cas. Real Property*.

⁸² *Outland v. Bowen*, *supra*; *Bedon v. Bedon*, 2 Bailey (S. C.) 231; *Deas v. Horry*, 2 Hill, Eq. (S. C.) 244.

⁸³ *SULLIVAN v. GARESCHE*, 229 Mo. 496, 129 S. W. 949, *Burdick Cas. Real Property*. And see *Outland v. Bowen*, *supra*. As to the effect of statutes, and also as to "Alternate Remainders," see *infra*.

⁸⁴ *Hall v. Priest*, 6 Gray (Mass.) 18; *Wilkes v. Lion*, 2 Cow. (N. Y.) 333; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565; *Driver v. Edgar*, 1 Comp. 379.

⁸⁵ *Litt.* 215; *Co. Litt.* 143a; *Fearne*, Cont. Rem. 3, *Butler's note*, c. 1; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565; *Dorr v. Johnson*, 170 Mass. 540, 49 N. E. 919. A particular estate *pur autre vie* will support a remainder. *IN RE KENYON*, 17 R. I. 149, 20 Atl. 294, *Burdick Cas. Real Property*.

sufferance, being too precarious, is not such a particular estate as will support a remainder,⁸⁶ and while there may be a so-called remainder after an estate for years,⁸⁷ yet such a limitation is not technically a remainder, since it takes effect at once, subject merely to the termination of the lease.⁸⁸ Where a so-called remainder in freehold was limited on an estate for years, it was necessary, at common law, that the lessee for years should have livery of seisin in order to take the freehold from the grantor, not for the sake of the estate for years, but in order that the livery made to the tenant in possession might relate and inure to the one in remainder, since the estate for years and the remainder in freehold were but one estate in law.⁸⁹ The particular estate which is required to support a remainder cannot be created by operation of law. For instance, an heir, in assigning dower, cannot limit a remainder to begin on the termination of the widow's life estate.⁹⁰ As a general rule, there can be no remainder where there can be no reversion,⁹¹ although there may be reversion where there can be no remainder.

142. ACCELERATION OF REMAINDERS—A remainder may be accelerated where the time for its vesting in possession is shortened by an earlier termination of the particular estate, or where the particular estate does not take effect.

If the particular estate on which a remainder is predicated never takes effect, as, for example, where the designated life tenant is legally incapable of taking,⁹² or where he refuses to accept,⁹³ or where a devisee for life dies before the testator and the remainderman survives him,⁹⁴ the remainder, if vested, takes effect at once. This is known as the acceleration of remainders.⁹⁵ In the case, how-

⁸⁶ 2 Blk. Comm. 166.

⁸⁷ *Frazer v. Frazer*, 74 S. W. 259, 24 Ky. Law Rep. 2517. So stated in *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁸⁸ *Challis*, *Real Prop.* 77; 1 *Leake, Land Law*, 320; *Tiffany*, *Real Prop.* § 119.

⁸⁹ 2 Blk. Comm. 167.

⁹⁰ *Cook v. Hammond*, 4 Mason, 467, Fed. Cas. No. 3,159.

⁹¹ See 2 Washb. *Real Prop.* (5th Ed.) 586.

⁹² See *Blatchford v. Newberry*, 99 Ill. 11; *Fox v. Rumery*, 68 Me. 121; *Jull v. Jacobs*, 3 Ch. Div. 703, 35 L. T. Rep. N. S. 153.

⁹³ *Fox v. Rumery*, *supra*; *Randall v. Randall*, 85 Md. 430, 37 Atl. 209; *Parker v. Ross*, 69 N. H. 213, 45 Atl. 576; *Adams v. Gillespie*, 55 N. C. 244.

⁹⁴ *Mercer v. Hopkins*, 88 Md. 292, 41 Atl. 156; *Taylor v. Wendell*, 4 Bradf. Sur. (N. Y.) 324.

⁹⁵ *Darcus v. Crump*, 6 B. Mon. (Ky.) 363; *Macknet's Ex'rs v. Macknet*, 24 N. J. Eq. 277; *Yeaton v. Roberts*, 28 N. H. 459. But see *Blatchford v. Newberry*, 99 Ill. 11.

ever, of contingent remainders,⁹⁶ which depend upon the happening of some designated contingency, the shortening or the failure of the preceding estate does not work an acceleration.⁹⁷

143. SUCCESSIVE REMAINDERS—One remainder may be limited to take effect after another, until the fee is exhausted. Such limitations are called “successive remainders.”

One remainder may be limited to take effect after another, and so on until the fee is exhausted.⁹⁸ For example, there may be an estate given to A. for life, with remainder to B. for life, with remainder to C. for life; and, if no further disposition of the estate be made on the death of C., the estate will revert to the grantor or his heirs. Successive remainders must, however, like other remainders, take effect immediately after each other.⁹⁹

144. CROSS-REMAINDERS—Remainders after two or more particular estates in different persons, which upon the termination of any one of the preceding estates go over to the survivor of the particular tenants, are called “cross-remainders.”

Where a particular estate is given to two or more persons as tenants in common, or particular estates in various parcels of the same land or in different lands are given to different persons in severalty, and upon the termination of the interest of any one of them his share is to remain over to the rest, the remainders so limited over are called “cross-remainders.”¹ Thus if black acre is given to A. and B., in common, for life, remainder in fee to the survivor, or a devise of black acre is made to A., and white acre to B., in tail, and if either dies without issue, the survivor to take, in either case A.

⁹⁶ *Infra*.

⁹⁷ *Purdy v. Hoyt*, 92 N. Y. 446. See, also, *Dale v. Bartley*, 58 Ind. 101; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155.

⁹⁸ 2 Washb. Real Prop. (5th Ed.) 589.

⁹⁹ *Whitcomb v. Taylor*, 122 Mass. 243.

¹ 1 Preston, Estates, 94; 2 Blk. Comm. 381; 4 Kent, Comm. 201; Challis, Real Prop. 241; 2 Washburn, Real Property, 233; *Hall v. Priest*, 6 Gray (Mass.) 18; *Allen v. Tr. of Ashley School Fund*, 102 Mass. 265; *Hawley v. Northampton*, 8 Mass. 3, 5 Am. Dec. 66; *Seabrook v. Mikell*, 1 Cheves Eq. (S. C.) 80. But see, for cases where the whole does not go to the last survivor, *McGee v. Hall*, 26 S. C. 179, 1 S. E. 711; *Reynolds v. Crispin* (Pa.) 11 Atl. 236.

and B. have cross-remainders by express terms.² If, however, the devise of the different lands had been to A. and B., and remainder over, on the death of both of them, to C., A. and B. have cross-remainders by implication.³ Cross-remainders in a deed can be given only by express limitation, and can never be implied;⁴ but they may be raised by implication in a will.⁵ It was said, in former times, that cross-remainders could never arise between more than two, owing to the great confusion it would create.⁶ This doctrine is, however, exploded. Whether or not cross-remainders are implied in a will is a question of the testator's intention, upon a construction of the whole instrument.⁷ While cross-remaindermen resemble in some respects joint tenants, yet it is not necessary that the four unities which are required in joint tenancies be present in the case of cross-remainders.

145. ALTERNATE REMAINDERS—When remainders are so limited after a particular estate that only one of them can ever take effect, they are called "alternate remainders."

Although a remainder cannot be limited after a fee simple, yet, even at common law, two or more concurrent fees by way of remainder, one as an alternative for the other, can be limited.⁸ One remainder is not limited upon or after the other, since only one of them can ever take effect.⁹ For example, land may be given to A. for life, and, if he have issue male, then to such issue male and his heirs forever, but, if he die without issue male, then to B. and his

² 4 Kent, Comm. 201.

³ Baldrick v. White, 2 Bailey (S. C.) 442; Wall v. Maguire, 24 Pa. 248.

⁴ Bohon v. Bohon, 78 Ky. 408; Cole v. Livingston, 1 Ventr. 224; Doe v. Dorvell, 5 Term R. 521; Doe v. Wainwright, 5 Term R. 427; Doe v. Worsley, 1 East, 416.

⁵ Purdy v. Hayt, 92 N. Y. 446; Turner v. Fowler, 10 Watts, 325; Atherton v. Pye, 4 Term R. 710. Cf. Doe v. Cooper, 1 East, 229. In a will they may arise by implication. Watson v. Foxon, 2 East, 36; Doe v. Webb, 1 Taunt. 234; Ashley v. Ashley, 6 Sim. 358.

⁶ Cro. Jac. 655; Shaw v. Weigh, 2 Jon. 82.

⁷ Taafe v. Conmee, 10 H. L. C. 64, 11 Eng. Reprint, 949.

⁸ Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24; Micheau v. Crawford, 8 N. J. Law 90; Allison v. Allison, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920. And see Demill v. Reid, 71 Md. 175, 17 Atl. 1014; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565; Beckley v. Leffingwell, 57 Conn. 163, 17 Atl. 766; Mercantile Bank of New York v. Ballard's Assignee, 83 Ky. 481, 4 Am. St. Rep. 160.

⁹ Woollen v. Frick, 38 Md. 428. See, also, Doe v. Selby, 2 B. & C. 926, 26 Rev. Rep. 585.

heirs forever.¹⁰ In this case only one remainder could take effect, and the other would be absolutely void; or, in other words, an alternative remainder in fee can be limited to take effect in place of another, but not subsequently to it. Limitations of this character are called "alternate remainders in fee," "substitutional fees," and "remainders on a contingency with a double aspect."¹¹ Alternate remainders are necessarily both contingent.¹²

146. VESTED REMAINDERS—A vested remainder is one where neither the right to the possession of the estate upon the determination of the preceding estate, nor the person entitled, is uncertain; the only uncertainty is the time of enjoyment.

Remainders are either vested or contingent.¹³ Vested remainders are sometimes termed executed,¹⁴ and contingent remainders executory.¹⁵ A vested remainder is a remainder limited to a certain person and on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant.¹⁶ The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.¹⁷ In other words, a vested remainder is a present right to the future enjoyment of an estate, and will vest in possession as soon as the particular estate determines.¹⁸ No amount of uncertainty as to enjoyment makes a remainder con-

¹⁰ *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54; *Loddington v. Kime*, 1 Salk. 224; *Goodright v. Dunham*, Doug. 264; *Smith v. Horlock*, 7 Taunt. 129.

¹¹ *Fearne*, Cont. Rem. 373; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295.

¹² *Luddington v. Kime*, 1 Ld. Raym. 203.

¹³ *Bunting v. Speck*, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *Palmer v. Dunham*, 52 Hun, 468, 6 N. Y. Supp. 46.

¹⁴ *Hudson v. Wadsworth*, 8 Conn. 348, 359; *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217.

¹⁵ *Hudson v. Wadsworth*, *supra*.

¹⁶ *Lantz v. Massie*, 99 Va. 709, 40 S. E. 50; *Wallace v. Minor*, 86 Va. 550, 10 S. E. 423; *Chippis v. Hall*, 23 W. Va. 504, 515.

¹⁷ *Fearne*, Cont. Rem. p. 216; *Parkhurst v. Smith*, Willis, 337.

¹⁸ *Croxall v. Shererd*, 5 Wall. 268, 288, 18 L. Ed. 572; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; *Marvin v. Ledwith*, 111 Ill. 144; *Hill v. Bacon*, 106 Mass. 578; *In re Young*, 145 N. Y. 535, 40 N. E. 226; *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811.

tingent. For instance, a vested remainder may be given to A. for life, to take effect after an estate tail in B. In this case, if A. is a person in being, the remainder is vested, although he will probably never enjoy his estate.¹⁹ A contingent remainder becomes vested upon the happening of the event which makes it contingent, and it is then in all respects like other vested remainders.²⁰ It is the uncertainty of the *right* of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent.²¹ The law favors vested estates, and in doubtful cases remainders are construed as vested, rather than as contingent.²² Accordingly, in construing wills, for the purpose of determining whether a remainder is vested or contingent, while the court will seek to give effect to the intention of the testator,²³ yet, where there is any ambiguity, the remainder will be construed as vested.²⁴

Remainders to a Class

A remainder to a class of persons, as, for example, to children, grandchildren, brothers and sisters, is usually a vested remainder, in case of a conveyance, provided there are members of the designated class living at the time of the delivery of the deed; and, in case of a will, the remainder will ordinarily vest in those who are in existence at the time of the testator's death, subject, in either case, to its opening and letting in those afterwards born, or otherwise coming within the designated class, provided they are born, or otherwise come in, before the particular estate determines, or before the period of distribution.²⁵ In case of a devise, if there is

¹⁹ *Kemp v. Bradford*, 61 Md. 330; *Gourley v. Woodbury*, 42 Vt. 395.

²⁰ *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Wendell v. Crandall*, 1 N. Y. 491; *Van Giesen v. White*, 53 N. J. Eq. 1, 30 Atl. 331; *Doe v. Perryn*, 3 Term R. 484.

²¹ 4 Kent, Comm. 203, note.

²² *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Wedekind v. Hallenberg*, 88 Ky. 114, 10 S. W. 368; *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45; *Weatherhead v. Stoddard*, 58 Vt. 623, 5 Atl. 517, 56 Am. Rep. 573; *Dingley v. Dingley*, 5 Mass. 535; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *IN RE KENYON*, 17 R. I. 149, 20 Atl. 294, *Burdick Cas. Real Property*.

²³ *Freeman v. Freeman*, 141 N. C. 97, 53 S. E. 620; *In re Moran's Will*, 118 Wis. 177, 96 N. W. 367.

²⁴ *Mettler v. Warner*, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388; *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246; *Canfield v. Fallon*, 43 App. Div. 561, 57 N. Y. Supp. 149; *McCall v. McCall*, 161 Pa. 412, 29 Atl. 63.

²⁵ *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325; *Thomas v. Thomas*, 247 Ill. 543, 93 N. E. 344, 139 Am. St. Rep. 347; *Minot v. Doggett*, 190 Mass. 435, 77 N. E. 629; *Johnson v. Valentine*, 4 Sandf. (N. Y.) 36; *Irvine's Estate*, 31 Pa. Super. Ct. 614.

no member of the class in existence at the time of the testator's death, the remainder is contingent for the time being,²⁶ although it will become vested as soon as a member of the designated class comes into existence.²⁷ In any case, however, although members of the class may be in existence, at the time of the delivery of a deed, or of a testator's death, the remainder will be contingent if the instrument shows that the vesting in any of the class is to depend upon some future event,²⁸ or that the members are to be ascertained at some future time.²⁹ For instance, where a remainder is given "to children of A. living at his death," the remainder is contingent, and does not vest until A.'s death, because up to that time the persons who are to take cannot be ascertained.³⁰ Where a remainder is given "to the children of A.," a living person, and becomes vested by the fact that A. has children, a conveyance by the children in whom the remainder had vested would not bar the rights of other children of A. subsequently born, not even if the conveyance was made by a guardian of the children under an order of court.³¹

Destruction of Vested Remainders

A vested remainder may be subject to be defeated by a contingency; that is, a vested remainder may be limited as an estate on condition or on limitation.³² Vested remainders, moreover, are destroyed by merger,³³ and, when limited after estates tail, may be barred in the same way as the entail.³⁴ In no other case, however, will acts of the tenant of the particular estate defeat a vested remainder.³⁵

²⁶ *Anthracite Sav. Bank v. Lees*, 176 Pa. 402, 35 Atl. 197; *In re Fetrow's Estate*, 58 Pa. 424; *Cooper v. Hepburn*, 15 Grat. (Va.) 551.

²⁷ *Phillips v. Johnson*, 14 B. Mon. (Ky.) 172; *Wootten v. Shelton*, 6 N. C. 188; *Anthracite Sav. Bank v. Lees*, 176 Pa. St. 402, 35 Atl. 197; *Cooper v. Hepburn*, *supra*.

²⁸ *Smith v. Rice*, 130 Mass. 441.

²⁹ *Thomas v. Thomas*, 247 Ill. 543, 93 N. E. 344, 139 Am. St. Rep. 347; *Crapo v. Price*, 190 Mass. 317, 76 N. E. 1043; *Schwencke v. Haffner*, 22 Misc. Rep. 293, 50 N. Y. Supp. 165; *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. 676.

³⁰ *Dwight v. Eastman*, 62 Vt. 398, 20 Atl. 594; *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797, 5 L. R. A. 45; *Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334; *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811.

³¹ *Graham v. Houghtalin*, 30 N. J. Law, 552.

³² *Roome v. Phillips*, 24 N. Y. 463; *Doe v. Moore*, 14 East, 601.

³³ See *Merger*, *ante*. There is no merger, however, when the particular estate is equitable and the remainder legal. *IN RE KENYON*, 17 R. I. 149, 20 Atl. 294, *Burdick Cas. Real Property*.

³⁴ *Gray*, *Perp.* § 111.

³⁵ *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *Whitney v. Salter*, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656; *Allen v. De Groodt*, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; *Varney v. Stevens*, 22 Me. 331. But see *Fidelity Ins. Trust & Safe-Deposit Co. v. Dietz*, 132 Pa. 36, 18 Atl. 1090.

147. CONTINGENT REMAINDERS—A contingent remainder is one where there is an uncertainty either as to the right to the estate, or as to the person entitled, or as to both. A contingent remainder depends on an event or condition which may never happen or be performed, or which may not happen or be performed till after the termination of the preceding estate.

The early English law required that, on a grant by deed of a particular estate and remainder, the remainder must immediately vest in the grantee of that estate.³⁶ In other words, the remainder came to be allowed at common law only by relaxation of this early rule.³⁷ It was not, however, till the times of Henry VI (1421-1471) that any relaxation of the rule was allowed; the earliest decision upon the subject appearing to be that a remainder to an heir of a living person was valid if such living person died before the preceding estate terminated.³⁸ This did not mean, of course, that all contingent remainders were valid, and, as a matter of history, it was only by slow steps that contingent remainders were generally recognized—in fact, not before the latter part of the sixteenth century.³⁹ In the case of a vested remainder, we have seen that the seisin was conceived of as being between the particular tenant and the remainderman—the former being seised of the land; the latter, of the remainder. A contingent remainder was not conceived of, however, as being invested with any part of the seisin, and there are various quaint notions expressed by the early writers upon the subject as to where the seisin was, in case of a contingent remainder, pending its vesting upon the happening of the contingent event. Thus, we are told that it was “in the clouds,” or “in the bosom of the law.”⁴⁰ It should be clear, however, that the seisin, so far as not disposed of by the creation of the particular estate, remains in the grantor as a reversion, although he has created a contingent remainder; such reversion to be divested and to take effect, by operation of law, as a vested remainder upon the happening of the contingency upon which the contingent remainder depended.⁴¹

The general definition of a remainder, already given,⁴² namely,

³⁶ Litt. § 721; Co. Litt. 378a.

³⁷ Laws of England, vol. 24, § 416, n.

³⁸ Holds., Hist. of English Law, III, 117; Y. B. 9 Hen. VI, Trin. pl. 19.

³⁹ Holds., Hist. of Eng. Law, III, 117; Gray, Perp. (2d Ed.) 111.

⁴⁰ Co. Litt. 342b; 1 P. Wms. 515, 516.

⁴¹ Town of Shapleigh v. Pillsbury, 1 Me. 271. Cf. Wilson v. Denig, 166 Pa. 29, 30 Atl. 1025. See Egerton v. Massey, 3 C. B. N. S. 338, 91 E. C. L. 338.

⁴² Supra.

that it is a remnant of an estate in land, depending upon a preceding particular estate, created by the same instrument, and limited to arise immediately upon the termination of the preceding estate, but not in abridgment of it, applies equally to contingent remainders as well as to vested remainders. Thus, a contingent remainder must vest at, or before, the termination of the particular estate which precedes it, although a child en ventre sa mere is regarded as in being, so that a remainder may vest in it;⁴³ and the contingency on which a remainder is to vest must in no case be in derogation of the preceding estate.⁴⁴ A contingent remainder will be void, however, if it is made to depend on an unlawful condition, or one against public policy.⁴⁵ For example, a remainder to illegitimate children, to be subsequently conceived, is void.⁴⁶ With these exceptions, a remainder may be made to depend on any contingency which the ingenuity of the person creating the remainder may devise.

Distinguished from Vested Remainders

It is either the uncertainty of the happening of the event upon which the remainder depends, or the uncertainty of the person who is to take, that makes a remainder contingent.⁴⁷ In contingent remainders, as distinguished from vested, there is an uncertainty as to vesting of the right or title, as well as to the vesting of the possession.⁴⁸ For a vested remainder there must be some certain, defined person, in esse and ascertained, who answers the description of remainderman at some time during the continuance of the particular estate, and not merely at its termination; and the remainder must, of course, be capable of taking effect in possession immediately on the termination of the preceding particular estate.⁴⁹ For ex-

⁴³ *Reeve v. Long*, 3 Lev. 408; *Doe v. Clarke*, 2 H. Bl. 399; *Blasson v. Blasson*, 2 De Gex, J. & S. 665. So by statute in some states. 1 Stim. Am. St. Law, § 1413.

⁴⁴ *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 149, 63 Am. Dec. 725, *Burdick Cas. Real Property*; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102. But see *Goodtitle v. Billington*, 1 Doug. 753.

⁴⁵ 2 Washb. Real Prop. (5th Ed.) 629. A contingent remainder may be void for remoteness. See rule against perpetuities, chapter XVI, post.

⁴⁶ *Blodwell v. Edwards*, Cro. Eliz. 509; *Lomas v. Wright*, 2 Mylne & K. 769.

⁴⁷ *Shannon v. Bonham*, 27 Ind. App. 369, 60 N. E. 951; *SULLIVAN v. GARESCHE*, 229 Mo. 496, 129 S. W. 949, *Burdick Cas. Real Property*.

⁴⁸ *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366; *L'Etourneau v. Henquet*, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; *Loddington v. Kime*, 1 Salk. 224; *Goodright v. Dunham*, Doug. 264. Where a devise is made to a woman, and, if she "die childless," remainder over, the remainder is contingent until her death. *Furnish v. Rogers*, 154 Ill. 569, 39 N. E. 989.

⁴⁹ *Blanchard v. Blanchard*, 1 Allen (Mass.) 223. And see *Thomson v. Hill*, 87 Hun, 111, 33 N. Y. Supp. 810.

ample, a limitation to A. for life, with remainder to the eldest son of B., becomes vested as soon as B. has a son; but, if the remainder had been to the eldest son of B. living at A.'s death, the remainder would have been contingent, and could not possibly vest until A.'s death, which in this case is also a termination of a particular estate. This remainder is contingent, because the person who is to take can be ascertained only at the termination of the particular estate; yet, if B. has a son, the remainder is capable of vesting in possession at any time the particular estate may be determined.⁵⁰ As said by Fearne:⁵¹ "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is, and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from a contingent."⁵²

Classes of Contingent Remainders

As already stated, a contingent remainder depends either upon the uncertainty of the happening of some event, or upon the uncertainty of the remainderman.⁵³ This classification is made, in fact, by Blackstone,⁵⁴ who says that contingent remainders may be limited (1) to a dubious and uncertain *person*; or (2) upon a dubious and uncertain *event*.

Mr. Fearne, however, presents a more analytical division,⁵⁵ and his classification of contingent remainders has been generally accepted.⁵⁶ He divides contingent remainders into four classes.⁵⁷ They may be summed up as follows:

⁵⁰ And see *Richardson v. Wheatland*, 7 Metc. (Mass.) 169; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Thomson v. Ludington*, 104 Mass. 193; *Colby v. Duncan*, 139 Mass. 398, 1 N. E. 744; *In re Callahan's Estate*, 13 Phila. (Pa.) 230; *Craige's Appeal*, 126 Pa. 223, 17 Atl. 585. But see *Smith v. West*, 103 Ill. 332.

⁵¹ Charles Fearne (pronounced Fûrn), 1742-1794, author of celebrated and masterly work on Contingent Remainders.

⁵² Fearne, *Contingent Remainders*, 216.

⁵³ *Shannon v. Bonham*, 27 Ind. App. 369, 60 N. E. 951.

⁵⁴ 2 Blk. Comm. 169.

⁵⁵ Fearne, *Contingent Remainders*.

⁵⁶ *Laws of England*, vol. 24, § 416, n.

⁵⁷ Fearne, *Contingent Remainders*, 5. For statement and illustration of Fearne's four classes of contingent remainders, see *SULLIVAN v. GAR-ESCHE*, 229 Mo. 496, 505, 129 S. W. 949, *Burdick Cas. Real Property*; *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217.

(1) *Where the Remainder Depends Entirely upon a Contingent Determination of the Preceding Estate Itself*

This is illustrated by a limitation to A. till a specified event, which may or may not happen, and, on its happening, then to B. in fee.⁵⁸ In such a case, A. has by implication a life estate determinable upon the happening of the event, while B.'s remainder is contingent on the happening of the same event during the life of A. The remainder cannot become vested during the continuance of the particular estate, since it vests, if at all, only upon the determination of the preceding estate, and then immediately. It will also be noted that it does not cut short the preceding estate, and thus complies with the requirement of a good remainder. If, however, there is a limitation to A. for life, with a condition that if a certain event happen the estate shall go to B., the interest of B. is not a remainder, since it abridges the preceding estate. Such a limitation would not be good at common law, but it would be good as a shifting use, or, in a will, as an executory devise.⁵⁹ Such a limitation is also called a conditional limitation.⁶⁰

(2) *Where the Contingency is Independent of the Determination of the Preceding Estate*

Thus, suppose a limitation to A. for life, remainder to B. for life, but, if B. die before A., remainder to C. for life. The remainder to C. is contingent upon the death of B. before A., but this contingency is independent of the determination of A.'s life estate. If B. survives A., the remainder to C. can never take effect.⁶¹

(3) *Where the Contingency is Certain to Happen, but may Not Happen till After the Determination of the Particular Estate*

This third class of Mr. Fearne's contingent remainders is illustrated as follows: A limitation to A. for life, and after the death of B., to C. in fee. Although the death of B. is certain, yet it may not happen till after the death of A., thus making the remainder to C. a contingent one, since, should B. outlive the life estate in A., the remainder to C. would not vest, owing to the fact that a remainder must arise immediately on the termination of the preceding estate.⁶²

⁵⁸ Boraston's Case (1587) 3 Co. Rep. 19a. Laws of England, vol. 24, § 416.

⁵⁹ See *infra*.

⁶⁰ Laws of England, vol. 24, § 416, n.; *Egerton v. Brounlow*, 4 H. L. Cas. 1, 186.

⁶¹ Laws of England, vol. 24, § 416, n.

⁶² See Definition of Remainder.

(4) *Where the Person to Whom the Limitation is Made is Not Ascertained or is Not in Being*

Thus, where there is a limitation to A. for life, remainder to the heirs of B., the remainder is contingent, since there can be no heirs of B. till his death, for "no one is the heir of the living."⁶³

The Preceding Estate

Where a contingent remainder is an estate of freehold, it must have some vested estate of freehold to precede and support it.⁶⁴ There must be some one to take the seisin, and for this a freehold is necessary.⁶⁵ For example, if land be given to A. for 25 years, if he lives so long, with remainder after his death to B., the remainder to B. is contingent, since A. may not die until after the expiration of the 25 years, and therefore is invalid, because there is no freehold to support it, and the remainder will not be ready to vest in possession on the expiration of the term.⁶⁶ If, however, the term of years given to A. is so long—for instance, 80 years—that there is no probability of A.'s living until the expiration of the time, it is held that the remainder is good, because A. really has an estate for life.⁶⁷ Where, however, a contingent remainder is merely an estate for years, it is not necessary that the preceding estate should be a freehold.⁶⁸ In any case, however, the preceding estate must continue until the contingent remainder vests; otherwise, the remainder can never take effect. In other words, every remainder, whether vested or contingent, must vest either during the preceding estate or else immediately upon its termination.⁶⁹

⁶³ Co. Litt. 378a; Laws of England, vol. 24, § 416. And see statement of this fourth class of contingent remainders in *SULLIVAN v. GARESCHE*, 229 Mo. 496, 129 S. W. 949, Burdick Cas. Real Property.

⁶⁴ Laws of England, vol. 24, § 417, note.

⁶⁵ *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 474, 18 L. Ed. 869. And see *supra*. In some states this has been changed by statute. 1 Stim. Am. St. Law, § 1424.

⁶⁶ *Beverly v. Beverly*, 2 Vern. 131.

⁶⁷ *Fearne*, Cont. Rem. p. 20 et seq.; 2 Washb. Real Prop. (5th Ed.) 615; *Weale v. Lower*, Poll. 55, 67; *Napper v. Sanders*, Hut. 118. "Apparently the length of the term should depend upon the age of the particular tenant. Thus, if he were forty at the date of the conveyance, a sixty years term should suffice. But this is not so, and the term must be at least eighty years, whatever the age of the life." Laws of Eng. vol. 24, § 412, note, citing *Beverly v. Beverly*, 2 Vern. 131.

⁶⁸ *Fearne*, Contingent Remainders, p. 285; Laws of Eng. vol. 24, § 417.

⁶⁹ *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Irvine v. Newlin*, 63 Miss. 192; *Festing v. Allen*, 12 Mees. & W. 279; *Price v. Hall*, L. R. 5 Eq. 399; *Astley v. Micklethwait*, 15 Ch. Div. 59; *Holmes v. Prescott*, 33 Law J. Ch. 264; *Rhodes v. Whitehead*, 2 Drew. & S. 532; *Fearne*, Contingent Remainders, pp. 307, 310.

148. SAME—DESTRUCTION OF CONTINGENT REMAINDERS—1. At common law, contingent remainders may be destroyed:

- (a) By the expiration of the particular estate before the remainder vests.
- (b) By the destruction of the particular estate.
- (c) By merger of the particular estate and the next vested remainder.
- (d) By forfeiture of the particular estate.

The destruction of contingent remainders may be prevented by limitations "to trustees to preserve contingent remainders."

In many states the liability of contingent remainders to destruction has been removed by statute.

In the absence of statutes to the contrary, a contingent remainder is liable to be destroyed, not only by its not being able to take effect in possession upon the natural determination of the preceding estate,⁷⁰ but also by any means which prematurely defeat or determine such estate, as, for example, forfeiture, surrender, or merger.⁷¹ This is not the case, however, when the legal fee is outstanding, and the particular estate and remainder are both equitable.⁷² At common law, the tenant of the particular estate, by surrendering his title to the one having the next vested remainder, could cause his particular estate to be merged, and thus cut out all contingent remainders intervening between his estate and the vested remainder.⁷³ Merger occurs, and thus destroys intervening contingent remainders, whenever the particular estate and the next vested remainder are united in the same person by act of law or of the parties.⁷⁴ This is not the case, however, when the two estates are so limited by the instrument creating them.⁷⁵ At common law, if the tenant of the particular estate

⁷⁰ Laws of Eng. vol. 24, § 419 (g). See *BAILS v. DAVIS*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937, Burdick Cas. Real Property.

⁷¹ Fearn, *Contingent Remainders*, 316 et seq.; Laws of Eng. vol. 24, § 419, (h) (i); *Doe v. Gatacre*, 5 Bing. N. C. 609; *Archer's Case*, 1 Coke, 66b. As to the effect of a disseisin of the tenant of the particular estate, see 1 Stim. Am. St. Law, § 1403b.

⁷² *Abbiss v. Burney*, 17 Ch. Div. 211; *Berry v. Berry*, 7 Ch. Div. 657; *Marshall v. Gingell*, 21 Ch. Div. 790; *Astley v. Micklethwait*, 15 Ch. Div. 59. And see Laws of Eng. vol. 24, § 419, (j) (k).

⁷³ See *Fisher v. Edington*, 12 Lea (Tenn.) 189.

⁷⁴ *Jordan v. McClure*, 85 Pa. 495; *Craig v. Warner*, 5 Mackey (D. C.) 460, 60 Am. Rep. 381.

⁷⁵ *Dennett v. Dennett*, 40 N. H. 498. See, however, *Egerton v. Massey*, 3 O. B. (N. S.) 338; *Bennett v. Morris*, 5 Rawle (Pa.) 9.

asserted a greater right or title than he had, as by making a tortious feoffment, it caused a forfeiture of his estate, and thus destroyed any contingent remainders depending thereon.⁷⁶ To have this effect, however, there must have been an entry by the one entitled to the next vested remainder, or by the reversioner.⁷⁷ The tortious effect of a feoffment no longer obtains.⁷⁸

Trustees to Preserve Contingent Remainders

The liability of contingent remainders to destruction by the premature determination of the preceding estate was avoided by the insertion in the instrument of limitations to trustees to preserve contingent remainders. An estate in remainder was vested in the trustees for the life of the tenant for life, to commence when his estate determined.⁷⁹ Thus, after the limitation of a particular estate, for instance, an estate to A. for life, the remainder was given to trustees to preserve contingent remainders during the life of A., and then other remainders over as in the usual limitations. In these cases, if by any means A.'s life estate was determined before his death, the trustees would hold the estate until his death, when the other remainders would take effect as though A. had not lost his estate. The trustees were held to take vested remainders under these limitations; otherwise, their estate would have been destroyed, like other contingent remainders.⁸⁰ Instead, however, of giving the trustees a vested remainder, the estate might be conveyed directly to a trustee and his heirs, in trust for the tenant of the particular estate, and upon the further trust to preserve the contingent remainder.⁸¹ In such cases, the statute of uses does not execute the trust; the legal estate remaining in the trustees.⁸² If the trustees should do anything to destroy their own estate, thereby defeating the contingent remainder depending thereon, they would ordinarily be guilty of a breach of trust, and liable for the damage suffered by the remaindermen.⁸³

⁷⁶ *Archer's Case*, 1 Coke, 66b; *Doe v. Howell*, 10 Barn. & C. 191.

⁷⁷ *Williams v. Angell*, 7 R. I. 145.

⁷⁸ *Ante*.

⁷⁹ *Fearne*, *Contingent Remainders*, p. 325 et seq.; 2 Blk. Comm. 171.

⁸⁰ *Smith v. Packhurst*, 3 Atk. 135.

⁸¹ *Vanderheyden v. Crandall*, 2 Denio (N. Y.) 9; *Moody v. Walters*, 16 Ves. Jr. 283, 33 Eng. Reprint, 992.

⁸² *Vanderheyden v. Crandall*, 2 Denio (N. Y.) 9.

⁸³ 2 Blk. Comm. 171; *Else v. Osborn*, 1 P. Wms. 387, 24 Eng. Reprint, 437; *Biscoe v. Perkins*, 1 Ves. & B. 485, 35 Eng. Reprint, 188; *Winnington v. Foley*, 1 P. Wms. 536, 24 Eng. Reprint, 505. For a full account of trustees to preserve contingent remainders, see *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510.

Statutory Modifications of Remainders

By express statutes in England, and in most of our states, it is now provided that contingent remainders shall not be destroyed by acts of the tenant of the particular estate, nor by the termination of the particular estate before the remainder vests.⁸⁴ Such statutes do away, of course, with the necessity of trustees to preserve contingent remainders. The English statute upon contingent remainders is very sweeping.⁸⁵ This statute provides that every contingent remainder created by any instrument executed after August 2, 1877, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect as a springing or shifting use or executory devise or other executory limitation.⁸⁶

There are other statutes, in our various states, upon the subject of remainders, which must be taken into consideration in any particular jurisdiction, since these statutes have modified many of the common-law rules. Some of these statutes, by their very definition of "remainders," have departed from the common-law definition, and include, in some of them, executory interests;⁸⁷ that is, future estates, which do not depend upon a preceding estate.⁸⁸ Moreover, other statutes permit the limitation of a fee upon a fee, also the limitation of a "remainder" on a contingency which may operate to abridge the preceding estate.⁸⁹ It should also be further stated that, even in the absence of statutes, the common-law requirements relating to remainders are not so important as they once were, since, under the statute of uses and the statute of wills, future estates, although not good as remainders, may, nevertheless, take effect as future uses or executory devises.⁹⁰

⁸⁴ 1 Stim. Am. St. Law, §§ 1403, 1426. And see *Ritchie v. Ritchie*, 171 Mass. 504, 51 N. E. 132; *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310.

⁸⁵ Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33).

⁸⁶ Laws of Eng. vol. 24, § 421. As to springing or shifting uses and executory devises, see *infra*.

⁸⁷ See *infra*.

⁸⁸ Consult the various statutes. See, e. g., Code Ga. 1895, § 3098. And see laws of New York, Michigan, Wisconsin and Minnesota.

⁸⁹ See 1 Stim. St. L. § 1421 et seq.

⁹⁰ See *infra*.

149. RULE IN SHELLEY'S CASE—Where, under a conveyance or devise, the ancestor takes an estate of freehold, and in the same instrument an estate is limited by way of remainder, either mediately or immediately, to his heirs or to his heirs in tail, the word "heirs" is a word of limitation and not of purchase, and the ancestor takes a fee simple or in tail, as the case may be.

In connection with the subject of remainders, it is important to consider a famous rule in the English common law, known as "the rule in Shelley's Case." Probably no other principle or rule in our law of real property has provoked more discussion, elicited more learning, caused more litigation, aroused more antagonism, and, with it all, been more vehemently assailed and, at the same time, more zealously defended, than this one.⁹¹ It has been bitterly opposed in many quarters, and has been expressly repealed by statute, in a number of our states, on the ground that it overrides the expressed intention of the grantor or testator. The difficulties and technicalities with which it is said to abound arise mainly, however, from the lack of harmony on the part of the courts in applying the rule, and also, frequently, from the complicated cases themselves in which the rule is invoked. As to the statement of what the rule is, no difficulty is presented. It may be shortly expressed in the words above set forth.⁹² By "a word of limitation," as used in the rule, is meant a word that limits or defines an estate; that is, measures the duration, the bounds, or the limits of the estate the ancestor takes.⁹³ By a word of "pur-

⁹¹ *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Spader v. Powers*, 56 Hun (N. Y.) 153, 9 N. Y. Supp. 39; *Settle v. Settle*, 10 Humph. (Tenn.) 474; *Doyle v. Andis*, 127 Iowa, 36, 102 N. W. 177, 69 L. R. A. 953, 4 Ann. Cas. 18; *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812. And see *HARDAGE v. STROOPE*, 58 Ark. 303, 24 S. W. 490, *Burdick Cas. Real Property*.

⁹² See, also, the following cases: *Kleppner v. Laverty*, 70 Pa. 70; *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30; *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662; *Taney v. Fahnley*, 126 Ind. 88, 25 N. E. 882; *Langley v. Baldwin*, 1 Eq. Cas. Abr. 185. Cf. *Turman v. White*, 14 B. Mon. (Ky.) 560; *Pratt v. Leadbetter*, 38 Me. 9; *Hamilton v. Wentworth*, 58 Me. 101; *HARDAGE v. STROOPE*, 58 Ark. 303, 24 S. W. 490, *Burdick Cas. Real Property*; *BAILS v. DAVIS*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937, *Burdick Cas. Real Property*.

⁹³ "The word 'limitation' has two well-defined and distinct meanings. In the one, the primary meaning signifies the marking out of the bounds or limits of an estate created. In the other, it signifies simply the creation of an estate." *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598.

chase" is meant the manner, in contradistinction from "descent," in which an estate is acquired by designated persons. All derivative titles are said to be either "titles by purchase" or "titles by descent."⁹⁴ The word "purchase" in its popular sense means the acquisition of property by bargain and sale for some valuable consideration; but purchase,⁹⁵ in its legal sense, includes every method of coming to an estate other than by inheritance, including a gift or a devise.⁹⁶ With this explanation, it will be readily seen that the rule in *Shelley's Case* means that the word "heirs" defines the quantum, or the character, of the estate given to the grantee or devisee,⁹⁷ and that the heirs of the grantee or devisee do not take any estate at all by purchase, that is, by the conveyance or by the will, but if they do take eventually, upon the death of the ancestor, they will take only by descent. In an ordinary case, when a life estate is given to one person, and in the same instrument a remainder is given to another person, the particular estate and the remainder are separate estates, and each person, the particular tenant and the remainderman, takes by "purchase," as distinguished from descent. It is only where the persons described as taking the "remainder" are generally described as the "heirs" of the taker of the particular estate that such a descriptive term is construed as a word of limitation of the estate of the first taker.⁹⁸ The estate for life limited to the ancestor may be followed immediately by a remainder to his heirs, or another remainder may be limited between the life estate and the remainder to the heirs. In this latter case, the remainder to the heirs is said to be limited "mediately," and the ancestor has two separate estates, a life estate in possession, and an estate of inheritance in remainder.⁹⁹

Shelley's Case

The celebrated case from which the rule receives its name was the case of *Wolfe v. Shelley*.¹ The case involved a number of points not necessary for our present consideration, but, for our immediate purpose, it may be briefly stated as follows: Edward Shelley and his wife were seised of certain lands in special tail, with remainder to the said Edward Shelley and his heirs male. Two sons, Henry and Richard, were born to Edward and his wife.

⁹⁴ See Title, post, chapter XXII.

⁹⁵ Lat., *perquisitio*.

⁹⁶ Litt. § 12; 2 Blk. Comm. 201.

⁹⁷ *Fullagar v. Stockdale*, 138 Mich. 363, 101 N. W. 576.

⁹⁸ Laws of Eng. vol. 24, § 422.

⁹⁹ Laws of Eng. vol. 24, § 422 (v).

¹ 1581, 1 Co. Rep. 93b. See *HARDAGE v. STROOPE*, 58 Ark. 303, 24 S. W. 490, *Burdick Cas. Real Property*.

Edward's wife died. Henry, the elder son, married, and died leaving his wife enceinte. Edward Shelley died before the birth of his grandchild, and after Edward's death Richard, the younger son, entered as heir. Soon after, Henry Shelley, the grandson of Edward, was born. Richard leased the lands to Wolfe. Henry Shelley, the grandson, entered and ejected Wolfe. Thereupon Wolfe, claiming under Richard, sues to recover from Henry. The question was whether or not Henry Shelley, the grandson of Edward and posthumous son of Henry, Edward's older son, was entitled to the property. In holding that Henry was entitled to the property, the court reaffirmed a rule of long standing, namely, that where a freehold is given to an ancestor for life, and in the same gift an estate is limited to his heirs in fee or in tail, the word "heirs" is a word of limitation; that is, the "heirs" take by descent, and not by purchase. This distinction was all-important in the Shelley Case, since if the heir (the oldest male heir, according to the English rule of primogeniture) did take by purchase, then Henry Shelley, the grandson, could not take, since in order to take by purchase it would have been necessary that he should have been in esse—that is, born—at the time of his grandfather's death. For the purpose of title by "purchase" a child in ventre sa mere is not considered in esse.² However, for the purposes of descent, such an unborn child is in esse,³ and, consequently, Henry, the grandson, as oldest son of Henry, Edward's older son, would take before his uncle, Richard, Edward's younger son.

Origin of the Rule

The "rule" laid down in Shelley's Case did not originate, however, in that case. As early as Bracton's day, it was settled that a grant to a man and his heirs gave nothing to the heirs.⁴ The word "heirs" was merely a word of limitation. Further, it is clear that a grant "to A. and to his heirs," and a grant "to A. for life, and after his decease to his heirs," according to the primitive force and effect of the expressions, were manifestly identical. They were still construed as identical, notwithstanding the change in the position and interest of the heir consequent upon the enlarged power of alienation in the ancestor. The limitation "to the heirs," in both cases, ceased to confer directly any estate upon the persons answering to that designation, and was referred to the estate of the ancestor, which, though expressed to be, in the first place, for

² 4 Kent, Comm. 248; Challis, Real Prop. 140, 155.

³ Challis, Real Prop. 139, 155.

⁴ Bracton's Note Book Case, 1054; 2 Pol. & M. 307; Holds., Hist. of Eng. Law, III, 92.

life, it enlarged to an estate of inheritance, so that the heir took only by descent. The rule, according to Holdsworth,⁵ preceded Shelley's Case by more than two centuries. Legal opinion inclined to it during the reign of Edward II.⁶ "It is laid down clearly in 1365,⁷ and was made the basis of a decision in 1367.⁸ The cases show that it was based partly upon the policy of rendering land alienable, partly upon the fact that any other interpretation might have defrauded the lord of his relief"⁹—that is, of the fruits of his seignior, or the lord's rights to the rents and services attached to land which would still be his in case of descent.¹⁰

Application of the Rule

The rule in Shelley's Case applies to leaseholds, as well as to freeholds.¹¹ The limitations must be all in one instrument,¹² but for this purpose a resulting use in the first taker is sufficient.¹³ A will and a codicil are regarded as the same instrument, however, for the purpose of the rule.¹⁴ The estate limited to the ancestor must be an estate of freehold; but the estate need not be expressly limited, since it may arise by implication.¹⁵ The rule applies, although the remainder to the heirs has further words of limitations added to it, provided the course of descent under the superadded words is not inconsistent with that defined by the previous words.¹⁶ Thus, if the word "heirs" is added to the first word "heirs," as where the limitation is to A. for life, remainder to his heirs and to their heirs forever, the second word "heirs" is of no effect, and A. takes a fee simple.¹⁷ The rule operates upon

⁵ Hold. Hist. of Eng. Law, III, 93.

⁶ Y. B. 16 Edw. III (R. S.) II, 212, 214. Sir William Blackstone, in his opinion in *Perrin v. Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II. See, also, *HARDAGE v. STROOPE*, 58 Ark. 303, 24 S. W. 490, *Burdick Cas. Real Property*.

⁷ Y. B. 38 Edw. III, Mich. pl. 26.

⁸ Y. B. 40 Edw. III, Hil. pl. 18.

⁹ Hold., Hist. of Eng. Law, III, 94.

¹⁰ *Van Grutten v. Foxwell*, F. C. 658, 668 (1897); *Chrystie v. Phyfe*, 19 N. Y. 344.

¹¹ *Ogden's Appeal*, 70 Pa. 501; *Hughes v. Nicklas*, 70 Md. 484, 17 Atl. 398, 14 Am. St. Rep. 377; *Seeger v. Leakin*, 76 Md. 500, 25 Atl. 862; *Horne v. Lyeth*, 4 Har. & J. (Md.) 431.

¹² *Adams v. Guerard*, 29 Ga. 651, 76 Am. Dec. 624; *Moor v. Parker*, 4 Mod. 316; *Laws of England*, vol. 24, § 229 (r).

¹³ *Pibus v. Mitford*, 1 Vent. 372.

¹⁴ *Haynes v. Foorde*, 2 W. Bl. 698.

¹⁵ *Laws of Eng.* vol. 24, § 423 (h) (i).

¹⁶ *Laws of Eng.* vol. 24, § 423 (n).

¹⁷ *Mills v. Seward*, 1 Johns. & H. 733.

limitations of equitable estates, as well as of legal; but both the remainder and the particular estate must be of the same kind.¹⁸ In a devise, the word "children," "sons," or "issue" may be equivalent to the word "heirs"; and, if such appears to be the intention of the testator, the rule will operate the same as if the word "heirs" had been used.¹⁹ On the other hand, the word "heirs" may be used as a word of purchase, where it designates certain ascertained persons, as children. In these cases the rule does not apply, and the person designated as heir takes a remainder.²⁰ Nor is the rule applicable when the remainder is limited to the heirs of another than the person who takes the particular estate; for instance, where a life estate is given to A., with a remainder to the heirs of A. and B., his wife.²¹ An express direction in the deed or will, containing a limitation of a form within the rule in Shelley's Case, that the rule shall not operate, will be ineffectual, and the one who takes the preceding estate may convey a fee simple, or a fee tail, as the case may be, without regard to the heirs.²² The heirs will take the estate by inheritance only in case the ancestor does not dispose of it in his lifetime, or by will. In some states the rule in Shelley's Case has been abolished by statute,²³ especially in the case of wills, and the heirs take a contingent remainder, according to the form of the limitation.²⁴ In England, however, and in a majority of our states, the rule is still in force.

¹⁸ *Ward v. Butler*, 239 Ill. 462, 88 N. E. 189, 29 L. R. A. (N. S.) 942; *Baker v. Scott*, 62 Ill. 86; *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572; *Ward v. Amory*, 1 Curt. 419, Fed. Cas. No. 17,146; *Baile v. Coleman*, 2 Vern. 670; *Garth v. Baldwin*, 2 Ves. Sr. 646; *BAILS v. DAVIS*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937, *Burdick Cas. Real Property*.

¹⁹ *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. 897; *Roe v. Grew*, 2 Wils. 322; *Doe v. Cooper*, 1 East, 229. But see *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237; *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72.

²⁰ *Righter v. Forrester*, 1 Bush (Ky.) 278; *Mitchell v. Simpson*, 88 Ky. 125, 10 S. W. 372; *Papillon v. Voice*, 2 P. Wms. 471; *Jordan v. Adams*, 9 C. B. (N. S.) 483; *Cowell v. Hicks* (N. J. Ch.) 30 Atl 1091. But see *Jesson v. Wright*, 2 Bligh, 1.

²¹ *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161; *Frogmorton v. Wharrey*, 2 W. Bl. 728. Cf. *Archer's Case*, 1 Coke, 66b. And see *BAILS v. DAVIS*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937, *Burdick Cas. Real Property*.

²² Cf. *Thong v. Bedford*, 4 Maule & S. 362. But see *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522; *Fields v. Watson*, 23 S. C. 42; *Earnhart v. Earnhart*, 127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652.

²³ 1 Stim. Am. St. Law, § 1406.

²⁴ *Richardson v. Wheatland*, 7 Metc. (Mass.) 169; *Moore v. Littel*, 41 N. Y. 66; *GODMAN v. SIMMONS*, 113 Mo. 122, 20 S. W. 972, *Burdick Cas. Real Property*.

SAME—ARISING UNDER THE STATUTE OF USES (FUTURE USES)

150. Future estates arising under the statute of uses are:

- (a) Uses taking effect as remainders.
- (b) Springing uses.
- (c) Shifting uses.

Future Uses

We have already seen, in connection with equitable estates,²⁵ that long before the statute of uses²⁶ courts of equity made a distinction between a legal estate in land and the use in land.²⁷ This division of the title made it possible to create, in equity, future estates in land which could not be raised at common law. The only future estates, at common law, as we have seen,²⁸ are remainders, which require a preceding estate, and which must arise without an abridgment of such preceding estate. Equity, however, never recognized such requirements, and future uses could be created which would spring into existence without any preceding estate, or which would defeat or cut short a preceding estate. Thus, for example, land could be conveyed to B. for the use of C. to commence ten years hence, or the owner could retain the seisin and make a covenant to stand seised for the use of B. in futuro; or, again, a grant could be made, for example, to the use of A. for life, and if B. shall marry before a specified date, then to the use of B. for life. Uses, however, can be limited to take effect in the future by way of remainder, and, if so, they come under the requirements of common-law remainders, namely, that they must have a preceding estate, that they arise upon its termination, and not in abridgment of it, as, for example, a grant to the use of A. for life, remainder to B. for the use of C. This last class is sometimes called "future uses," in distinction from the preceding classes, which are called springing and shifting uses; but they are all "future" uses, in distinction from uses in possession.* Consequently it is more accurate to say that future uses may be created by way of remainder, or by way of executory interests; the latter not being subject to the rules governing remainders. The statute of uses provided that the beneficiary of a use should have a legal estate in the land corresponding to

²⁵ Ante, chapter XIV.

²⁶ 27 Hen. VIII, c. 10 (1535).

²⁷ This distinction started soon after the statute *quia emptores*.

²⁸ *Supra*.

his equitable interest.²⁹ The statute did not put a stop to the creation of uses, but merely converted uses into legal estates; that is, if the use was vested, the legal title was executed in the beneficiaries; and contingent uses were executed as soon as they became vested. In this way legal estates could be created which were impossible before the statute, and the same ease and freedom with which such interests had been created in equity were now available for the creation of estates at law.

151. TAKING EFFECT AS REMAINDERS—Future uses having preceding particular estates to support them may take effect as common-law remainders.

Where a conveyance is made of the uses of the entire estate, by way of a preceding estate and remainder, each estate, if executed by the statute of uses, becomes a legal estate, and the remainder to uses takes effect as a common-law remainder. Future uses, which take effect as remainders, are sometimes called "contingent uses." This is incorrect, however, since such uses may take effect as vested remainders, as well as contingent.³⁰

Remainders arising under the statute of uses have the same incidents as those at common law.³¹ Such a use must have a preceding particular estate to support it, and must not take effect in derogation of that estate. If these requisites fail, the limitation will take effect as a springing or shifting use.³² Contingent uses by way of remainder may be defeated the same as contingent remainders.³³ For example, a grant to the use of A. for life, remainder to the use of the heirs of B., is a contingent remainder arising under the statute of uses, and, unless some statute otherwise provides, will be defeated in case A. dies before B.³⁴

²⁹ Ante, chapter XIV.

³⁰ *Adams v. Terre-Tenants of Savage*, 2 Salk. 679; *Davies v. Speed*, Id. 675; *Southcote v. Stowell*, 1 Mod. 238; *Cole v. Sewell*, 4 Dru. & War. 1; *Gore v. Gore*, 2 P. Wms. 28.

³¹ 2 Washb. Real Prop. (5th Ed.) 663; *Rogers v. Fire Co.*, 9 Wend. (N. Y.) 611; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554. So they cannot be limited after an estate for years. *Adams v. Savage*, 2 Ld. Raym. 854; *Rawley v. Holland*, 22 Vin. Abr. 189, pl. 11.

³² *Gore v. Gore*, 2 P. Wms. 28; *Davies v. Speed*, 2 Salk. 675.

³³ See *Davies v. Speed*, 2 Salk. 675.

³⁴ 1 Sanders, Uses and Trusts (4th Ed.) p. 136 et seq.

152. SPRINGING USES—Springing uses are future uses which take effect without any preceding estate to support them.

When a future use, not limited by way of remainder, does not defeat a previous estate expressly limited by the same instrument, it is called a "springing use."³⁵ It is otherwise defined as "a use, either vested or contingent, limited to arise without any preceding limitation."³⁶ It receives its name from the fact that it springs up as a separate and independent interest in lands, cutting short no preceding use.³⁷ A limitation to the use of B. and his heirs after the death of A.,³⁸ or a limitation to A. in fee for the use of B. in fee after ten years, are examples of springing uses. When there is a limitation of a springing use, there is also a resulting use in fee in the grantor, until the springing use takes effect, so that in reality the springing use operates on the preceding resulting use in the grantor in the same way that a shifting use does upon the particular estate which precedes it.³⁹ A springing use may be contingent as well as vested.⁴⁰

153. SHIFTING USES—Shifting uses are future uses which take effect in derogation of a preceding estate.

When a future use, not limited by way of remainder, defeats a previous estate expressly limited by the same instrument, it is called a "shifting use."⁴¹ The use is said to shift from the first taker to the second. For this reason, shifting uses are also called "secondary uses." A limitation, for example, to the use of A. for life, and if B. shall marry before a specified date, then to the use

³⁵ *McKee v. Marshall* (Ky.) 5 S. W. 415; *Wyman v. Brown*, 50 Me. 139; *Egerton v. Brownlow*, 4 H. L. Cas. 1, 205; *Laws of England*, vol. 24, § 505; *Sugden's Gilbert on Uses and Trusts*, p. 161. And see *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

³⁶ *Cornish, Uses*, 91.

³⁷ *Sugden's Gilbert on Uses and Trusts*, p. 153.

³⁸ *Jackson v. Dunsbagh*, 1 Johns. Cas. (N. Y.) 92; *Mutton's Case*, 3 Dyer, 274.

³⁹ *Town of Shapleigh v. Pilsbury*, 1 Me. 271; *Nicolls v. Sheffield*, 2 Brown, Ch. 215.

⁴⁰ *Town of Shapleigh v. Pilsbury*, 1 Me. 271.

⁴¹ *Sugden's Gilbert on Uses and Trusts*, pp. 153, 286; *Fogarty v. Stack*, 86 Tenn. 610, 8 S. W. 846; *Batley v. Hopkins*, 6 R. I. 443; *Buckworth v. Thirkell*, 3 Bos. & P. 652, note; *Mutton's Case*, 3 Dyer, 274; *Carwardine v. Carwardine*, 1 Eden, 28, 34; *Egerton v. Brownlow*, 4 H. L. Cas. 1. And see *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

of B. for life, is an illustration of a shifting use. The estate which B. takes upon his marriage shifts from A. to B., and cuts off the preceding estate in A. By means of a shifting use, it is possible to limit a fee after a fee;⁴² thus, in the illustration already given, the uses may both be in fee simple, as, for example, to the use of A. and his heirs, and if B. shall marry before a specified date, then to the use of B. and his heirs. Strictly speaking, however, the second fee is not limited upon the first fee, but is in derogation of the first. Springing uses, as we have seen, may be either vested or contingent; but shifting uses, since they do not wait for the regular termination of the preceding estate, but defeat it, are all necessarily contingent.

SAME—ARISING UNDER THE STATUTE OF WILLS (EXECUTORY DEVICES)

154. Executory devises are future estates created by devise under the statute of wills, which cannot take effect as remainders.

Executory devises are sometimes said to be either springing or shifting.

Prior to the establishment of tenure in England, under the feudal system, lands were devisable, but after that time until the time of Henry VIII they were not. However, during this interval, owing to the distinction made in equity between the legal estate in land and the use in land, as previously pointed out in connection with future uses,⁴³ a man might by will dispose of the use or profits of the land, although he could not dispose of the land itself.⁴⁴ The statute of uses, however, which was enacted in 1535, prohibited this method of practically alienating by will the land itself under the guise of devising the uses and profits of the land.⁴⁵ This put a stop to "wills of uses," but the inconvenience produced was so great that it led, five years later (1540), to the enactment of the statute of wills.⁴⁶ By the very liberal provisions of this statute, it was possible to create any future interest in realty which could be created by means of uses before the statute of uses; and the constructions placed on such limitations by the courts did not follow the strict rules governing conveyances *inter vivos*. In fact,

⁴² *Batley v. Hopkins*, 6 R. I. 443.

⁴³ *Supra*.

⁴⁴ See *Wright, Tenures*, pp. 172, 173.

⁴⁵ See *Dig. Hist. Real Prop.* (4th Ed.) 375.

⁴⁶ 32 Hen. VIII. c. 1.

they were as liberal as equity had been with uses, and even more liberal, in time, owing to the efforts of the courts to carry out the intentions of testators.⁴⁷ These executory limitations arising under wills are called "executory devises." They do not take effect at the testator's death, as in case of an ordinary devise, but arise and vest upon some future event or contingency.⁴⁸ They consist of such interests created by will as would be called springing and shifting uses if created inter vivos by way of use. They are not future uses, however, since a future use limited in a will is not construed as an executory devise, but will amount to a legal estate under the operation of the statute of uses. Executory devises, on the contrary, despite their freedom from common-law rules, are, in effect, common-law estates. They are created only by will,⁴⁹ yet they are not remainders, since they require no preceding estate to support them;⁵⁰ or, in case there is a preceding estate, it is not necessary that they should vest upon the determination of it,⁵¹ since they may vest in derogation of it.⁵² They may, consequently, be limited after an estate in fee,⁵³ and they are not defeated or destroyed by the premature termination of a preceding estate.⁵⁴ Subject to the restriction of the rule against perpetuities,⁵⁵ there may be, in executory devises, any number of intervening estates, and any number of contingencies.⁵⁶

⁴⁷ *Annable v. Patch*, 3 Pick. (Mass.) 360; *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Rupp v. Eberly*, 79 Pa. 141; *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322.

⁴⁸ *Fearne, Contingent Remainders*, 382; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁴⁹ *St. Amour v. Rivard*, 2 Mich. 294.

⁵⁰ *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Thompson's Lessee v. Hoop*, 6 Ohio St. 480; *Mangum v. Piester*, 16 S. C. 316; *RYAN v. MONAGHAN*, 99 Tenn. 338, 42 S. W. 144, *Burdick Cas. Real Property*.

⁵¹ *St. Amour v. Rivard*, 2 Mich. 294; *Thompson's Lessee v. Hoop*, 6 Ohio St. 480.

⁵² *Thompson v. Hoop*, *supra*.

⁵³ *Bristol v. Atwater*, 50 Conn. 402; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Mangum v. Piester*, 16 S. C. 316; *GLOVER v. CONDELL*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360, *Burdick Cas. Real Property*.

⁵⁴ It should be remembered, however, that by the effect of statutes in many states, providing that contingent remainders shall not be defeated by the premature termination of preceding estates, the distinction between contingent remainders and executory devises has been practically abolished. See *Statutory Modification of Remainders*, *ante*.

⁵⁵ See, *post*, chapter XVI.

⁵⁶ *Miller v. Chittenden*, 4 Iowa, 252; *Lovett v. Lovett*, 10 Phila. (Pa.) 537.

Illustrations

Executory devices may be limited upon some future event or contingency;⁵⁷ to uncertain persons, as to after-born children;⁵⁸ or after a fee, as a limitation over in case the first devisee dies without heirs,⁵⁹ or children,⁶⁰ or issue,⁶¹ provided a definite and not an indefinite failure is intended, since otherwise the limitation over would be too remote and violate the rule against perpetuities.⁶² Executory devices may be also limited in case the first devisee dies before marriage,⁶³ or before attaining a certain age.⁶⁴

Springing or Shifting

A will may create a future estate in the nature of a springing⁶⁵ or shifting use,⁶⁶ sometimes called a springing or shifting devise.⁶⁷ An executory devise takes effect as a springing devise when it has no preceding estate of freehold to support it,⁶⁸ or where there is an interval between the termination of a preceding estate and

⁵⁷ *Matter of Sanders*, 4 Paige (N. Y.) 293; *Morton v. Funk*, 6 Pa. 483; *Beard v. Rowan*, 2 Fed. Cas. 1172, No. 1181; *Hopkins v. Hopkins*, 1 Atk. 581, 26 Eng. Reprint, 365.

⁵⁸ *Dunn v. Mobile Bank*, 2 Ala. 152; *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693; *Shull v. Johnson*, 55 N. C. 202.

⁵⁹ *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Jackson ex dem. Bowman v. Christman*, 4 Wend. (N. Y.) 277; *Turner v. Fowler*, 10 Watts (Pa.) 325; *Norris v. Johnston*, 17 Gratt. (Va.) 8.

⁶⁰ *Bristol v. Atwater*, 50 Conn. 402; *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. 645; *Hooper v. Bradbury*, 133 Mass. 303; *Sherman v. Sherman*, 3 Barb. (N. Y.) 385.

⁶¹ *Fenby v. Johnson*, 21 Md. 106; *Brightman v. Brightman*, 100 Mass. 238; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047; *Weller v. Weller*, 28 Barb. (N. Y.) 588; *Nicholson v. Bettie*, 57 Pa. 384.

⁶² *Robinson v. Bishop*, 23 Ark. 378; *Gilkie v. Marsh*, 186 Mass. 336, 71 N. E. 703; *Paterson v. Ellis*, 11 Wend. (N. Y.) 259; *Vaughan v. Dickes*, 20 Pa. 509. See, post, chapter XVI, for Rule against Perpetuities.

⁶³ *SULLIVAN v. GARESCHE*, 229 Mo. 496, 129 S. W. 949, *Burdick Cas. Real Property*.

⁶⁴ *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 929, 4 L. R. A. (N. S.) 922; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; *Wells v. Ritter*, 3 Whart. (Pa.) 208.

⁶⁵ *Stuart v. Stuart*, 18 W. Va. 675; *Carwardine v. Carwardine*, 1 Eden, 28, 28 Eng. Reprint, 594.

⁶⁶ *Carver v. Astor*, 4 Pet. (U. S.) 1, 7 L. Ed. 761.

⁶⁷ See *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725; *Burdick Cas. Real Property*; *Stuart v. Stuart*, 18 W. Va. 675.

⁶⁸ *Fearne, Contingent Remainders*, p. 395. For example, a devise to A. in fee, to take effect one year after the testator's death. *Clark v. Smith*, 1 Lut. 793, 798.

the vesting in possession of the executory interest.⁶⁹ Until the devise does take effect in possession, the title is in the heirs at law,⁷⁰ unless some statute provides that it shall pass, for the time being, to the personal representatives; that is, to the executors or administrators.

When an executory devise is so limited that it does not wait for the natural determination of a preceding estate, as in case of a remainder, but takes effect upon the happening of some event which cuts short the preceding estate, it is a shifting devise.⁷¹ Where, however, the preceding estate fails in some other way than by the happening of the event upon which a shifting devise is limited, the land goes to the heirs, or residuary devisee.⁷² A shifting devise may divest the preceding estate in part only, and in cases where the first taker is given a fee, with a shifting devise to another of a life estate, the question arises whether the devise will defeat the prior estate altogether, or only to the extent of the life estate. The decision in all of these cases must depend upon the intention of the testator.⁷³

Constructions Applying to Executory Devises

Executory devises may be created by way of direct gift to the devisee, or through the medium of a declaration of uses.⁷⁴ Remainders may, of course, be limited by a devise,⁷⁵ and one or more remainders may be followed by an executory devise; but there can be no remainder after an executory devise, since all such limitations are construed as executory devises also. They are, in fact, successive executory devises, like successive remainders. When, however, the first devise vests, all the others will vest as remainders, if they can.⁷⁶ Executory devises are presumed to be devises in præsentia, rather than limitations of future estates, whenever it is possible to so construe them, so that if they do not take effect at the death of the testator they will lapse.⁷⁷ But slight

⁶⁹ Fearn, *Contingent Remainders*, p. 400. As to A. for life, and after his death and one day to the oldest son of B. (1 Plowd. 25B).

⁷⁰ Clarke v. Smith, 1 Lut. 793, 798; Bullock v. Stones, 2 Ves. Sr. 521.

⁷¹ Blackman v. Fysh, 3 Ch. 209, C. A. (1892).

⁷² Laws of Eng. vol. 24, § 430.

⁷³ *Gatenby v. Morgan*, 1 Q. B. Div. 685; *Jackson v. Noble*, 2 Keen, 590.

⁷⁴ *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

⁷⁵ *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Hall v. Priest*, 6 Gray (Mass.) 18; *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312.

⁷⁶ *Brownsword v. Edwards*, 2 Ves. Sr. 243; *Doe v. Howell*, 10 Barn. & C. 191; *Pay's Case*, Cro. Eliz. 878.

⁷⁷ *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *Kouvalinka v. Geibel*, 40 N. J. Eq. 443, 3 Atl. 260; *Jones v. Webb*, 5 Del. Ch. 132.

circumstances are, in the later cases, held sufficient to rebut this presumption.⁷⁸ Like other executory limitations, executory devises may be either vested or contingent, and a destruction of the first devise does not defeat subsequent ones.⁷⁹ An estate limited to take effect after a fee tail is always construed as a remainder, if possible, rather than as an executory devise.⁸⁰ A limitation, however, in a will, which would be good as a remainder at the time the will was executed, but, on account of an event occurring before the death of the testator, becomes impossible as a remainder, may take effect as an executory devise.⁸¹ On the other hand, an estate which has become operative as springing or shifting use or executory devise will be turned into a remainder at any time when that becomes possible.⁸²

SAME—INCIDENTS OF FUTURE ESTATES

155. The rights and duties of the owners of future estates are correlative with the rights and duties of the tenants of the particular preceding estates.

Most of the questions that deal with the rights and liabilities of the owners of future estates arise out of their relations to, and

⁷⁸ *Annable v. Patch*, 3 Pick. (Mass.) 360; *Rupp v. Eberly*, 79 Pa. 141; *Darcus v. Crump*, 6 B. Mon. (Ky.) 363; *Napier v. Howard*, 3 Ga. 192.

⁷⁹ *Moffat's Ex'rs v. Strong*, 10 Johns. (N. Y.) 12; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; *Smith v. Hunter*, 23 Ind. 580; *Randall v. Josselyn*, 59 Vt. 557, 10 Atl. 577; *Den ex dem. Smith v. Hance*, 11 N. J. Law, 244; *Mathis v. Hammond*, 6 Rich. Eq. (S. C.) 121.

⁸⁰ *Allen v. Trustees*, 102 Mass. 262; *Parker v. Parker*, 5 Metc. (Mass.) 134; *Hawley v. Northampton*, 8 Mass. 3, 5 Am. Dec. 66; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Reinoehl v. Shirk*, 119 Pa. 108, 12 Atl. 806; *Titzell v. Cochran* (Pa. Sup.) 10 Atl. 9; *Richardson v. Richardson*, 80 Me. 585, 16 Atl. 250. But see, for limitations which have been held to create executory devises, *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24; *Lion v. Burtiss*, 20 Johns. (N. Y.) 483; *Jackson ex dem. Henry v. Thompson*, 6 Cow. (N. Y.) 178; *Nicholson v. Bettle*, 57 Pa. 384.

⁸¹ *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Doe v. Howell*, 10 Barn. & C. 191.

⁸² *Thompson's Lessee v. Hoop*, 6 Ohio St. 480; *Wells v. Ritter*, 3 Whart. (Pa.) 208. At common law, future estates cannot be created out of chattel interests. A life estate and a remainder cannot be limited out of a term of years, though the duration of the term be greater than the possible duration of the life of the first taker. *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298; *Merrill v. Emery*, 10 Pick. (Mass.) 507. But such limitations may be made either as future uses or executory devises. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Gillespie v. Miller*, 5 Johns. Ch. (N. Y.) 21; *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298; *Wright v. Cartwright*, 1 Burrows, 282; *Lampet's Case*, 10 Coke, 46.

controversies with, the tenants of preceding estates in possession. Consequently, it may be said, in general, that the rights and duties of the owners of future estates are similar to, and correlative with, the rights and duties of the owners of the estates which precede them, which have already been considered in connection with the discussion of the incidents of estates in general.⁸³ Likewise, the right to dower and curtesy in future estates has been treated of in connection with those subjects.⁸⁴ Also, in other connections it has been seen that the tenant of an estate which precedes a future estate has no claim on the owner of the latter for improvements. The methods by which future estates may be destroyed have been touched upon in connection with reversions and remainders, and as to executory devises it has been seen that no act of the tenant of the particular estate can destroy them.

SAME—TENURE OF FUTURE ESTATES

156. There is no relation of tenure between the owner of a future estate and the tenant of the preceding estate.

Possession by the tenant of the particular estate is in no case adverse to the owner of the future estate, and, therefore, the former cannot disseise the latter.⁸⁵ In reversions, which are distinguished, however, as we have seen,⁸⁶ from future estates proper, tenure exists between the tenant of the particular estate and the reversioner.⁸⁷ In case the particular estate is a freehold, the tenant of the particular estate has the seisin; but, when the particular estate is less than a freehold, the actual seisin is in the reversioner.⁸⁸ In remainders, however, there is no tenure between the tenant of the particular estate and the remainderman, because both hold under the same person.⁸⁹ Also, in future uses and devises, no relation of tenure exists.

⁸³ Ante.

⁸⁴ Ante, chapter VIII.

⁸⁵ *Jackson ex dem. Hardenbergh v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Davis v. Dickson*, 92 Pa. 365; *Miller v. Shackelford*, 3 Dana (Ky.) 289; *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; *Stubblefield v. Menzies*, 8 Sawy. 41, 11 Fed. 268.

⁸⁶ Supra.

⁸⁷ 2 Washb. Real Prop. (5th Ed.) 803.

⁸⁸ 2 Washb. Real Prop. (5th Ed.) 804; *Williams*, Real Prop. (17th Ed.) 387.

⁸⁹ *Van Deusen v. Young*, 29 N. Y. 9; *Hill v. Roderick*, 4 Watts & S. (Pa.) 221.

SAME—PROTECTION OF FUTURE ESTATES

157. A vested remainderman may maintain an action for damages for any injury to his interest. Waste by the tenant in possession will also be remedied in favor of the owner of a future estate, unless that is a contingent remainder, which may be defeated by the tenant of the preceding estate.

The common-law action for waste is a legal remedy, and can be brought only by one who has the immediate estate of inheritance.⁹⁰ This rule, however, has been modified by statute in some states, and by force of such statutes any person seised of an estate in remainder may maintain an action for waste or trespass for an injury done to the inheritance.⁹¹ Moreover, a remainderman may maintain an action on the case in the nature of waste, since such action is not confined to one who has the estate of inheritance at the time the waste is committed.⁹²

As a general rule, therefore, a vested remainderman may, during the period of the preceding estate, maintain an action for damages for any injury to his interest.⁹³ He is also entitled to equitable relief when necessary to protect his rights,⁹⁴ whether the property be in the possession of the preceding life tenant,⁹⁵ or in the hands of a trustee.⁹⁶ He may also bring proceedings to remove a cloud upon his title.⁹⁷ He cannot, however, maintain an action for par-

⁹⁰ See *Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736; *United States Fidelity & Guaranty Co. v. Rieck*, 76 Neb. 300, 107 N. W. 389; *Price v. Ward*, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459; *Robinson v. Wheeler*, 25 N. Y. 252.

⁹¹ *Halstead v. Sigler*, 35 Ind. App. 419, 74 N. E. 257; *Hoolihan v. Hoolihan*, 193 N. Y. 197, 85 N. E. 1103, 15 Ann. Cas. 269; *Price v. Ward*, supra.

⁹² *Dickinson v. Baltimore*, 48 Md. 583, 30 Am. Rep. 492; *Dennett v. Dennett*, 43 N. H. 499; *Dupree v. Dupr e*, 49 N. C. 387, 69 Am. Dec. 757; *Wyant v. Dieffendafer*, 2 Grant, Cas. (Pa.) 334.

⁹³ *Shortle v. Terra Haute, etc., R. Co.*, 131 Ind. 338, 30 N. E. 1084; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859. See, also, *Robertson's Adm'r v. Rodes*, 13 B. Mon. (Ky.) 325; *Bogle v. N. C. R. Co.*, 51 N. C. 419.

⁹⁴ *Gibson v. Jayne*, 37 Miss. 164; *Murphy v. Whitney*, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123.

⁹⁵ *Bethea v. Bethea*, 116 Ala. 265, 22 So. 561; *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296; *Yancy v. Holladay*, 7 Dana (Ky.) 230; *Brown v. Wilson*, 41 N. C. 558.

⁹⁶ *State v. Brown*, 64 Md. 97, 1 Atl. 410; *Haydel v. Hurck*, 5 Mo. App. 267.

⁹⁷ *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577; *Wiley v. Bird*, 108 Tenn. 168, 66 S. W. 43; *Aiken v. Suttle*, 4 Lea (Tenn.) 103.

tion,⁹⁸ or an action of trespass to try title,⁹⁹ since he has no present right of possession. For injuries to the corpus of the estate committed by strangers, both the owner of the particular estate and of the future estate may have actions according to their interests.¹

A contingent remainderman, however, having no vested interest, cannot maintain an action for damages for waste.² Moreover, formerly, while waste would be restrained in favor of the owner of a vested remainder, it would not be for the owner of a contingent remainder, because the tenant of the particular estate could defeat the contingent remainder absolutely.³ This was not the case, however, when there was an immediate limitation to trustees to preserve the contingent remainders, because the tenant then had no power to destroy the remainders. As soon as a contingent remainder became vested, however, waste would be restrained. The common-law action of waste, however, and also action on the case for damages, have been practically superseded, in modern times, by the remedy of injunction.⁴ Moreover, in applying this remedy, the rights of contingent remaindermen are more extensively protected than at law, since, although equity may not allow them to recover damages for injuries to property which may never be theirs, yet they may be permitted to prevent the waste of that which may at some time belong to them.⁵ Springing and shifting uses and executory devises are indestructible by the tenant in possession, and he will be enjoined from committing waste. When, however, the limitation is after a fee, ordinary waste by the owner of the fee will not be restrained, although equitable waste will be.⁶

⁹⁸ *Wolfe's Estate*, 15 Montg. Co. Rep. (Pa.) 128, 22 Pa. Co. Ct. R. 340.

⁹⁹ *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385.

¹ *Foot v. Dickinson*, 2 Metc. (Mass.) 611; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *Elliot v. Smith*, 2 N. H. 430; *Chase v. Hazelton*, 7 N. H. 171. But see *Peterson v. Clark*, 15 Johns. (N. Y.) 205.

² *Cannon v. Barry*, 59 Miss. 289; *Taylor v. Adams*, 93 Mo. App. 277; *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209.

³ *Hunt v. Hall*, 37 Me. 363; *Bacon v. Smith*, 1 Q. B. 345.

⁴ *Palmer v. Young*, 108 Ill. App. 252; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Roots v. Boring Junction Lumber Co.*, 50 Or. 298, 92 Pac. 811, 94 Pac. 182; *Poertner v. Russel*, 33 Wis. 193.

⁵ *Taylor v. Adams*, 93 Mo. App. 277. And see *Cannon v. Barry*, 59 Miss. 289.

⁶ *Matthews v. Hudson*, 81 Ga. 120, 7 S. E. 286, 12 Am. St. Rep. 305; *Robinson v. Litton*, 3 Atk. 209.

SAME—ALIENATION OF FUTURE ESTATES

158. Under the modern law, a future estate can be transferred, if the person who is to take is ascertained.

A vested remainder, being a present interest in property, may be transferred by the owner by deed,⁷ or may be mortgaged during the continuance of the preceding estate.⁸ At common law, however, contingent remainders and executory interests came within the rule that no possibility, right, title, or thing in action is assignable.⁹ Such interests could, however, be released to the tenant in possession.¹⁰ They also came under the doctrine of estoppel,¹¹ and consequently, where a warranty deed is given, the title, which vests upon the happening of the event upon which a contingent remainder depends, inures to the benefit of the grantee; the grantor being estopped to claim title in himself.¹² Moreover, conveyances relating to such interests, if made for a valuable consideration, are regarded as effective in equity upon the vesting of the estate.¹³ Some cases distinguish between the uncertainty of the person and the uncertainty of the event, holding that, when the person who is to take is ascertained, he may transfer his interest.¹⁴ The same rule has also been applied to the mortgage of a contin-

⁷ *Watson v. Cressey*, 79 Me. 381, 10 Atl. 59; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Glidden v. Blodgett*, 38 N. H. 74; *Stewart v. Neely*, 139 Pa. 309, 20 Atl. 1002; *Robertson v. Wilson*, 38 N. H. 48; *Brown v. Fulkerson*, 125 Mo. 400, 28 S. W. 632.

⁸ *In re John & Cherry Sts.*, 19 Wend. (N. Y.) 659; *Andress' Estate*, 14 Phila. (Pa.) 240.

⁹ *Hall v. Chaffee*, 14 N. H. 215; *Lampet's Case*, 10 Coke, 46b; *Fulwood's Case*, 4 Co. Rep. 64b, 66b, (1591); *GODMAN v. SIMMONS*, 113 Mo. 122, 20 S. W. 972, *Burdick Cas. Real Property*.

¹⁰ *Lampet's Case*, 10 Co. Rep. 46b, 48b, (1612); *Smith v. Pendell*, 19 Conn. 107, 48 Am. Dec. 146; *Williams v. Esten*, 179 Ill. 267, 53 N. E. 562; *Miller v. Emans*, 19 N. Y. 384.

¹¹ *Doe d. Brune v. Martyn*, 8 B. & C. 497; *Robertson v. Wilson*, 38 N. H. 48; *Stewart v. Neely*, 139 Pa. 309, 20 Atl. 1002; *Jackson v. Everett* (Tenn.) 58 S. W. 340.

¹² *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332; *Hayes v. Tabor*, 41 N. H. 521; *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426; *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642.

¹³ *Lackland v. Nevins*, 3 Mo. App. 335; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Bayler v. Com.*, 40 Pa. 37, 80 Am. Dec. 551; *Wright v. Wright*, 1 Ves. Sr. 409; *Crofts v. Middleton*, 8 De Gex, M. & G. 192.

¹⁴ *Cummings v. Stearns*, 161 Mass. 506, 37 N. E. 758; *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *Havens v. Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497.

gent remainder,¹⁵ and likewise to the transfer of springing and shifting uses and executory devises.¹⁶ While a court of equity may order a sale of future interests in property for the purpose of better protecting the same,¹⁷ it has, however, been held that it will not order a sale of such property to satisfy an execution.¹⁸

The question of alienation is covered by statute, in a number of jurisdictions, under provisions to the effect that contingent, executory, and future interests, and possibilities coupled with an interest, may be disposed of by deed.¹⁹

SAME—DEVISE OF FUTURE ESTATES

159. The same general rules apply to the devise of future estates as to their alienation.

A vested remainder may be devised.²⁰ A contingent remainder may also be devised, where the remainderman is ascertained, and his existence does not constitute the contingency;²¹ otherwise not.²² By force of statute, however, all contingent remainders may be devisable.²³ Executory devises are also included within those interests that may be disposed of by will.²⁴

¹⁵ *People's Loan, etc., Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

¹⁶ *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Nutter v. Russell*, 3 Metc. (Ky.) 163; *Jacob v. Howard* (Ky.) 22 S. W. 332; *Hall v. Chaffee*, 14 N. H. 216.

¹⁷ *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; *Marsh v. Dellinger*, 127 N. C. 360, 37 S. E. 494; *Ridley v. Halliday*, 106 Tenn. 607, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. Rep. 902; *Ruggles v. Tyson*, 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 809.

¹⁸ *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990; *Wiley v. Bridgman*, 1 Head (Tenn.) 68.

¹⁹ Eng. Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 6). *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584. *Brown v. Fulkerson*, 125 Mo. 400, 28 S. W. 632; *Griffin v. Shepard*, 124 N. Y. 70, 26 N. E. 339; *GODMAN v. SIMMONS*, 113 Mo. 122, 20 S. W. 972, *Burdick Cas. Real Property*.

²⁰ *Wimple v. Fonda*, 2 Johns. (N. Y.) 288; *Davis v. Bawcum*, 10 Heisk (Tenn.) 406.

²¹ *Mohn v. Mohn*, 148 Iowa, 288, 126 N. W. 1127; *Fisher v. Wagner*, 109 Md. 243, 71 Atl. 999, 21 L. R. A. (N. S.) 121; *Cummings v. Stearns*, 161 Mass. 506, 37 N. E. 758; *Kenyon v. See*, 94 N. Y. 563.

²² *McClain v. Capper*, 98 Iowa, 145, 67 N. W. 102.

²³ *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642.

²⁴ *Collins v. Smith*, 105 Ga. 525, 31 S. E. 449; *Wortman v. Robinson*, 44 Hun (N. Y.) 357; *Lewis v. Smith*, 23 N. C. 145; *Thompson's Lessee v. Hoop*, 6 Ohio St. 480.

SAME—DESCENT OF FUTURE ESTATES

160. When the person who is to take a future estate is ascertained, it descends, on his death intestate, to his heirs.

Remainders, future estates arising under the statute of uses, and executory devises descend to the heirs of their owners, except in cases where the person who is to take is not ascertained.²⁵ The future estate, however, in order that it may descend, must in each case be of sufficient quantity; that is, it must be an estate of inheritance.

²⁵ *Barnitz v. Casey*, 7 Cranch, 456, 3 L. Ed. 403; *Ackless v. Seekright*, 1 Ill. 76; *Medley v. Medley*, 81 Va. 265.

BURD.REAL PROP.—25

CHAPTER XVI

THE RULE AGAINST PERPETUITIES

- 161. The Rule Stated.
- 162. Estates and Interests Subject to the Rule.
- 163. Exceptions to the Rule.
- 164. Rule Against Accumulations.

THE RULE STATED

161. Unless otherwise provided by statute, no future contingent and indestructible interest in property can, in general, be created which must not necessarily vest within twenty-one years, exclusive of periods of gestation, after lives in being.

Nature of the Rule

In the preceding chapter we considered the various kinds of future interests in lands. There remains, however, one very important question, namely, whether the law imposes any restraint upon the right to create such interests, particularly when contingent, regardless of the time, however remote, when they shall take effect, or become vested.

Although, even before the statute of uses (1535), equity permitted the creation of future uses, as already shown,¹ yet it was not until after the passage of that statute, and the passage of the statute of wills, in 1540, that the creation of future contingent interests, other than contingent remainders, became frequent. With the growth of such executory interests there developed a belief in the courts that the creation of such interests should be confined within reasonable limits.² The reason for this belief originated, very probably, in the desire of the courts to prevent property from being inalienable;³ that is, that it should not be kept out of commerce for an indefinite period,⁴ and thus become a "perpetuity."⁵ This no-

¹ *Supra*.

² See Gray, *Perp.* §§ 153-167. The principle, not the rule against perpetuity existed before and throughout the reign of Henry VIII. *Hope v. Gloucester Corporation*, 7 De G., M. & G. 647. The principle was perhaps introduced after the statute of *quia emptores* (1290). 2 *Preston, Estates*, p. 307.

³ Gray, *Perp.* § 268.

⁴ See *Perpetuities*, article by Prof. Warren, in *Cyc.* vol. 30, p. 1469.

⁵ The origin of the legal term "perpetuity" is not known; the use of the

tion has clung to the word in many modern quarters, and is even the popular meaning of "perpetuity," to-day.⁶ In fact, long before the development of the modern rule against perpetuities, one of the meanings of the word "perpetuity" was an inalienable estate tail.⁷ The word "perpetuity" was also used in the early cases to describe certain future interests,⁸ and when, in the course of time, the courts, by successive decisions, finally evolved a rule defining what was a reasonable limit for the creation of future contingent interests, a broader view than the notion of alienability was taken, and it was held that such limitations, even of alienable interests, were invalid, if made to commence at too remote a period.⁹ The rule finally became based on considerations of public policy.¹⁰ "To have property incumbered with such remotely possible interests is a disadvantage to the persons otherwise entitled to the property, greater than is the advantage to the owners of such remote interests."¹¹ The rule, however, when established, became known as "the rule against perpetuities." This was unfortunate, since a better designation would be "the rule against remoteness."¹² The misnomer has in all probability given rise to much of the confusion which exists in relation to the rule. What is known as the modern rule against perpetuities has nothing to do with restraints on alienation, although many statutes and cases have so treated it.

Development of the Rule

The leading case upon the subject is known as "The Duke of Norfolk's case,"¹³ decided by Lord Chancellor Nottingham, in 1682, and affirmed, in 1685, in the House of Lords. This case held that a

term in the courts does not appear to be reported prior to Chudleigh's Case (1595) 1 Co. 113c. Laws of Eng. vol. 22, 296.

⁶ See Perpetuities, article by Prof. Warren, in Cyc. vol. 30, p. 1469.

⁷ Corbet's Case (1600) 1 Coke, 836, 76 Eng. Reprint, 187.

⁸ See 30 Cyc. 1468; Chudleigh's Case, 1 Coke 120a, 76 Eng. Reprint, 270; Manning's Case, 8 Coke, 94b, 77 Eng. Reprint, 618.

⁹ Gray, Perp. (2d Ed.) § 269; Midgley v. Tatley, 43 Ch. Div. 406, C. A. 1890.

¹⁰ This basis of the rule was recognized nearly two hundred years ago, when Jekyl, M. R., in the case of Stanley v. Leigh, 2 P. Wms. 686 (1732), spoke of the public policy of the rule as the mischief that would arise to the public from estates remaining forever or for a long time inalienable or untransferable from one hand to another, being a menace to industry and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered. See Sibley v. Ashforth, 1 Ch. 535, 542 (1905).

¹¹ Prof. Warren, Perp. 30 Cyc. 1467.

¹² Gray, Perp. § 2; Challis, Real Prop. 214; 1 Jarm. Wills (6th Ed.) 296. In English Conveyancing Act of 1911 (1 & 2 Geo. V, c. 37) the term used is "the rule of law relating to perpetuities."

¹³ The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Reprint, 931.

limitation over might be made to take effect on a contingency which must happen, if at all, within a life in being. The facts, in brief, were that a conveyance was made by a father of three sons, to trustees, in trust for the second son, and the heirs male of his body, providing that, should the first son die without issue male, *in the lifetime of the second son*, the property should be held in trust for the third son. The first son died without issue male, during the lifetime of the second son, and the limitation over to the third son was held good, since it must take effect, if at all, during the lifetime of the second son. This decision is the foundation of the modern rule against perpetuities.¹⁴

In 1736, the case of *Stephens v. Stephens*¹⁵ decided that a limitation to the child of a living person, upon such child's attaining the age of twenty-one years, was good; and finally it was held that a gift might be made by a limitation over to vest within twenty-one years after any life in being, regardless of the question of one's minority.¹⁶

A child en ventre sa mere at the death of a testator is regarded as in being,¹⁷ and when gestation is in fact taking place, the period of gestation is excluded from the computation of the time.¹⁸ As the rule is often stated, the period of gestation is added to the period of twenty-one years,¹⁹ but this is not strictly accurate. Gestation, to be excluded, must exist, and it is possible that three periods of gestation may occur in a limitation without violating the rule.²⁰

¹⁴ Prof. Warren, *Perp.* 30 Cyc. 1470; *Laws of Eng.* XXII, p. 300, note.

¹⁵ *Cas. t. Talb.* 228, 25 Eng. Reprint, 751.

¹⁶ *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Barnitz v. Casey*, 7 Cranch (U. S.) 456, 3 L. Ed. 403. The rule stated. See *APPLETON'S APPEAL*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

¹⁷ *Gray*, *Perp.* § 220; *Storrs v. Benbow*, 3 De Gex, M. & G. 390; *Long v. Blackall*, 7 Term R. 100.

¹⁸ *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Reprint, 956. And see *Thellusson v. Woodford*, 11 Ves. 112, 32 Eng. Reprint, 1030.

¹⁹ *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; *Jee v. Audey*, 1 Cox, Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint, 1186. Instead of making the possible period of gestation a part of the definition, it would, perhaps, be better merely to say "for the purpose of the rule, a child en ventre sa mere is considered as a life in being." *Jarman on Wills* (5th Ed.) 216; *Challis*, *Real Prop.* (2d Ed.) 170.

²⁰ "Suppose, for instance, a devise to testator's children for life, on their death to be accumulated till youngest grandchild reaches twenty-one and then to be divided among all the grandchildren then living, and the issue then living of any deceased grandchild. The testator leaves a posthumous child, who dies leaving one child, A., born, and another, B., en ventre sa mere. B. is born, and reaches twenty-one but before he does so A. dies, leaving his

The rule against perpetuities, as established in the English courts, has been adopted in most American states as part of the common law.²¹ In some states, there are statutes which are merely declaratory of the common-law rule, while in other states, as shown later in this chapter, a different statutory rule has been substituted.

Application of the Rule

The rule against perpetuities is not one of construction, but is applied to a will or a deed after such an instrument limiting the estates is construed, and is applied regardless of the intention, and often, as a restraint imposed by reasons of public policy, it defeats it.²² It is only in cases of ambiguous construction that it is presumed that the intention was to limit an estate which would not be void as contravening the rule.²³

It is not necessary that future interests should be enjoyed in possession during the limits prescribed by the rule, since the fact that they shall vest within such period is the sole requirement. The rule does not apply, in other words, to the too remote enjoyment of an estate, but to its too remote vesting. Moreover, the rule against perpetuities applies only to estates which are limited to vest on the happening of a contingency, and this contingency must happen, if at all, within the prescribed period, or the estate so limited is void.²⁴

wife enceinte, who gives birth to a child after B. reaches twenty-one. Here we have (1) the period until the testator's child is born; (2) the life of such child; (3) the period from the time when B. reaches twenty-one until A.'s child is born. Here we have a life, a minority of twenty-one years, and three periods of gestation." Gray, *Perp.* § 202. And compare *Long v. Blackall*, 7 Term R. 100; *Thellusson v. Woodford*, 11 Ves. 112. See, also, *Smith v. Farr*, 8 L. J. Exch. 46, 3 Y. & C. Exch. 328.

²¹ *APPLETON'S APPEAL*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

²² Gray, *Perp.* § 629; *Maule, J.*, in *Dungannon v. Smith*, 12 Clark & F. 546; *James, L. J.*, in *Heasman v. Pearse*, 7 Ch. App. 275; *Dungannon v. Smith*, 12 Cl. & F. 546, 10 Jur. 721, 8 Eng. Reprint, 1523; *Reid v. Voorhes*, 216 Ill. 236, 74 N. E. 804, 3 Ann. Cas. 946; *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565; *In re Stickney's Will*, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308.

²³ *Post v. Hover*, 33 N. Y. 593; *Du Bois v. Ray*, 35 N. Y. 162; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Siddall's Estate*, 180 Pa. 127, 36 Atl. 570; *Gray v. Whittenmore*, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363.

²⁴ *Jee v. Audley*, 1 Cox, Ch. 324; *Abbyss v. Burney*, 17 Ch. Div. 211; *In re Frost*, 43 Ch. Div. 246; *In re Hargreaves*, Id. 401; *Porter v. Fox*, 6 Sim. 485; *Doe v. Challis*, 18 Q. B. 224, 231. See *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; *Lloyd v. Carëw*, Show. Parl. Cas. 137; And see *SEAVER v. FITZGERALD*, 141 Mass. 401, 6 N. E. 73, *Burdick Cas. Real Property*. For a longer period made possible under statutes affecting estates tail, see 1 *Dembitz, Land Tit.* 118.

The fact that a future estate *may* vest within such time is not sufficient to make the limitation valid. It must necessarily vest within the prescribed time.²⁵ An estate may be limited after any number of lives in being,²⁶ the only suggested restriction being that the number must not be so great that evidence of the termination of the lives cannot be obtained.²⁷ Since the term of twenty-one years which is allowed by the rule may be in gross without reference to the minority of any person,²⁸ a limitation of an estate after a term of twenty-one years is good.²⁹ The time within which an estate limited must vest under the rule is computed from the death of the testator, when the limitation is by will,³⁰ and when by deed, from the delivery of the deed.³¹ The rule is satisfied if the estate vests within this time, although the interest so created does not terminate until a later time.³²

Effect of Violating the Rule

When the limitation of a future estate is void on account of the rule against perpetuities, the prior estates take effect, as if there had been no subsequent limitations.³³ Estates, however, which are to take effect after limitations that are too remote, if vested, or if they become vested within the time prescribed by the rule, will not be affected by the void limitations.³⁴ In cases where a good limitation

²⁵ *Stephens v. Evans*, 30 Ind. 39; *Jee v. Audley*, 1 Cox, Ch. 324; *Lett v. Randall*, 3 Smale & G. 83; *Quinlan v. Wickham*, 233 Ill. 39, 84 N. E. 38, 17 L. R. A. (N. S.) 216; *In re Wilcox*, 194 N. Y. 288, 87 N. E. 497. And see *APPLETON'S APPEAL*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

²⁶ Or after the lives of unborn persons, if the vesting is during the lives of persons in being. *Evans v. Walker*, 3 Ch. Div. 211.

²⁷ *Thellusson v. Woodford*, 11 Ves. 112; *Low v. Burron*, 3 P. Wms. 262. See *Scatterwood v. Edge*, 1 Salk. 229.

²⁸ *Beard v. Westcott*, 5 Taunt. 393; *Cadell v. Palmer*, 1 Clark & F. 372.

²⁹ *Gray, Perp.* § 225; *Low v. Burron*, 3 P. Wms. 262. See *Stephens v. Stephens*, *Cas. t. Talb.* 228; *Avern v. Lloyd*, L. R. 5 Eq. 383.

³⁰ *Southern v. Wallaston*, 16 Beav. 276; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *Bullard v. Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; *Mullreed v. Clark*, 110 Mich. 229, 68 N. W. 138, 989.

³¹ *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015.

³² *Otis v. McLellan*, 13 Allen (Mass.) 339; *Minot v. Taylor*, 129 Mass. 160; *Heald v. Heald*, 56 Md. 300. But see *Slade v. Patten*, 68 Me. 380.

³³ *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*; *Lewis, Law of Perpetuity*, 657.

³⁴ *Gray, Perp.* § 251. But see *Proctor v. Bishop of Bath & Wells*, 2 H. Bl. 358. So some of the limitations may vest in time, and be valid though others fail. *Wilkinson v. Duncan*, 30 Beav. 111; *Cattlin v. Brown*, 11 Hare, 372; *Picken v. Matthews*, 10 Ch. Div. 264; *Hills v. Simonds*, 125 Mass. 536. But see *Pearks v. Moseley*, 5 App. Cas. 714.

of an estate is made, and a subsequent modification is added which would make the estate void for remoteness, the modification will be rejected, and the estate will stand as under the original limitation.³⁵ When there is no disposition in a will, except the void limitation, the heirs will take.³⁶

ESTATES AND INTERESTS SUBJECT TO THE RULE

162. The rule against perpetuities applies to all future contingent and indestructible estates and interests in land, legal or equitable. It does not, however, apply to:

- (a) Destructible future interests.
- (b) Present interests.
- (c) Vested future interests.

EXCEPTIONS TO THE RULE

163. As established exceptions to the rule, should be noted:

- (a) Gifts on a charitable trust, with a remote gift over to another charitable trust.
- (b) Unconditional gifts on a charitable trust to a corporation, no such corporation being in existence at the time.
- (c) In some jurisdictions, rights of entry for condition broken.

The rule against perpetuities applies to both real and personal property, and to interests either legal or equitable. The rule applies, however, only to future interests, and, moreover, only to such future interests as are contingent and indestructible—contingent, for the reason that the rule merely requires that interests shall vest within a certain time, and, if vested, there is no occasion for the rule; indestructible, for the reason that, if the future interest can be destroyed, it neither hampers the alienation of the property, nor diminishes the value of the present estate, consequently it is not objectionable for either of the reasons of public policy that gave rise to the rule.³⁷ The mere fact of destructibility by the owner himself is not sufficient, however, to prevent an estate or interest

³⁵ *Slade v. Patten*, 68 Me. 380; *Ring v. Hardwick*, 2 Beav. 352; *Gove v. Gove*, 2 P. Wms. 28. Otherwise when the first limitation is not absolute. *Whitehead v. Rennett*, 22 Law J. Ch. 1020.

³⁶ *Fosdick v. Fosdick*, 6 Allen (Mass.) 41; *Wainman v. Field, Kay*, 507.

³⁷ Prof. Warren, *Perp.*, 30 Cyc. 1476. See, also, *APPLETON'S APPEAL*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*, as to property and interests subject to the rule.

from being too remote,³⁸ since the destructibility must depend upon the will of the owner of another estate to whom the right to destroy is given by operation of law.³⁹ The rule applies to executory devises,⁴⁰ and to springing and shifting uses.⁴¹ Contingent remainders are by the weight of authority subject to the rule.⁴² There has been considerable conflict upon this question, owing to the fact that, at common law, contingent remainders may be destroyed by the tenant of the preceding estates.⁴³ Since, however, under the statutes they are no longer destructible, it would seem to be the better opinion that they are now subject to the rule.⁴⁴ Remainders following an estate tail are not, however, too remote, even if not vested, since future interests expectant on an estate tail may be destroyed by the tenant in tail.⁴⁵

Present and Vested Interests

The rule against perpetuities does not apply to present interests since they are vested.⁴⁶ Accordingly it is said that easements and profits à prendre are not within the rule, although they are to last

³⁸ *Cochrane v. Cochrane* (1883) 11 L. R. Ir. 361, 368. And see *Midgley v. Tatley*, 43 Ch. Div. 401, C. A. (1890); *Laws of Eng.* vol. XXII, p. 323.

³⁹ *Lewis, Law of Perpetuity*, 164; *Sibley v. Ashforth*, [1905] 1 Ch. 535, 544.

⁴⁰ *Lewis, Law of Perpetuity*, c. 10. Executory devises held invalid: To the children of a living person who should attain twenty-two or any other age greater than twenty-one, *Bull v. Pritchard* (1847) 5 Hare, 567; a devise to the first son of A. who should be bred a clergyman, *Proctor v. Bishop of Bath and Wells* (1794) 2 H. Bl. 358.

⁴¹ *Savill Brothers v. Bethell*, [1902] 2 Ch. 523, C. A.; *Bennett v. Bennett* (1864) 2 Drew & Sm. 266, 267.

⁴² *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *United States Fidelity & Guaranty Co. v. Douglas' Trustee*, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993; *In re Kountz's Estate*, 213 Pa. 390, 62 Atl. 1103, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427; *St. Amour v. Rivard*, 2 Mich. 294; *Hill v. Gianelli*, 221 Ill. 286, 77 N. E. 458, 112 Am. St. Rep. 182. Likewise a conditional limitation. *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*.

⁴³ See *Contingent Remainders*, ante.

⁴⁴ See cases in note 42. It is said that a contingent remainder cannot be given to an unborn child of an unborn person, even when the gift is so framed as not to offend the rule against perpetuities. *Whitby v. Mitchell*, 44 Ch. D. 85. The correctness of this is, however, doubted, since it is founded upon the exploded notion that there cannot be a "possibility" on a "possibility." See Gray, *Perp.* §§ 287-294. See, also, *In re Ashforth*, [1905] 1 Ch. 535; *In re Bowles*, [1902] 2 Ch. 650; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 369, 7 S. W. 640.

⁴⁵ *Pennington v. Pennington*, 70 Md. 418, 17 Atl. 329, 3 L. R. A. 816; *Goodwin v. Clark*, 1 Lev. 35; *Nicolls v. Sheffield*, 2 Brown, Ch. 215. See *Duke of Norfolk's Case*, 3 Ch. Cas. 1. And cf. *Bristow v. Boothby*, 2 Sim. & S. 465.

⁴⁶ *Elliott v. Delaney*, 217 Mo. 14, 116 S. W. 494; *Henderson v. Coal Co.*, 78 Ill. App. 437. See, also, *Gex v. Dill*, 86 Miss. 10, 38 South. 193.

for an indefinite time.⁴⁷ Covenants running with the land are also present interests, and therefore are not subject to the rule.⁴⁸

If property is vested absolutely in a person, and a condition is added postponing his enjoyment, such a condition may be void for repugnancy; but such cases have nothing to do with the rule against perpetuities.⁴⁹ Likewise, if future interests are vested, as vested remainders,⁵⁰ reversions,⁵¹ or the possibility of a reverter,⁵² the rule has no application to them.

Equitable Interests

The rule against perpetuities applies to equitable as well as to legal estates. If they are vested, they are not subject to the rule;⁵³ otherwise, they are.⁵⁴ A trust does not violate the rule against perpetuities merely because it is to continue indefinitely, if it vests within the time required, because the rule against perpetuities is concerned with the vesting of estates, not with their duration.⁵⁵ On the other hand, however, a beneficial interest under a trust may not vest within the required time, and be void, consequently, for remoteness.⁵⁶ Charitable trusts and trusts for accumulation are referred to in following paragraphs.⁵⁷

⁴⁷ *London & S. W. Ry. Co. v. Gomm*, (1882) 20 Ch. Div. 562, 583, C. A. See, however, *Gray*, *Perp.* § 279.

⁴⁸ *Tobey v. Moore*, 130 Mass. 448; *Ex parte Ralph*, 1 De Gex, 219.

⁴⁹ *Daniels v. Eldredge*, 125 Mass. 356; *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115. In re *Ridley*, 11 Ch. Div. 645. But see *Herbert v. Webster*, 15 Ch. Div. 610. See *Leake v. Robinson*, 2 Mer. 363.

⁵⁰ *Gray*, *Perp.* § 205; *Lunt v. Lunt*, 108 Ill. 307; *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412; *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73; *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; *Todhunter v. Railroad Co.*, 58 Iowa, 205, 12 N. W. 267; *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246.

⁵¹ *Kasey v. Trust Co.*, 131 Ky. 609, 115 S. W. 739; *Patterson v. Patterson*, 135 Ky. 339, 122 S. W. 169; *Johnson v. Edmond*, 65 Conn. 492, 33 Atl. 503.

⁵² *First Universalist Soc. of North Adams v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; *French v. Old South Society in Boston*, 106 Mass. 479.

⁵³ *Flanner v. Fellows*, 206 Ill. 136, 68 N. E. 1057; *Abend v. Endowment Fund Com'rs of McKendree College*, 174 Ill. 96, 50 N. E. 1052; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

⁵⁴ *Russell v. Trust Co.*, 171 Fed. 161; *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989; *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561. See *Abbiss v. Burney*, 17 Ch. Div. 211; *Bull v. Pritchard*, 5 Hare, 567; *Blagrove v. Hancock*, 16 Sim. 371.

⁵⁵ *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 84 Am. Dec. 470; *Appeal of Yard*, 64 Pa. 95. *Contra*, *Slade v. Patten*, 68 Me. 380.

⁵⁶ *Newman v. Newman*, 10 Sim. 51. (In this case the beneficial interest went to the heir at law.)

⁵⁷ See *infra*.

Failure of Issue

In connection with the rule, many cases have arisen where there were limitations over "on failure of issue." At common law, these words are held to mean an indefinite failure of issue, and not a failure at the death of the person named.⁵⁸ An indefinite failure of issue would, of course, postpone too long the vesting of the future limitation, and thus fail to comply with the requirements of the rule.⁵⁹ Where, however, the limitation over is to take effect upon a definite failure of issue, the rule is not violated.⁶⁰

When the failure is of the issue of some other person than the holder of the estate, the limitation over is an executory devise, and void in cases of indefinite failure.⁶¹ If, however, the remainder is given to another on the failure of issue of the first taker, a limitation after an indefinite failure is construed to give the first taker an estate tail, and the remainder after it, therefore, does not violate the rule against perpetuities.⁶² In any case where a definite failure of issue of a living person is meant, limitations over are not within the rule, since they must take effect at the end of a life in being.⁶³

Limitations to Classes

Important questions connected with the rule against perpetuities may arise under limitations by a will to a class, as, for example, to the children or grandchildren of A., or a limitation to such of the children or grandchildren of A. as may reach a certain age. A limitation to all the grandchildren of a testator will not offend the

⁵⁸ *Chadock v. Cowley*, Cro. Jac. 695; *Burrough v. Foster*, 6 R. I. 534. Cf. *Ashley v. Ashley*, 6 Sim. 358. But otherwise as to leaseholds, *Forth v. Chapman*, 1 P. Wms. 663; or legacies, *Nichols v. Hooper*, Id. 198. And see *Hughes v. Sayer*, Id. 534. See, however, *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. 11; *Abbott v. Essex Co.*, 18 How. (U. S.) 202, 15 L. Ed. 352; *Greenwood v. Verdon*, 1 Kay & J. 74; *Trotter v. Oswald*, 1 Cox, Ch. 317; *Ex parte Davies*, 2 Sim. (N. S.) 114; *Roe v. Jeffery*, 7 Term R. 589; *Barlow v. Salter*, 17 Ves. 479. The rule has been changed by statute, in some states. See 1 *Stim. Am. St. Law*, § 1415.

⁵⁹ *Hackney v. Tracy*, 137 Pa. 53, 20 Atl. 560; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Merrill v. American Baptist Missionary Union*, 73 N. H. 414, 62 Atl. 647, 3 L. R. A. (N. S.) 1143, 111 Am. St. Rep. 632, 6 Ann. Cas. 646; *Cooke v. Bucklin*, 18 R. I. 666, 29 Atl. 840.

⁶⁰ *Strain v. Sweeny*, 163 Ill. 603, 45 N. E. 201; *Miller's Estate*, 145 Pa. 561, 22 Atl. 1044; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. 56; *In re Tyler*, 30 R. I. 590, 76 Atl. 661; *GLOVER v. CONDELL*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360, *Burdick Cas. Real Property*.

⁶¹ *Sanders v. Cornish*, Cro. Car. 230; *Love v. Wyndham*, 1 Mod. 50.

⁶² *Tatton v. Mollineux*, Moore, 809; *Retherick v. Chappel*, 2 Bulst. 28.

⁶³ *Gray*, *Perp.* §§ 155-158; *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304; *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54. And see *SEAVER v. FITZGERALD*, 141 Mass. 401, 6 N. E. 73, *Burdick Cas. Real Property*.

rule, since all the testator's children will be in esse at his death, and all the grandchildren will, therefore, be ascertained during lives in being. A limitation, however, to the grandchildren of a living person does violate the rule, since some grandchildren may be born more than twenty-one years after the lives in being at the time the limitation was created.⁶⁴ Under limitations to a class which are void because some of the persons who are to take cannot be ascertained within the time required by the rule against perpetuities, the limitations are void as to all of the class, unless so made that the amount one is to receive is not affected by the existence of the other limitations.⁶⁵ In the latter case those limitations will be good which can vest within the required time, and the others will be bad.⁶⁶ Under limitations, however, to a series of persons, the limitation to the first one of the series will not be rendered void by the fact that the limitations to the others are too remote.⁶⁷

Powers

The rule against perpetuities applies to powers when (1) the creation of the power, that is, the time when it takes effect or becomes operative, is too remote;⁶⁸ or (2) when the power duly created may be exercised at a time beyond the limit allowed by the rule.⁶⁹ If, however, a power cannot be exercised beyond the prescribed time, the rule does not apply. Moreover, a power which cannot be exercised beyond the limits of the rule is not rendered invalid by the fact that an appointment, within its terms, could be made that would be too remote,⁷⁰ since the appointment actually

⁶⁴ *United States Fidelity & Guaranty Co. v. Douglas' Trustee*, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993; *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Hardenbergh v. McCarthy*, 130 App. Div. 538, 114 N. Y. Supp. 1073; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; *Strode v. McCormick*, 158 Ill. 142, 41 N. E. 1091.

⁶⁵ "Suppose a testator gives a thousand dollars to each of his grandchildren who reaches twenty-two. The gift to each grandchild would be construed separately; the gift to such grandchildren as were alive at the testator's death would be good, and the gift to such grandchildren as were born after the testator's death would be bad." Prof. Warren, *Perp.* 30 Cyc. 1490.

⁶⁶ *Lowry v. Muldrow*, 8 Rich. Eq. (S. C.) 241; *Hills v. Simonds*, 125 Mass. 536; *Boughton v. Boughton*, 1 H. L. Cas. 406; *Storrs v. Benbow*, 3 De Gex, M. & G. 390; *Wilkinson v. Duncan*, 30 Beav. 111; *Elliott v. Elliott*, 12 Sim. 276.

⁶⁷ *Goldsborough v. Martin*, 41 Md. 488; *Caldwell v. Willis*, 57 Miss. 555; *Siedler v. Syms*, 56 N. J. Eq. 275, 38 Atl. 424; *Dillon v. Reilly*, Ir. R. 10 Eq. 152; *Liley v. Hey*, 1 Hare, 580, 66 Eng. Reprint, 1162; *Wainman v. Field*, Kay, 507, 69 Eng. Reprint, 215.

⁶⁸ *Blight v. Hartnoll*, 19 Ch. D. 294; *Bristow v. Boothby*, 2 Sim. & St. 465, 57 Eng. Reprint, 424.

⁶⁹ *Gray*, *Perp.* § 475; *Goodiers v. Edmunds*, [1893] 3 Ch. 455.

⁷⁰ *Routledge v. Dorril*, 2 Ves. Jr. 357; *Sugden*, *Powers*, 152, 397; *Gray*, *Perp.* §§ 473, 510.

made would determine whether or not it was too remote.⁷¹ A power of appointment given to a living person, or given to any number of persons, or to the survivor of them, all of whom are living at the time of the creation of the power, is evidently valid.⁷² A power of appointment by will, given, however, to a person unborn at the creation of the power, is invalid.⁷³ A power given to a donee to sell for the purpose of raising money for the payment of the debts of the donor of the power is generally exempt from the application of the rule. Such a power must be executed within a reasonable time. Moreover, the creditors may compel its execution.⁷⁴

The rule against perpetuities does not apply to a power of sale given to a mortgagee; the same being a power given by way of security which is exempt from the rule.⁷⁵ A trust deed, moreover, given to secure a debt is not void because it creates a trust in violation of the statute of perpetuities.⁷⁶

With reference to the remoteness of an appointment, it should be observed that the question of whether the appointment is or is not too remote must be determined by its distance from the creation of the power, and not from the time of its exercise.⁷⁷ The ef-

⁷¹ *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.

⁷² *APPLETON'S APPEAL*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*; *Morse v. Martin*, 34 Beav. 500; *Robinson v. Harcastle*, 2 Bro. C. C. 22; *Thelluson v. Woodford* (1805) 11 Ves. 112 H. L.; *Myers v. Provident, etc., Co.*, 19 Ont. 358. See *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 85 N. E. 59; *Christmas v. Winston*, 152 N. C. 48, 67 S. E. 58, 27 L. R. A. (N. S.) 1084.

⁷³ *Whitby v. Mitchell*, 42 Ch. D. 494; *Wollaston v. King*, L. R. 8 Eq. 165; *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561; *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

⁷⁴ *Silk v. Prime*, 1 Bro. C. C. 133, note, 23 Eng. Reprint, 1037.

⁷⁵ *Quart v. Eager* (1908) 18 Ont. L. R. 18. Cf. *Wood v. Drew* (1864) 33 Beav. 610, 615; *Lewis, Law of Perp.* p. 560. Prof. Gray (*Gray, Perp.* [2d Ed.] § 562 et seq.) is of the opinion that the rule does apply to mortgages, as, for example, when the condition is to pay the mortgage debt in thirty years. The above cases, however, do not make an indefinite future time for paying the debt material. For further discussion of this question, see Gray, *Perp.*, supra; also *Laws of Eng.* vol. 22, *Perpetuities*, § 739.

⁷⁶ *Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813.

⁷⁷ *Fargo v. Squiers*, 154 N. Y. 250, 48 N. E. 509; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; *Genet v. Hunt*, 113 N. Y. 58, 21 N. E. 91; *Gray, Perp.* § 473; *In re Powell's Trusts*, 39 Law J. Ch. 188. *Contra, Rous v. Jackson*, 29 Ch. Div. 521.

fect of appointments under powers which are too remote is the same as for estates limited in violation of the rule.⁷⁸

Charitable Trusts

It is not infrequently stated that the rule against perpetuities does not apply to charitable trusts.⁷⁹ On the other hand, perpetual trusts, although intended as a present gift, are by some called "perpetuities," and are said to be void.⁸⁰ It is well established, however, with certain well-recognized exceptions, that gifts in trust for charity, if conditional upon a future and uncertain event, are subject to the same rules and principles as any other estate depending upon a condition precedent.⁸¹ When, however, there is a present gift, it is taken entirely out of the scope of the law of remoteness, as in the case of any other present vested interest.⁸² For instance, where there is a gift to a charity, with a gift over to an individual, whether in trust for him or not, the gift over is void, if it violates the rule.⁸³ So with a gift to an individual, followed by a too remote gift over to a charity.⁸⁴ Again, property may be held in trust

⁷⁸ *Morgan v. Gronon*, L. R. 16 Eq. 1. The appointment is bad if it might vest at a too remote period, though it does not. *Smith's Appeal*, 88 Pa. 492. An appointment over on a contingency after an appointment which violates the rule is void also. *Routledge v. Dorril*, 2 Ves. Jr. 357. A power collateral to an estate tail is not void, since the tenant in tail may bar it at any time. *Lantsbery v. Collier*, 2 Kay & J. 709. A void clause may be rejected, and the rest of the appointment stand. In *re Teague's Settlement*, L. R. 10 Eq. 564.

⁷⁹ Such gifts are, however, properly excepted from the rule on the ground that they are present interests. *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. 796; *Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100. And see *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728. And see *Jones v. Habersham*, 107 U. S. 174, 185, 2 Sup. Ct. 336, 27 L. Ed. 401; *Williams v. Williams*, 8 N. Y. 525, 535; *Garrison v. Little*, 75 Ill. App. 402; *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594. See, however, *Gray, Perp. § 589 et seq.*

⁸⁰ *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n*, 66 Kan. 1, 77 Pac. 286; *Missionary Soc. of M. E. Church v. Humphreys*, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432.

⁸¹ *Lord Chancellor Selborne in Chamberlayne v. Brockett*, L. R. 8 Ch. A. C. 206 (1870).

⁸² *Id.*

⁸³ *Merritt v. Bucknam*, 77 Me. 253; *Society for Promoting Theological Education v. Attorney General*, 135 Mass. 285; *Gray, Perp. § 593*; *PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT*, 3 Gray (Mass.) 142, 63 Am. Dec. 725, *Burdick Cas. Real Property*; *Wells v. Heath*, 10 Gray (Mass.) 17; *Palmer v. Bank*, 17 R. I. 627, 24 Atl. 109.

⁸⁴ *Smith v. Townsend*, 32 Pa. 434; In *re Johnson*, L. R. 2 Eq. 716, 12 Jur. N. S. 616; *Leonard v. Burr*, 18 N. Y. 96; *Commissioners of Charitable Donations & Bequests v. De Clifford*, 1 Dru. & War. 245; *Attorney General v. Gill*,

for an individual, to be held, on the happening of a contingency, for a charity. If, however, the contingency is too remote, the gift to the charity is void.⁸⁵

There are, however, two established exceptions to the general rule. Where there is a gift to one charity, with a remote gift over to another charity, the gift over is good, even though its future contingency may extend beyond the period fixed by the rule.⁸⁶

The second exception is that where a gift is given unconditionally on a charitable trust to a corporation not in existence at the time, nevertheless if such corporation is created within a reasonable time after the gift, the trust will be good. The courts, generally, construe such gifts as present gifts; the creation of the corporation being merely the means for carrying out the gift.⁸⁷

Rights of Entry for Condition Broken

In England, the rule against perpetuities applies to rights of entry for condition broken.⁸⁸ Thus, where land was conveyed by A. to B., on condition that, if it was ever used for certain trades, A. might re-enter, the condition was held void for remoteness.⁸⁹ In this country, however, rights of entry for conditions broken are treated as exceptions to the rule, and conditions have repeatedly been upheld, although not within the limits of the rule.⁹⁰

Statutory Modifications of the Rule

As already pointed out, remoteness in vesting, and not suspension of alienation, is the test of the rule against perpetuities. In some states, however, under statutory modifications of the rule, the sus-

2 P. Wms. 369; In re Johnson's Trusts, L. R. 2 Eq. 716. And see Gray, Perp. § 594.

⁸⁵ Gray, Perp. §§ 595, 596.

⁸⁶ Storrs Agr. School v. Whitney, 54 Conn. 342, 8 Atl. 141; Wolfe v. Hatheway, 81 Conn. 181, 70 Atl. 645; Lennig's Estate, 154 Pa. 209, 25 Atl. 1049; Jones v. Habersham, 107 U. S. 174, 185, 2 Sup. Ct. 336, 27 L. Ed. 401; Chamberlayne v. Brockett, 8 Ch. App. 206.

⁸⁷ Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008, 105 Am. St. Rep. 394; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Miller v. Chittenden, 2 Iowa, 315; Id., 4 Iowa, 252. Compare Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; Appeal of Elliot, 74 Conn. 586, 51 Atl. 558. See, however, Carter v. Balfour's Adm'r, 19 Ala. 814; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590.

⁸⁸ In re Hollis Hospital, 2 Ch. 540 (1899).

⁸⁹ Dunn v. Flood, 25 Ch. D. 629.

⁹⁰ See Gray, Perp. § 304 et seq.; First Universalist Soc. of North Adams v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT, 3 Gray (Mass.) 142, 63 Am. Dec. 725, Burdick Cas. Real Property; Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451; Palmer v. Bank, 17 R. I. 627, 24 Atl. 109; Cowell v. Springs Co., 100 U. S. 55, 25 L. Ed. 547.

pension of alienation is made the criterion of perpetuities. For example, in New York, the statute provides that "every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate."⁹¹ The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.⁹² Under such a statute, it is not necessary that a future contingent estate shall vest within the period prescribed, namely, two lives in being; but it is necessary that there should be some person who can convey, within the statutory limitation, an absolute estate in fee in the property. For example, a limitation to the issue of A. who are living at the death of three or more persons is invalid.⁹³ The "two lives in being" may be any two lives, regardless of the fact of their interest in the property.⁹⁴ The suspension of the power of alienation must necessarily cease during two lives; it is not sufficient that it may cease, or that, as a fact, in any particular case, it does cease within such time.⁹⁵

Under the New York law as amended, gifts of realty or personalty may be made to any trustee on a perpetual charitable trust, or to a corporation not yet in existence.⁹⁶ The former law that such gifts could be made only to such corporations as were expressly authorized to hold property for charitable purposes has been changed,⁹⁷ and "the ancient law of charitable uses has been restored."⁹⁸

The New York statutes governing the suspension of alienation ap-

⁹¹ Laws N. Y. 1896, c. 547, § 32. In case of a contingent remainder in fee, the statute allows the further period of a minority.

⁹² *Id.*

⁹³ *Herzog v. Trust Co.*, 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146; *Nester v. Nester*, 68 Misc. Rep. 207, 118 N. Y. Supp. 1009, 124 N. Y. Supp. 974; *Vanderpoel v. Loew*, 112 N. Y. 167, 19 N. E. 481.

⁹⁴ *Bailey v. Bailey*, 97 N. Y. 460; *Crooke v. County of Kings*, 97 N. Y. 421; *Woodgate v. Fleet*, 64 N. Y. 566; *Gilman v. Reddington*, 24 N. Y. 9; *Kahn v. Tierney*, 135 App. Div. 897, 120 N. Y. Supp. 663.

⁹⁵ *Knox v. Jones*, 47 N. Y. 389; *Jennings v. Jennings*, 7 N. Y. 547; *Ahern v. Ahern*, 52 App. Div. 356, 65 N. Y. Supp. 81.

⁹⁶ Since the enactment of Laws N. Y. 1893, c. 701, and the decision of *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568, property given for charitable purposes may pass to a corporation not necessarily formed within the statutory limit. Prior to this enactment a gift even for charitable purposes could not be made to a corporation not in existence, unless such corporation, must necessarily be formed within statutory limit, if at all. *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

⁹⁷ *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568.

⁹⁸ In *re Watson's Estate*, 171 N. Y. 256, 63 N. E. 1109.

ply both to realty and to personalty.⁹⁹ There are also statutes in other states more or less similar to the statutes in New York. This is true of the states of California,¹ Michigan,² Minnesota,³ and Wisconsin.⁴ The statutes, however, of these last three states do not apply to personalty.⁵

RULE AGAINST ACCUMULATIONS

164. Trusts for the accumulation of the rents and profits of land, other than accumulations for the payment of debts or incumbrances, are subject to the rule against perpetuities. In a number of states, however, statutes have prescribed a different period.

Where the beneficiary of a trust must necessarily obtain a vested interest during the period prescribed by the rule against perpetuities, a direction that the income, rents, and profits of such trust property shall be accumulated by the trustee, until, for example, a certain fund shall be reached, is valid, even regardless of the length of time the period of accumulation is to run.⁶ On the other hand, if the property is not sure to vest within the perpetuity period, a provision for its accumulation by trustees will violate the rule, and will be void.⁷

⁹⁹ Laws N. Y. 1897, c. 417, § 2, provides as follows: The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitations or conditions, or if such instrument be a will, for not more than two lives in being at the death of the testator.

¹ In re Haines' Estate, 150 Cal. 640, 89 Pac. 606; In re Campbell's Estate, 149 Cal. 712, 87 Pac. 573.

² Foster v. Stevens, 146 Mich. 131, 109 N. W. 265; Cole v. Lee, 143 Mich. 267, 106 N. W. 855.

³ CITY OF 'OWATONNA v. ROSEBROCK, 88 Minn. 318, 92 N. W. 1122, Burdick Cas. Real Property; Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948.

⁴ Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258; Holmes v. Walter, 118 Wis. 409, 95 N. W. 330, 62 L. R. A. 986.

⁵ Atwater v. Russell, 49 Minn. 22, 51 N. W. 624; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258. The states of Idaho, Iowa, Indiana, Kentucky, and North Dakota, and likewise the District of Columbia also have statutes bearing upon this subject. See 30 Cyc. 1520.

⁶ Kimball v. Crocker, 53 Me. 263; Otis v. Coffin, 7 Gray (Mass.) 511; Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202; Thellusson v. Woodford, (1799) 4 Ves. 227, affirmed (1805) 11 Ves. 112, H. L.

⁷ In re Gerber's Estate, 196 Pa. 366, 46 Atl. 497; Andrews v. Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; Girard Trust Co. v. Russell, 179 Fed. 446, 102 C. C. A. 592.

Where, moreover, property is given absolutely to one under a present vested interest, no direction to trustees for the accumulation of the income can be too remote, for the reason that the rule does not apply, since the power of accumulation is destructible, and the donee or grantee may, at any time, put a stop to the accumulations, and demand the full possession of the property.⁸ Likewise, where property is given immediately and unconditionally to charitable purposes, unlawful directions as to accumulations will not defeat the gift.⁹

Trusts for accumulations for the purpose of paying debts and incumbrances are held not to be within the rule, either on the ground that the estate is vested,¹⁰ or that the trusts are destructible by the payment of the debts.¹¹ In many states, the period of possible accumulations has been restricted to a shorter time by statute. In some states, these periods are measured by minorities; in others, a definite number of years is prescribed, regardless of lives or minorities.¹²

⁸ *Kimball v. Crocker*, 53 Me. 263; *Roger's Estate*, 179 Pa. 602, 36 Atl. 1130. In Connecticut and Massachusetts, the limit of an accumulation for the benefit of charity is subject to the orders of a court of equity. *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231.

⁹ *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371; *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 84 Am. Dec. 470; *Martin v. Magham*, 14 Sim. 230.

¹⁰ *Southampton v. Hertford*, 2 Ves. & B. 54, 65; *Bacon v. Proctor*, Turn. & R. 31.

¹¹ *Payne v. Grey*, [1912] 1 Ch. 343, 368, C. A.

¹² 1 Stim. Am. St. Law, §§ 1443, 1444; *Brandt v. Brandt*, 13 Misc. Rep. 431, 34 N. Y. Supp. 684. The English statutes on this subject are the Accumulations Act of 1880, commonly called the "Thellusson Act" (39 & 40 Geo. III, c. 98), and the Accumulations Act of 1892 (55 & 56 Vict. c. 58). The later act merely supplements the first. See *De Hoghton v. De Hoghton*, [1896] 1 Ch. 855, C. A. (twenty-one years); *Herbert v. Freshfield*, [1903] 2 Ch. 330.

(B) RIGHTS IN THE LAND OF OTHERS

CHAPTER XVII

EASEMENTS, PROFITS À PRENDRE, RENTS, AND FRANCHISES

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RIGHTS IN LAND APART FROM OWNERSHIP

165. Apart from estates or interests in land connected with ownership, there may be rights in lands belonging to other persons. Such rights are illustrated by easements, profits à prendre, rents, and franchises.

In addition to the rights of ownership of land, there also exist certain rights in lands owned by others. The needs of human relations cannot be met by the theory of ownership alone. It must also be possible for a person to deal in a manner authorized by law with things which belong to another.¹ In recognition of this need, a legal theory of real rights in the property of others, that is, rights not merely personal, but rights enforceable against everybody, was developed by the Roman jurists. Such rights were technically known as "jura in re aliena." They are distinguished from the rights of ownership, in that the rights of con-

¹ Sohm's Inst. Rom. Law, 337.

trol which they confer are limited in regard to their contents.² It is proposed in the present chapter to discuss certain rights in the land of others which are usually classed under incorporeal hereditaments, namely, easements, profits à prendre (including commons), rents, and franchises. Such rights are incorporeal, in that they issue out of, or are annexed to, things corporeal. They may also be of an inheritable quality, although they are not necessarily inheritable. Licenses are merely personal rights in another's lands, and do not arise to the dignity of an interest in land as already shown.³

EASEMENT DEFINED

166. An easement is a privilege or right, without taking any profit, which the owner or one parcel of land has, by reason of such ownership, to use the land of another for a certain defined purpose not inconsistent with the general property in the latter.

The Roman law of servitudes has had much influence upon the English law of easements.⁴ In the Roman law, servitudes are a division of "jura in re aliena," or real rights which one has in the property of another. Servitudes are of two classes, personal and prædial. The former are individual rights, lasting at most for a lifetime; the latter are rights of using in a certain definite way the land of one person by the owner of adjoining land.⁵ The land subject to this right is known as the servient land, while the land to which the right is attached is called the dominant land.⁶ From the definition of an easement as given above, it appears that it corresponds to a prædial servitude of the Roman law.⁷ In an

² Id. 338.

³ Chapter XI. License distinguished from easement, see *YEAGER V. TUNING*, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679, Burdick Cas. Real Property.

⁴ See Williams, *Inst. of Justinian*, 80-88.

⁵ *Owen v. Field*, 102 Mass. 90, 103; *Greenwood Lake & P. J. R. Co. v. Railroad Co.*, 134 N. Y. 435, 439, 31 N. E. 874; *Appeal of Big Mountain Imp. Co.*, 54 Pa. 361, 369; *Scheel v. Mining Co.*, 79 Fed. 821; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Harrison v. Boring*, 44 Tex. 255; *Perrin v. Garfield*, 37 Vt. 304. See 2 Wash. Real Prop. 25.

⁶ *Inst. of Justinian*, II, 1.

⁷ Servitude is, however, a broader term than easement, since it also includes profits à prendre. Lord Chancellor Selborne in *Dalton v. Angus*, 6 App. Cas. 740 (1881).

easement proper there must be two estates, the one burdened with the obligation, the other possessing the right of enjoyment, known respectively as the servient and dominant estates.⁸ Looked at from the standpoint of the owner of the dominant estate, the right is an easement; from the standpoint of the servient estate, it is a servitude. The essential qualities of true easements are: (1) They are incorporeal; (2) they are imposed on corporeal property, and not upon the owner thereof; (3) they confer no right to a participation in the profits arising from such property; (4) they are imposed for the benefit of corporeal property; (5) there must be two tenements, the dominant, to which the right belongs, and the servient, upon which the obligation rests.⁹ Although easements are by most writers classed among incorporeal hereditaments,¹⁰ yet the true nature of an easement is a matter of dispute among legal scholars;¹¹ some contending that easements are not incorporeal hereditaments at all, but rights appurtenant to corporeal hereditaments.¹²

Distinguished from Other Rights

Easements are distinguished from profits à prendre, in that an easement is a right merely to use the servient land in a particular manner, but carries with it no right to take anything from it, either of its soil, or produce, or game,¹³ as is the case of a profit à prendre.¹⁴ Easements also differ from licenses, in that a license is personal,¹⁵ and does not run with the land.¹⁶ A license, more-

⁸ *Goodwin v. Hamersly*, 69 Conn. 115, 36 Atl. 1065; *Karmuller v. Krotz*, 18 Iowa, 352; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Hawkins v. Rutter*, 1 Q. B. 668 (1892).

⁹ *Le Blond v. Town of Peshtigo*, 140 Wis. 604, 123 N. W. 157, 25 L. R. A. (N. S.) 511; *PIERCE v. KEATOR*, 70 N. Y. 419, 421, 26 Am. Rep. 612, *Burdick Cas. Real Property*; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72, 89.

¹⁰ *Williams, Real Prop.* (3d Ed.) 265; *Leake, Prop. in Land*, 53; *Goodeve, Real Prop.* (1st Ed.) 351. *Blackstone* (II, Comm. 21) classes "commons" and "ways" as incorporeal hereditament, although he does not use the term "easement." See, also, 24 L. Q. R. 264. That easements are incorporeal hereditaments, see *Stone v. Stone*, 1 R. I. 425, 428; *Stingerland v. Contracting Co.*, 43 App. Div. 215, 60 N. Y. Supp. 12, 22; *Cary v. Daniels*, 5 Metc. (Mass.) 236, 238; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739.

¹¹ See 24 L. Q. R. 199, 259, 264.

¹² See *Hood & Challis, Conveyancing, etc.*, Acts (6th Ed.) 150; *Goodeve's Real Prop.* (5th Ed.) 13, note.

¹³ *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203.

¹⁴ *PIERCE v. KEATOR*, 70 N. Y. 419, 26 Am. Rep. 612, *Burdick Cas. Real Property*. And see *infra*.

¹⁵ See *Licenses*, ante. And see *Ex parte Rawlings*, 22 Q. B. D. 193, C. A. (1888.)

¹⁶ *Taylor v. Waters*, 7 Taunt. 374, 384.

over, may be created by parol,¹⁷ while a deed, or some writing, as required by the statute of frauds, is usually necessary in order to grant an easement.¹⁸ A license also is revocable at the will of the person giving it,¹⁹ while easements are not.²⁰ A license is a mere authority to do a specific act or a series of specific acts on the land of the licensor,²¹ while an easement is a permanent right or interest in the land of another.

SAME—CLASSIFICATION OF EASEMENTS

167. Easements may be classified as follows:

- (a) Continuous and non-continuous.
- (b) Appurtenant and in gross.
- (c) Affirmative and negative.
- (d) Of necessity and not of necessity.
- (e) Equitable or quasi easements.
- (f) Private and public.

There are various classes of easements met with in the reports, some of them being still of importance, although others are not. The distinction, for example, between the first class mentioned above, namely, continuous and non-continuous easements, is yet of practical value.²² Continuous easements are said to be rights of a continuous nature, the enjoyment of which may be continued

¹⁷ *Fitch v. Seymour*, 9 Metc. (Mass.) 462; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Miller v. Railroad Co.*, 6 Hill (N. Y.) 61; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 154; *Id.*, 3 Chand. (Wis.) 117.

¹⁸ *Howes v. Barmon*, 11 Idaho, 64, 69, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. Rep. 253; *Johnson v. Lewis*, 47 Ark. 66, 2 S. W. 329; *McManus v. Cooke*, 35 Ch. D. 681 (1887); *YEAGER v. TUNING*, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679, *Burdick Cas. Real Property*. And see *Creation of Easements*, *infra*.

¹⁹ *Cook v. Railroad Co.*, 40 Iowa, 451; *Fitch v. Seymour*, 9 Metc. (Mass.) 462; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Miller v. Railroad Co.*, 6 Hill (N. Y.) 61.

²⁰ *Hills v. Miller*, 3 Paige (N. Y.) 254, 24 Am. Dec. 218; *Ex parte Coburn*, 1 Cow. (N. Y.) 568; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Wallis v. Harrison*, 4 Mees. & W. 538.

²¹ See *Licenses*, *ante*.

²² The importance of this distinction lies in the fact that easements that pass by implication of law must be continuous. See *infra*. In England, however, it is said that while, formerly, the distinction between continuous and non-continuous easements was of great importance, chiefly with reference to the creation of easements by implication of law, yet since the decision in *Wheeldon v. Burrows* (1879) 12 Ch. 31, C. A., the distinction has been treated as of little significance. *Laws of Eng.* vol. 11, p. 240.

without the necessity of any human interference,²³ as a right to lateral or subjacent support,²⁴ a right to light and air,²⁵ a right to an open drain,²⁶ or to water courses.²⁷ A non-continuous easement, on the other hand, is an intermittent enjoyment of a right,²⁸ an enjoyment to be had only by the interference of man,²⁹ such as rights of way,³⁰ or a right to draw water.³¹ Another classification of easements is that which divides them into easements appurtenant and easements in gross.³² The former class comprise easements proper, which cannot be severed from the tenement with which they are connected; that is, an easement belongs to an estate, and not to a person.³³ Easements in gross, however, are not connected with any parcel of land, and exist in a person or in the public.³⁴ It is, however, said that, strictly speaking, there

²³ *Lampman v. Milks*, 21 N. Y. 505; *DEE v. KING*, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860, Burdick Cas. Real Property.

²⁴ See *infra*.

²⁵ *Lampman v. Milks*, 21 N. Y. 505.

²⁶ *Hall v. Morton*, 125 Mo. App. 315, 102 S. W. 570. See *Brown v. Fuller*, 165 Mich. 162, 130 N. W. 621, 623, 33 L. R. A. (N. S.) 459, Ann. Cas. 1912C, 853; *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. 276; *Pyer v. Carter*, 1 H. & N. 916.

²⁷ *Watts v. Kelson*, 6 Ch. App. 166, 173.

²⁸ *Suffield v. Brown*, 4 De G., J. & Sm. 185.

²⁹ *Lampman v. Milks*, 21 N. Y. 505.

³⁰ *Oliver v. Pitman*, 98 Mass. 46; *Pettingill v. Porter*, 8 Allen (Mass.) 1, 85 Am. Dec. 671; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Stuyvesant v. Woodruff*, 21 N. J. Law, 133, 57 Am. Dec. 156. But see *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Hutlemier v. Albro*, 18 N. Y. 48; *Manbeck v. Jones*, 190 Pa. 171, 42 Atl. 536.

³¹ *Lampman v. Milks*, 21 N. Y. 505.

³² *Dennis v. Wilson*, 107 Mass. 591; *Spensley v. Valentine*, 34 Wis. 154; *McMahon v. Williams*, 79 Ala. 288. Some of the old reports speak of easements as "appendant." An easement is never, however, appendant to land. This error arose from the ambiguous translation of the Latin word "pertinens" in the old pleadings. *Laws of Eng.* vol. 11, p. 236. Profits a prendre may be, however, either appendant or appurtenant. See *infra*.

³³ Easements appurtenant inhere in the land. *Moore v. Crose*, 43 Ind. 30; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300; *Kuecken v. Voltz*, 110 Ill. 264.

³⁴ See *Abbott v. Weekly*, 1 Lev. 176; *Fitch v. Rawling*, 2 H. Bl. 393; *Mounsey v. Ismay*, 1 Hurl. & C. 729, 3 Hurl. & C. 486; *Hall v. Nottingham*, 1 Exch. Div. 1; *Tyson v. Smith*, 9 Adol. & E. 406; *Nudd v. Hobbs*, 17 N. H. 524; *Knowles v. Dow*, 22 N. H. 387, 55 Am. Dec. 163. Such rights do not exist in some states. *Ackerman v. Shelp*, 8 N. J. Law, 125. An easement cannot be granted in gross so that it will be assignable. *Ackroyd v. Smith*, 10 C. B. 164; *Boatman v. Lasley*, 23 Ohio St. 614. See *Garrison v. Ruud*, 19 Ill. 558, and, contra, *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Amidon v. Harris*, 113 Mass. 59. Nor to give a right of action against a third person. *Hill v. Tupper*, 2 Hurl. & C. 121.

can be no such thing as an easement in gross, since it is necessary that in every easement there should be both a servient and a dominant tenement.³⁵ There is, however, a class of rights which may be exercised by individuals without any occupancy of a dominant tenement, a mere burden or servitude resting upon one piece of land for the use of a person, and such burdens have been conveniently classed as easements in gross.³⁶ Highways have been classed as easements of this kind, also easements in respect to the flowage of water,³⁷ as, likewise, a right to draw water from a well.³⁸ Easements are also divided, with respect to the obligation imposed on the owner of the servient estate, into negative easements and affirmative easements. Under the former the owner of the servient estate is prohibited from doing some acts of ownership on his own property, as an easement that land shall not be built upon,³⁹ while in the case of an affirmative easement the owner of the servient estate is merely required to permit something to be done on his land, such as piling materials on it.⁴⁰ Easements of necessity, as distinguished from easements not of necessity, are easements that are necessary for the use of the tenement, without which the land could not be used at all.⁴¹ They are easements which pass by implication or construction of law.⁴² Easements of necessity are sometimes called natural easements, in distinction from conventional easements, which arise by the agreement of the parties.⁴³

³⁵ *Hawkins v. Rutter* [1892] 1 Q. B. 668; *Rangeley v. Midland Rail Co.* (1868) 3 Ch. App. 306, 311.

³⁶ *Willoughby v. Lawrence*, 116 Ill. 11, 19, 4 N. E. 356, 56 Am. Rep. 758; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354. See *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412.

³⁷ *SHAW v. PROFITT*, 57 Or. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63, *Burdick Cas. Real Property* (a highway); *De Witt v. Harvey*, 4 Gray (Mass.) 486; *Bissell v. Grant*, 35 Conn. 288; *Poull v. Mockley*, 33 Wis. 482.

³⁸ *Amidon v. Harris*, 113 Mass. 59; *Owen v. Field*, 102 Mass. 90; *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550.

³⁹ *Hills v. Miller*, 3 Paige (N. Y.) 254, 24 Am. Dec. 218. See *Washburn, Real Prop.* (6th Ed.) § 1230. A negative easement involves merely a right to prohibit the commission of certain acts upon the servient tenement. The commonest forms are the right to light, the right to receive water flowing over the servient tenement, and the right to discharge water thereon. *Laws of Eng.* vol. 11, p. 240.

⁴⁰ *Voorhees v. Burchard*, 55 N. Y. 98; *Appeal of Big Mounain Imp. Co.*, 54 Pa. 361. And see *Melvin v. Whiting*, 13 Pick. (Mass.) 184.

⁴¹ *Union Lighterage Co. v. Dock Co.*, 2 Ch. 557, C. A. (1902); *HILDRETH v. GOOGINS*, 91 Me. 227, 39 Atl. 550, *Burdick Cas. Real Property*.

⁴² See *infra*.

⁴³ *Laumier v. Francis*, 23 Mo. 181; *Stokoe v. Singers*, 8 El. & Bl. 31.

Easements are also sometimes distinguished as equitable or quasi easements. They are not strict easements, but may arise between two pieces of land owned by the same person, when the enjoyment by one piece of a right in the other would be a legal easement, were the pieces owned by different persons.⁴⁴ For example, an owner of two lots may construct a drain for one of them across the other, and then sell either of them. In such case, if he transfer the dominant estate, the right to drain across the remaining lot will continue; and the same result may obtain if he transfers the servient estate to one who has knowledge of the existence of the drain, and the easement is necessary to the enjoyment of the other lot.⁴⁵ Another classification of easements sometimes employed is that of private and public easements. Private easements are easements proper; that is, there is both a servient and a dominant estate. Public easements are not strict easements. They are enjoyed by the public, and there is no dominant estate. They are illustrations of what are termed easements in gross.⁴⁶

SAME—CREATION OF EASEMENTS

168. Easements may be created either:

- (a) By grant, express or implied; or
- (b) By prescription.

169. BY GRANT—Easements created by grant include easements arising under covenants and implied grants. The grant of an easement must be in writing.

Easements can be created only by grant, express or implied, or by prescription, which is based upon the common-law doctrine of the presumption of a grant, or upon statutory provisions.⁴⁷

⁴⁴ *DEE v. KING*, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860, *Burdick Cas. Real Property*; *Wheeldon v. Burrows*, 12 Ch. D. 31, C. A. (1879); *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 37 Am. Dec. 85; *Lampman v. Milks*, 21 N. Y. 505; *Watts v. Kelson*, 6 Ch. App. 166. But see *Suffield v. Brown*, 4 De Gex, J. & S. 185; *Thomson v. Waterlow*, L. R. 6 Eq. 36.

⁴⁵ *Thayer v. Payne*, 2 Cush (Mass.) 327; *Pyer v. Carter*, 1 Hurl. & N. 916; *Dunklee v. Railroad Co.*, 24 N. H. 489; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108. But see *Nicholas v. Chamberlain*, Cro. Jac. 121; *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 37 Am. Dec. 85; *Collier v. Pierce*, 7 Gray (Mass.) 18, 66 Am. Dec. 453; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Randall v. McLaughlin*, 10 Allen (Mass.) 366; *Buss v. Dyer*, 125 Mass. 287; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352.

⁴⁶ See *supra*. See, also, Black, L. Dict.; Jones, Easements, § 422.

⁴⁷ See, in general, as to the creation of easements, *In re North Beach &*

They may be created by grant; that is, by deed, like other interests in land.⁴⁸ Thus, they may be created in fee simple,⁴⁹ or for life,⁵⁰ or for a term of years.⁵¹ The word "grant" is not necessary, however, for the creation of an easement, since any words which show an intention to create an easement will be sufficient.⁵² Easements cannot, however, be created by parol, and an attempt to do so would amount only to a license, which would be revocable.⁵³ A deed creating an easement must be executed, the same as a deed conveying any other interest in land. It may be necessary in some jurisdictions that it should be sealed,⁵⁴ and also that it should be acknowledged and recorded.⁵⁵ By means of a reservation or an exception in a deed, a grantor of land may retain an easement for his own enjoyment, or for the enjoyment of himself and heirs,

M. R. Co., 32 Cal. 499; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; *White v. Railroad Co.*, 139 N. Y. 19, 34 N. E. 887; *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203; *SHAW v. PROF-FITT*, 57 Or. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63, *Burdick Cas. Real Property*.

⁴⁸ *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Forbes v. Balenseifer*, 74 Ill. 183; *Duinneen v. Rich*, 22 Wis. 550; *YEAGER v. TUNING*, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679, *Burdick Cas. Real Property*.

⁴⁹ Unless otherwise provided by statute, it has been held that the use of the word "heirs" is necessary to create an easement in fee, as in the case of a grant of a corporeal hereditament. See *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Bean v. French*, 140 Mass. 229, 3 N. E. 206. This question is a disputed one, however; it being contended that words of limitation are not necessary for the creation of a perpetual easement by express grant. See, upon this point, the articles in 24 L. Q. R. pp. 199, 259, 264.

⁵⁰ *Pym v. Harrison* (1876) 33 L. T. 796, C. A.

⁵¹ *Davis v. Morgan*, 4 D. & C. 8, *Curtis v. Gardner*, 13 Metc. (Mass.) 457; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159.

⁵² *Rowbotham v. Wilson* (1860) 8 H. L. Cas. 348, 362.

⁵³ *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Minneapolis W. Ry. Co. v. Railway Co.*, 58 Minn. 128, 59 N. W. 983. But see *Wilkinson v. Suplee*, 166 Pa. 315, 31 Atl. 36. An easement may, however, be created by parol, in equity, as where, for example, one agrees to grant an easement to the owner of adjoining land, who upon the faith of such promise changes his position to his injury. See *McManus v. Cooke*, 35 Ch. D. 681 (1887).

⁵⁴ *Brady v. Blackinton*, 174 Mass. 559, 55 N. E. 474; *Isele v. Schwamb*, 131 Mass. 337; *Wilkins v. Irvine*, 33 Ohio St. 138. But see *Union Terminal R. Co. v. Railroad Co.*, 9 Kan. App. 281, 60 Pac. 541; *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817.

⁵⁵ *Morcum v. O'Keefe*, 12 Luz. Leg. Reg. (Pa.) 213; *Hays v. Richardson*, 1 Gill & J. (Md.) 366. *Contra Union Terminal R. Co. v. Railroad Co.*, 9 Kan. App. 281, 60 Pac. 541.

in the property conveyed.⁵⁶ A reservation, however, must be in favor of the grantor, and cannot be made in favor of one not a party to the deed.⁵⁷ Covenants in deeds may also operate as grants of easements;⁵⁸ for example, a series of building lots may be conveyed with covenants by the grantee of each lot that he will not build within a certain distance of the street. Such covenants are held to impose a servitude on each lot in favor of the others.⁵⁹

Implied Grant

In connection with a grant of land, easements appurtenant to it and necessary for its enjoyment pass with the grant of the dominant estate, although not expressly mentioned.⁶⁰ Easements, however, which pass by implication, must be necessary and permanent in their character.⁶¹ Ways of necessity are common illustrations of easements created by implication.⁶² For the cre-

⁵⁶ *DEE v. KING*, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860, *Burdick Cas. Real Property*; *Lipsby v. Heller*, 199 Mass. 310, 85 N. E. 453; *Hale v. Jenkins*, 55 Misc. Rep. 119, 106 N. Y. Supp. 282; *Horner v. Keene*, 177 Ill. 390, 52 N. E. 492; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Emerson v. Mooney*, 50 N. H. 315; *Jones v. Adams*, 162 Mass. 224, 38 N. E. 437; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482. There must be a sufficient description of the easement. *Wells v. Tolman*, 88 Hun. 438, 34 N. Y. Supp. 840; *Nunnely v. Iron Co.*, 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421.

⁵⁷ *Matter of City of Buffalo*, 65 Misc. Rep. 636, 120 N. Y. Supp. 611; *Karmuller v. Krotz*, 18 Iowa, 352; *S. K. Edwards Hall Co. v. Dresser*, 168 Mass. 136, 46 N. E. 420. But see *Northern Pac. R. Co. v. Duncan*, 87 Minn. 91, 91 N. W. 271.

⁵⁸ *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Ladd v. Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303; *Wilkinson v. Suplee*, 166 Pa. 315, 31 Atl. 36.

⁵⁹ *Tallmadge v. Bank*, 26 N. Y. 105; *Winfield v. Henning*, 21 N. J. Eq. 188; *Peck v. Conway*, 119 Mass. 546. So an agreement to clean and repair a water course which has been granted through covenantor's land was held to run with the land. *Holmes v. Buckley*, Prec. Ch. 39. But see *Keates v. Lyon*, 4 Ch. App. 218; *Renals v. Cowlshaw*, 11 Ch. Div. 866; *Haywood v. Building Soc.*, 8 Q. B. Div. 403; *Sharp v. Ropes*, 110 Mass. 381; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946.

⁶⁰ *Underwood v. Carney*, 1 Cush. (Mass.) 285; *Morgan v. Mason*, 20 Ohio, 402, 55 Am. Dec. 464. Cf. *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Anderson v. Railroad Co.*, 132 App. Div. 183, 116 N. Y. Supp. 954; *Powers v. Heffernan*, 233 Ill. 597, 84 N. E. 661, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199; *Jeffery v. Winter*, 190 Mass. 90, 76 N. E. 282; *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413; *Purvis v. Overlander*, 44 Pa. Super. Ct. 22. See, also, *Equitable Easements*, supra.

⁶¹ *Francies' Appeal*, 96 Pa. 200; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Philbrick v. Ewing*, 97 Mass. 133; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281.

⁶² *Blum v. Weston*, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; *New York & N. E. R. Co. v. Board of Railroad Com'rs*, 162 Mass. 81, 38 N. E.

ation, however, of a way of necessity, the servient and the dominant estate must have been originally owned by the same person, since one cannot have a way of necessity over the land of one not a party to the transfer of the land.⁶³

170. BY PRESCRIPTION—Easements may be acquired by prescription in case of adverse user continued for the time required by the statute of limitations.

Easements may also be created by what is known as prescription. At common law, prescription is based upon immemorial usage,⁶⁴ by virtue of presumed ancient grant, of which, owing to the lapse of time, no evidence remains.⁶⁵ This is known as the doctrine of lost or destroyed grant.⁶⁶ By the ancient rule, the enjoyment of an easement had to be proved from a time "whereof the memory of man runneth not to the contrary."⁶⁷ By an early English statute,⁶⁸ however, the commencement of legal memory was fixed at the first year of the reign of Richard I, or the year 1189, and the presumed grant was then assumed to have been made prior to that year. For the purpose of getting rid of the doctrine of "time immemorial" and the presumption of lost grants, the English Prescription Act was passed in 1832,⁶⁹ which provided, in general, that an enjoyment for a period of twenty years should be sufficient.⁷⁰ This

27; *Smyles v. Hastings*, 22 N. Y. 217; *HILDRETH v. GOOGINS*, 91 Me. 227, 39 Atl. 550, *Burdick Cas.* Real Property.

⁶³ *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Tracy v. Ather-ton*, 35 Vt. 52, 82 Am. Dec. 621; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Id.*, 15 Conn. 423; *Banks v. School Directors*, 194 Ill. 247, 62 N. E. 604. And see, *Atchison, T. & S. F. R. Co. v. Conlon*, 62 Kan. 416, 63 Pac. 432, 53 L. R. A. 781. Where there was originally no privity of ownership, the fact that the land of one person is entirely surrounded by the land of another does not of itself give the former a way of necessity over the land of such other person. *Ellis v. Blue Mountain Forest Ass'n*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570.

⁶⁴ *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 20 Am. Dec. 524. See *Mayor of Kingston v. Horner*, Cowp. 102. And see *Kent v. Waite*, 10 Pick. (Mass.) 138. The term "prescription" is, however, often used when the statute of limitations is meant.

⁶⁵ *Webb v. Bird*, 13 C. B. (N. S.) 841; *Mayor of Kingston v. Horner*, Cowp. 102.

⁶⁶ *Goodman v. Saltash Corporation* (1882) 7 App. Cas. 633, 654; *Bass v. Gregory*, 25 Q. B. D. 481; *Cross v. Lewis*, 2 Barn. & C. 686. And see, *Johnson v. Lewis*, 47 Ark. 66, 2 S. W. 329.

⁶⁷ *Co. Litt.* 114b; *Chapman v. Smith* (1754), 2 Ves. Sen. 506; *Johnson v. Lewis*, 47 Ark. 66, 2 S. W. 329; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400.

⁶⁸ *Westminster I*, 3 Edw. I, c. 39 (1275 A. D.)

⁶⁹ St. 2 & 3 Wm. IV, c. 71.

⁷⁰ Periods of 30, 40, and 60 years were fixed for particular cases.

act applies; in England, to easements of every kind, except light.⁷¹ In this country, the doctrine of immemorial usage is also superseded by the doctrine of the statute of limitations;⁷² and either by express statute, or by the application of the statutes of limitations governing title by adverse possession of land, the enjoyment of an easement for the period prescribed by the statute, twenty years or less, will amount to a presumed grant of the same.⁷³ The character, however, of the acts necessary for gaining an easement under the statute of limitations and by the doctrine of prescription is the same, and the term "prescription" is often used to denote the former. The user must be uninterrupted and continuous,⁷⁴ according to the nature of the easement.⁷⁵ It must also be visible, open, notorious, or with the knowledge and acquiescence of the owner of the servient estate,⁷⁶ since user in secret will not be sufficient to establish the right.⁷⁷ It must be adverse, under a hostile claim of right,⁷⁸ although color of title is not necessary.⁷⁹ It must

⁷¹ *Simpson v. Godmanchester Corporation* [1897] A. C. 696, 909; *Perry v. Eames* [1891] 1 Ch. 658, 665.

⁷² *Clafin v. Railroad Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 438; *Jones v. Crow*, 32 Pa. 398; *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 5 L. Ed. 398.

⁷³ *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Chicago v. Railroad Co.* 152 Ill. 561, 38 N. E. 768; *Kamer v. Bryant*, 103 Ky. 723, 46 S. W. 14, 20 Ky. Law Rep. 340; *O'Brien v. Goodrich*, 177 Mass. 32, 58 N. E. 151; *Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612; *Lewis v. Railroad Co.*, 162 N. Y. 202, 56 N. E. 540; *Carter v. Fishing Co.*, 77 Pa. 310; *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 5 L. Ed. 398.

⁷⁴ *Richard v. Hupp* (1894) 104 Cal. xviii, 37 Pac. 920; *Chicago & N. W. Ry. Co. v. Hoag*, 90 Ill. 339; *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93, 67 Pac. 446; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Jones v. Crow*, 32 Pa. 398.

⁷⁵ *Bodfish v. Bodfish*, 105 Mass. 317; *Cox v. Forrest*, 60 Md. 74; *Iselin v. Starin*, 144 N. Y. 453, 39 N. E. 488; *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Dalton v. Angus*, 6 App. Cas. 740, affirming *Angus v. Dalton*, 4 Q. B. Div. 162. For acts held insufficient to create easements in water by prescription, see *Green Bay & M. Canal Co. v. Water Power Co.*, 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443, 48 Am. St. Rep. 937; *Mason v. Horton*, 67 Vt. 266, 31 Atl. 291, 48 Am. St. Rep. 817.

⁷⁶ *Richard v. Hupp* (1894) 104 Cal. xviii, 37 Pac. 920; *Chicago & N. W. Ry. Co. v. Hoag*, 90 Ill. 339; *Carbrey v. Willis*; 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Hurt v. Adams*, 86 Mo. App. 73; *Treadwell v. Inslee*, 120 N. Y. 458, 24 N. E. 651.

⁷⁷ *Cook v. Gammon*, 93 Ga. 298, 20 S. E. 332; *Daniel v. North*, 11 East, 372. But when the user is open and uninterrupted, the servient owner is charged with notice. *Bushey v. Santiff*, 86 Hun, 384, 33 N. Y. Supp. 473.

⁷⁸ *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *Chicago, B. & Q. R. Co. v. Ives*, 202 Ill. 69, 66 N. E. 940; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *People v. Ferguson*, 119 Mich. 373, 78 N. W. 334; *City of Buffalo v. Railroad Co.*, 68 App. Div. 488, 74 N. Y. Supp. 343; *Jones v. Crow*, 32 Pa. 398.

⁷⁹ *Burbank v. Fay*, 65 N. Y. 57; *Bachelder v. Wakefield*, 8 Cush. (Mass.)

not be permissive,⁸⁰ since its use cannot be adverse, if it is begun with the permission of the owner of the land,⁸¹ or by his license.⁸² The prescriptive period does not begin to run until some act of user arises which would give the owner of the land a cause of action,⁸³ and it does not begin to run while the owner of the servient estate is under disability.⁸⁴ Likewise the period does not begin against a reversioner or remainderman until he is entitled to possession of the estate.⁸⁵ The period of adverse occupancy required by the statute need not be confined to one person, but may be covered by a number, if they are in privity.⁸⁶ The public, however, cannot acquire an easement by prescription,⁸⁷ although a dedication may be presumed from use by the public.⁸⁸ An easement, moreover, cannot be acquired by prescription against the state or nation.⁸⁹

243; *Blanchard v. Moulton*, 63 Me. 434; *Richard v. Hupp*, 104 Cal. xviii, 37 Pac. 920.

⁸⁰ *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Stewart v. Andrews*, 239 Ill. 186, 87 N. E. 864; *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542, 95 N. E. 938; *Moore v. Bulgreen*, 153 Mich. 261, 116 N. W. 1005; *Slattery v. McCaw*, 44 Misc. Rep. 426, 90 N. Y. Supp. 52; *Zorby v. Allen*, 215 Pa. 383, 64 Atl. 587.

⁸¹ *Smith v. Miller*, 11 Gray (Mass.) 145; *Perrin v. Garfield*, 37 Vt. 304; *Carger v. Fee*, 140 Ind. 572, 39 N. E. 93. See *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 37 Am. Dec. 100. That no easement is acquired by the use of a way maintained by the owner of the land for his own convenience, see *Wood v. Reed* (Sup.) 30 N. Y. Supp. 112.

⁸² *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192; *Colchester v. Roberts*, 4 Mees. & W. 769.

⁸³ *Roe v. Howard County*, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. (N. S.) 831; *Van Duzen v. Schraffenberger*, 2 Ohio S. & C. P. Dec. 470; *Ells v. Railroad Co.*, 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787. See *Frant v. Mendonca*, 131 Cal. 205, 63 Pac. 361.

⁸⁴ *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744. Disability arising after the user is begun does not interrupt the acquisition of the right. *Tracy v. Atherton*, 36 Vt. 503; *Wallace v. Fletcher*, 30 N. H. 434. Contra, *Lamb v. Crosland*, 4 Rich. (S. C.) 536.

⁸⁵ *Schenley v. Com.*, 36 Pa. 29, 78 Am. Dec. 359; *Pentland v. Keep*, 41 Wis. 490.

⁸⁶ *Bryan v. East St. Louis*, 12 Ill. App. 390; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Cole v. Bradbury*, 86 Me. 380, 29 Atl. 1097; *Ross v. Thompson*, 78 Ind. 90; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Hill v. Crosby*, 2 Pick. (Mass.) 466, 13 Am. Dec. 448.

⁸⁷ *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Ackerman v. Shelp*, 8 N. J. Law, 125.

⁸⁸ *Verona Borough v. Railroad*, 152 Pa. 368, 25 Atl. 518; *Klenk v. Town of Walnut Lake*, 51 Minn. 381, 53 N. W. 703.

⁸⁹ *Glaze v. Railroad Co.*, 67 Ga. 761; *Miser v. O'Shea*, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751. But see *Atty. Gen. v. Copper Co.*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510.

SAME—INCIDENTS OF EASEMENTS

171. The principal rights and incidents growing out of easements are the following:

- (a) The dominant owner must use his easement, and the servient owner his estate, in a reasonable manner.
- (b) The dominant owner must repair the easement.
- (c) The servient owner must not obstruct the easement.

Use of Easement

An easement can be lawfully used only for the objects and purposes for which it was granted,⁹⁰ or acquired by prescription.⁹¹ Moreover, the owner of the dominant estate must make his use of the easement reasonable, so as to interfere as little as possible with the servient owner's enjoyment of his land.⁹² On the other hand, the latter must not use his estate in such a way as to obstruct the easement or unreasonably interfere with its enjoyment.⁹³ The grant of an easement, however, includes a grant of all rights necessary for its use.

⁹⁰ *Warren & O. R. Co. v. Garrison*, 74 Ark. 136, 85 S. W. 81; *Winslow v. Vallejo*, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349, 7 Ann. Cas. 851; *Rolens v. Hutchinson*, 83 Kan. 618, 112 Pac. 129. See *Forbes v. Gorman*, 159 Mich. 291, 295, 123 N. W. 1089, 25 L. R. A. (N. S.) 318, 134 Am. St. Rep. 718; *Crabtree Coal Min. Co. v. Hamby's Adm'r*, 90 S. W. 226, 28 Ky. Law Rep. 687; *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197; *Waters v. Lumber Co.*, 115 N. C. 648, 20 S. E. 718. Nor can the use of the dominant tenement be changed so as to increase the burden. *Wood v. Saunders*, 10 Ch. App. 582.

⁹¹ *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Prentice v. Geiger*, 74 N. Y. 341.

⁹² *Bennett v. Seligman*, 32 Mich. 500; *Knowles v. Nichols*, 14 Fed. Cas. No. 7,897, 2 Curt. 571. See *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; *Kaler v. Beaman*, 49 Me. 207.

⁹³ *Wells v. Tolman*, 88 Hun, 438, 34 N. Y. Supp. 840; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275; *Gerrish v. Shattuck*, 132 Mass. 235; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Williams v. Clark*, 140 Mass. 238, 5 N. E. 802; *Connery v. Brooke*, 73 Pa. 80. Cf. *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *Attorney General v. Williams*, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468. Plowing part of land over which there is a right of way is not necessarily an interference with the easement. *Moffitt v. Lytle*, 165 Pa. 173, 30 Atl. 922. A contract to permit the use of a wall for a sign space is an easement, and implies the right of such access to the wall as is necessary for the purpose indicated. *R. J. Gunning Co. v. Cusack*, 50 Ill. App. 290.

Repairs of Easement

In absence of an agreement to the contrary,⁹⁴ the owner of the servient estate is, as a rule, under no obligation to make repairs,⁹⁵ since the owner of the dominant estate—that is, the one who has the benefit of the easement—must keep it in repair and condition for use.⁹⁶ The easement carries with it the right to do anything necessary to make repairs,⁹⁷ including a right of entry upon the servient estate for such purposes.⁹⁸

Obstruction of Easement

The owner of the servient estate has no right to obstruct an easement in any way that will interfere with its reasonable use.⁹⁹ Should he do so, the owner of the dominant estate may have an action for the obstruction of his easement by the servient owner, even though no actual damage has been caused.¹ The owner of the dominant estate may also remove obstructions to his easement, and may enter upon the servient estate for that purpose,² providing, however, he commits no breach of the peace in so doing.³ In cases

⁹⁴ See *Doane v. Badger*, 12 Mass. 65.

⁹⁵ *Oney v. Land Co.*, 104 Va. 580, 585, 52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066; *Hastings v. Railroad Co.*, 148 Iowa, 390, 126 N. W. 786; *Fritcher v. Anthony*, 20 Hun (N. Y.) 495. See *Bryn Mawr Hotel Co. v. Baldwin*, 12 Montg. Co. Law Rep. (Pa.) 145.

⁹⁶ *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800; *Townsend v. Railroad Co.*, 56 Misc. Rep. 253, 106 N. Y. Supp. 381; *Washb. Easem. & Serv.* (4th Ed.) 730; *Doane v. Badger*, 12 Mass. 65. But cf. *Pomfret v. Ricroft*, 1 Saund. 321; *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444.

⁹⁷ *Ballard v. Titus*, 157 Cal. 673, 110 Pac. 118; *Wells v. Tolman*, 88 Hun, 438, 34 N. Y. Supp. 840; *Fetter v. Schmidt*, 5 Lanc. Law Rev. (Pa.) 9; *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; *Williams v. Safford*, 7 Barb. (N. Y.) 309; *Hamilton v. White*, 5 N. Y. 9.

⁹⁸ *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; *Roberts v. Roberts*, 7 Lans. (N. Y.) 55.

⁹⁹ *Dickinson v. Whiting*, 141 Mass. 414, 6 N. E. 92; *McTavish v. Carroll*, 17 Md. 1; *Quintard v. Bishop*, 29 Conn. 366.

¹ *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845; *Collins v. St. Peters*, 65 Vt. 618, 27 Atl. 425; *Joyce v. Conlin*, 72 Wis. 607, 40 N. W. 212; *McCord v. High*, 24 Iowa, 336; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53. For acts held not to constitute an obstruction, see *Green v. Goff*, 153 Ill. 534, 39 N. E. 975. That a gate is not an obstruction of a right of way, see *Hartman v. Fick*, 167 Pa. 18, 31 Atl. 342, 46 Am. St. Rep. 658. But see *Rowe v. Nally*, 81 Md. 367, 32 Atl. 198.

² *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700; *Morse v. Swanson*, 129 App. Div. 835, 114 N. Y. Supp. 876; *Sargent v. Hubbard*, 102 Mass. 380; *Joyce v. Conlin*, 72 Wis. 607, 40 N. W. 212; *McCord v. High*, 24 Iowa, 336.

³ *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071, 11 L. R. A. (N. S.) 457, 117 Am. St. Rep. 261; *McEwan v. Baker*, 98 Ill. App. 271; *Patout v. Lewis*, 51 La. Ann. 210, 25 South. 134.

where the title to the easement is clear, the owner of the servient estate may be restrained by injunction from obstructing it,⁴ providing his legal remedy for damages is inadequate.⁵

SAME—TERMINATION OF EASEMENTS

172. Easements may be terminated:

- (a) By release.
- (b) By license to the servient owner.
- (c) By abandonment.
- (d) By obstructions amounting to abandonment.
- (e) By merger.
- (f) By operation of law.
- (g) By adverse possession.
- (h) By cessation of their necessity.
- (i) By appropriation to public use.

Easements may be terminated or destroyed in various ways. The owner of an easement may by deed release it to the owner of the servient estate.⁶ An unexecuted parol agreement will not, however, amount to a release.⁷ An easement may also be destroyed by a license to the owner of the servient estate to do acts upon his land which interfere with the exercise of the easement;⁸ for instance,

⁴ *Espencheid v. Bauer*, 235 Ill. 172, 85 N. E. 230; *Bailey v. Bank*, 190 Mass. 20, 76 N. E. 449, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296; *Sultzman v. Branham*, 128 Mo. App. 696, 108 S. W. 1074; *Hess v. Kenny*, 69 N. J. Eq. 138, 61 Atl. 464; *Louisville & N. R. Co. v. Smith*, 128 Fed. 1, 63 C. C. A. 1; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838; *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427; *Bailey v. Schnitzius*, 53 N. J. Eq. 235, 22 Atl. 732, 32 Atl. 219; *Martin v. Price* [1894] 1 Ch. 276.

⁵ *Danielson v. Sykes*, 157 Cal. 686, 109 Pac. 87, 28 L. R. A. (N. S.) 1024; *Lehigh Valley R. Co. v. Water Co.*, 76 N. J. Eq. 504, 74 Atl. 970; *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *Cadigan v. Brown*, 120 Mass. 493; *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441; *Hicksell v. Gross*, 3 Brewst. (Pa.) 430.

⁶ *Wellner v. Power Co.*, 38 Pa. Super. Ct. 26; *Richards v. Railroad Co.*, 153 Mass. 120, 26 N. E. 418; *Flaten v. Moorhead*, 58 Minn. 324, 59 N. W. 1044. See *Hamilton v. Farrar*, 128 Mass. 492.

⁷ *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. And see *Pope v. Devereux*, 5 Gray (Mass.) 409.

⁸ *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314, 28 N. E. 227; *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Liggins v. Inge*, 7 Bing. 682.

an easement of light and air may be lost by a permission given the owner to erect a wall on his land which would obstruct the light.⁹ Easements may also be lost by abandonment.¹⁰ Abandonment, however, is a matter of fact,¹¹ and mere nonuser, although continued for the period prescribed by the statute of limitations, is not, in itself, conclusive of the fact of abandonment.¹² This is the established rule in the case of easements created by grant,¹³ although some states hold that nonuser in the case of easements acquired by prescription will amount to an abandonment, providing the nonuse has been continued for the time required for title by prescription.¹⁴ Connected with the doctrine of abandonment is the doctrine of obstructions which destroy the enjoyment of the easement. A mere misuser will not destroy an easement,¹⁵ but where by the erection of obstructions the owner of the easement does anything which increases the burden of the easement, he thereby destroys his easement, unless the increase of the burden can be separated from the

⁹ *Winter v. Brockwell*, 8 East, 308. See, also, *Morse v. Copeland*, 2 Gray (Mass.) 302.

¹⁰ *Trimble v. King*, 131 Ky. 1, 114 S. W. 317, 22 L. R. A. (N. S.) 880; *Oney v. Land Co.*, 104 Va. 580, 52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066; *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; *Canny v. Andrews*, 123 Mass. 155; *Hickox v. Railroad Co.*, 78 Mich. 615, 44 N. W. 143; *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Steere v. Tiffany*, 13 R. I. 568; *Richard v. Hupp*, 104 Cal. xviii, 37 Pac. 920. But see *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Pratt v. Sweetser*, 68 Me. 344; *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. 533; *Suydam v. Dunton*, 84 Hun, 506, 32 N. Y. Supp. 333.

¹¹ *Vogler v. Geiss*, 51 Md. 407; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Cooper v. Smith*, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658.

¹² *Mason v. Ross*, 75 N. J. Eq. 136, 71 Atl. 141. See *Matter of City of Buffalo*, 65 Misc. Rep. 636, 120 N. Y. Supp. 611; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Valentine v. Schreiber*, 3 App. Div. 235, 38 N. Y. Supp. 417; *Bombaugh v. Miller*, 82 Pa. 203.

¹³ *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Lutheran Swedish Evangelist Church v. Jackson*, 229 Ill. 506, 82 N. E. 348; *Conabeer v. Railroad Co.*, 156 N. Y. 474, 51 N. E. 402; *Citizens' Electric Co. v. Davis*, 44 Pa. Super. Ct. 138; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Barnes v. Lloyd*, 112 Mass. 224; *Riehle v. Heulings*, 38 N. J. Eq. 20; *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *Lovell v. Smith*, 3 C. B. (N. S.) 120. See, also, *Ward v. Ward*, 7 Exch. 838.

¹⁴ *Browne v. Baltimore M. E. Church*, 37 Md. 108; *Shields v. Arndt*, 4 N. J. Eq. 234. By statute, so in some states. Civ. Code Cal. 1899, § 811; Civ. Code Mont. 1895, § 1260; Rev. Codes N. D. 1899, § 3361; St. Okl. 1893, § 3734; Civ. Code S. D. § 277.

¹⁵ *McCullough v. Exch. Co.*, 101 App. Div. 566, 92 N. Y. Supp. 533; *Mendell v. Delano*, 7 Metc. (Mass.) 176; *Deavitt v. Washington County*, 75 Vt. 156, 53 Atl. 563; *Walker v. Gerhard*, 9 Phila. (Pa.) 116.

original.¹⁶ Such obstructions and burdens will be regarded as an abandonment.¹⁷ Obstructions erected, however, by the owner of the servient estate, without the consent of the owner of the dominant estate, will not destroy the easement.¹⁸ No one can have an easement in his own estate in fee.¹⁹ Consequently, when there is a merger of the dominant and servient estates in the same person, as where the owner of the easement acquires title to the servient estate, the easement is terminated.²⁰ If, however, the dominant estate is of greater duration than the servient, the easement will only be suspended during the continuance of the servient estate.²¹ Moreover, if the title to the latter estate is subsequently defeated, the result is the same—a mere suspension of the easement.²² When there is a merger, the easement is extinguished, and is not renewed by a subsequent grant of the dominant estate, though the same or a similar easement may be implied, or may arise by necessity.²³ Easements may also be terminated by operation of law, as where, for example, the servient estate is destroyed.²⁴ Ad-

¹⁶ *Fowler v. Wick*, 74 N. J. Eq. 603, 70 Atl. 682; *Deeves v. Constable*, 87 App. Div. 352, 84 N. Y. Supp. 592; *Stenz v. Mahoney*, 114 Wis. 117, 89 N. W. 819; *Washb. Easem. & Serv.* (4th Ed.) 704; *Jones v. Tapling*, 11 C. B. (N. S.) 283. Cf. *Harvey v. Walters*, L. R. 8 C. P. 162.

¹⁷ *Norris v. Hoffman*, 62 Misc. Rep. 385, 115 N. Y. Supp. 890; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Skrainka v. Oertel*, 14 Mo. App. 474; *Stein v. Dahm*, 96 Ala. 481, 11 South. 597.

¹⁸ *Lavillebeuvre v. Cosgrove*, 13 La. Ann. 323. See *Ballinger v. Kinney*, 87 Neb. 342, 127 N. W. 239.

¹⁹ *Oliver v. Burnett*, 10 Cal. App. 403, 102 Pac. 223; *Rogers v. Powers*, 204 Mass. 257, 90 N. E. 514; *Zerbey v. Allan*, 215 Pa. 383, 64 Atl. 587; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149.

²⁰ *Drake v. Land Co.*, 10 Cal. App. 654, 103 Pac. 167. See *City of Chicago v. Hogberg*, 217 Ill. 180, 75 N. E. 542; *Riehlman v. Field*, 81 App. Div. 526, 81 N. Y. Supp. 239; *Kieffer v. Imhoff*, 26 Pa. 438; *McAllister v. Devane*, 76 N. C. 57; *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744.

²¹ *Blanchard v. Maxson*, 84 Conn. 429, 80 Atl. 206; *Smith v. Roath*, 238 Ill. 247, 87 N. E. 414, 128 Am. St. Rep. 123; *Atlanta Mills v. Mason*, 120 Mass. 244; *Thomas v. Thomas*, 2 Cromp., M. & R. 34.

²² *Tyler v. Hammond*, 11 Pick. (Mass.) 193; *Duval v. Becker*, 81 Md. 537, 32 Atl. 308.

²³ *Hurlburt v. Firth*, 10 Phila. (Pa.) 135; *Kieffer v. Imhoff*, 26 Pa. 438; *Miller v. Lapham*, 44 Vt. 416; *Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. No. 6,281.

²⁴ *Cotting v. Boston*, 201 Mass. 97, 87 N. E. 205; *Lawson v. Murden*, 60 Misc. Rep. 163, 112 N. Y. Supp. 140; *Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339; *Hahn v. Baker*, Lodge No. 47, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723; *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376; *Bartlett v. Peaslee*, 20 N. H. 547, 51 Am. Dec. 242. A right to use a stairway in a building may be destroyed by the destruction of the building. *Douglas v. Coonley*, 84 Hun, 158, 32 N. Y. Supp. 444.

verse possession by the servient owner for the statutory period may also put an end to an easement.²⁵ Easements of necessity cease when the necessity ceases,²⁶ although this rule does not apply to necessary rights of way when acquired by grant²⁷ or by prescription.²⁸ An appropriation to public use of the land of the servient estate will likewise destroy an easement.²⁹

SAME—PARTICULAR EASEMENTS

173. The most important easements are the following:

- (a) Rights of way.
- (b) Highways.
- (c) Light and air.
- (d) Lateral and subjacent support.
- (e) Party walls.
- (f) Easements in water.

174. RIGHTS OF WAY—A right of way is an easement in favor of an individual or class of individuals to have a passage on an established line over land of the servient owner to and from land of the dominant owner.

Rights of way are either public or private. A public right of way is known as a highway.³⁰ A private right of way is defined above. It may also be defined as the right of going over another man's ground,³¹ particularly so when it is a mere personal right or a right

²⁵ *Rupprecht v. Church Society*, 131 App. Div. 564, 115 N. Y. Supp. 926; *Woodbury v. Allan*, 215 Pa. 390, 64 Atl. 590; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. 178, 129 Am. St. Rep. 149; *Reed v. Gasser*, 130 Iowa, 87, 106 N. W. 383; *Ihde v. Starr*, 21 Ont. L. R. 407, 16 Ont. W. R. 473.

²⁶ *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277; *Rater v. Shuttlefield*, 146 Iowa, 512, 125 N. W. 235, 44 L. R. A. (N. S.) 101; *Ann Arbor Fruit & Vinegar Co. v. Railroad Co.*, 136 Mich. 599, 99 N. W. 869, 66 L. R. A. 431; *Empire Bridge Co. v. Soap Co.*, 59 Misc. Rep. 46, 109 N. Y. Supp. 1062; *Delevan v. Champ-lin*, 4 Lack. Jur. (Pa.) 259.

²⁷ *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. Law, 474, 53 Atl. 699. See, also, *New York Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

²⁸ *Crounse v. Wemple*, 29 N. Y. 540. See *Johnson v. Allen*, 110 S. W. 851, 33 Ky. Law Rep. 621. Compare *Chenault v. Gravitt*, 85 S. W. 184, 27 Ky. Law Rep. 403.

²⁹ *Cornell-Andrews Smelting Co. v. Railroad Corp.*, 202 Mass. 585, 89 N. E. 118. See *McKinney v. Railroad Co.*, 222 Pa. 48, 70 Atl. 946, 21 L. R. A. (N. S.) 1002; *Hancock v. Wentworth*, 5 Metc. (Mass.) 446. See *Hoboken M. E. Church v. Hoboken*, 19 N. J. Eq. 355; *Mussey v. Union Wharf*, 41 Me. 34.

³⁰ *Rangley v. Midland Rail Co.* (1868) 3 Ch. App. 306. And see *infra*.

³¹ 2 Blk. Comm. 35.

of way in gross.³² Rights of way may be footpaths, or for carriages, or for both foot and carriage.³³ They may be created by the various methods mentioned previously in connection with the creation of easements in general. They may also be created in such form and with such conditions as the parties may, by express contract, choose to designate.³⁴ Rights of way frequently arise by implication either as ways of necessity,³⁵ or when land is sold by reference in the deed to a map or plat, and represented in such map or plat as bounded or reached by certain streets laid out by the owner of the tract.³⁶ Whether such streets are accepted by proper authority as public streets or not, the purchaser has an implied easement therein.³⁷ Ways of necessity, as previously pointed out, can exist only over the land of the grantor, not over that of a stranger.³⁸ Though the necessity need not be absolute, yet great inconvenience or expense will not be sufficient.³⁹ Ways of necessity arise chiefly through grants of parcels of land to which there

³² See Classifications.

³³ *Ballard v. Dyson*, 1 Taunt. 279; *Cowling v. Higginson*, 4 Mees. & W. 245. In the Roman law private rights of way are classed as *iter*, *actus*, and *via*; the first being a footway, the second a right to drive a horse or cattle over land, and the third a general right of way, including the two former. Coke refers to these classes as being found "in our ancient books." See *Co. Litt.* 56.

³⁴ Whether a way has been created or granted is in each case a matter of construction. *Espley v. Wilkes*, L. R. 7 Exch. 298; *Kay v. Oxley*, L. R. 10 Q. B. 360.

³⁵ *Tutwiler Coal, Coke & Iron Co. v. Tuvin*, 158 Ala. 657, 48 South. 79; *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126. See *Cornell-Andrews Smelting Co. v. Railroad Corp.*, 202 Mass. 585, 89 N. E. 118; *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413; *Commonwealth v. Burford*, 225 Pa. 93, 73 Atl. 1064; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43.

³⁶ *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Crowell v. Beverly*, 134 Mass. 98; *Trowbridge v. Ehrich*, 191 N. Y. 361, 84 N. E. 297; *Tobey v. Taunton*, 119 Mass. 404; *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Taylor v. Hopper*, 62 N. Y. 649; *Regan v. Light Co.*, 137 Mass. 37; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639.

³⁷ *Schreck v. Blun*, 131 Ga. 489, 62 S. E. 705. Compare *City of Chicago v. Hogberg*, 217 Ill. 180, 75 N. E. 542. See *People ex rel. Washburn v. Gloversville*, 128 App. Div. 44, 112 N. Y. Supp. 387; *Carroll v. Asbury*, 28 Pa. Super. Ct. 354; *Barbour v. Lyddy*, 49 Fed. 896.

³⁸ *Bass v. Edwards*, 126 Mass. 445; *Kuhlman v. Hecht*, 77 Ill. 570; *Taylor v. Warnaky*, 55 Cal. 350; *Tracy v. Asherton*, 35 Vt. 52, 82 Am. Dec. 621; *Bullard v. Harrison*, 4 Maule & S. 387.

³⁹ *Oliver v. Pitman*, 98 Mass. 46; *Francies' Appeal*, 96 Pa. 200; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004. And see *HILDRETH v. GOOGINS*, 91 Me. 227, 39 Atl. 550, *Burdick Cas. Real Property*; *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700; *Staples v. Cornwall*, 114 App. Div. 596,

is no access, save over the land of the grantor. It is held, in such cases, that the grantor must have intended to give a right to pass over his land to enable the granted estate to be enjoyed.⁴⁰ Where such right of way is created, the owner of the servient estate has the first right to select the way.⁴¹ If he neglects to do so, the owner of the dominant estate may locate the way, doing as little damage as possible.⁴² The rule is the same as to the location of ways created by express agreement, if it is not otherwise provided for.⁴³ After a right of way has once been located, it cannot be changed without the consent of both parties.⁴⁴ Ways of necessity may be used for all purposes necessary for the enjoyment of the dominant estate,⁴⁵ but cannot be extended for uses of mere convenience.⁴⁶ Ways, however, arising by express grant, or by prescription, can be used only for the purposes for which they were created.⁴⁷ There-

99 N. Y. Supp. 1009; *Miller v. Hoeschler*, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327.

⁴⁰ *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Wissler v. Hershey*, 23 Pa. 333; *Clark v. Cogge*, Cro. Jac. 170; *Parker v. Welsted*, 2 Sid. 39, 111; *Pinnington v. Galland*, 9 Exch. 1. But see *Kingsley v. Improvement Co.*, 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502. Cf. *Worthington v. Gimson*, 2 El. & El. 618; *Dodd v. Burchell*, 1 Hurl. & C. 113; *Wheeldon v. Burrows*, 12 Ch. Div. 31. Where one conveys to a railroad company a right of way through his land, so as to cut off access to a part thereof, he has a way of necessity over the land conveyed. *New York & N. E. R. Co. v. Board of Railroad Com'rs*, 162 Mass. 81, 38 N. E. 27. And see *Morris v. Edgington*, 3 Taunt. 24.

⁴¹ *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879; *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Fritz v. Tompkins*, 18 Misc. Rep. 514, 41 N. Y. Supp. 985; *Schmidt v. Quinn*, 136 Mass. 575; *Russell v. Jackson*, 2 Pick. (Mass.) 574.

⁴² *Tutwiler Coal, Coke & Iron Co. v. Tuvin*, 158 Ala. 657, 666, 48 South. 79; *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Fritz v. Tompkins*, 18 Misc. Rep. 514, 41 N. Y. Supp. 985; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

⁴³ *Hart v. Connor*, 25 Conn. 331.

⁴⁴ *Cornell-Andrews Smelting Co. v. Railroad Corp.*, 202 Mass. 585, 89 N. E. 118; *Johnson v. Jaqui*, 27 N. J. Eq. 552; *Jennison v. Walker*, 11 Gray (Mass.) 423; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Smith v. Lee*, 14 Gray (Mass.) 473; *Kraut's Appeal*, 71 Pa. 64; *Karmuller v. Krotz*, 18 Iowa, 352. When rights of way are acquired by prescription, the user must be of some definite track. *Bushey v. Santiff*, 86 Hun. 384, 33 N. Y. Supp. 473; *Garnett v. City of Slater*, 56 Mo. App. 207; *Follendore v. Thomas*, 93 Ga. 300, 20 S. E. 329.

⁴⁵ *Gunson v. Healy*, 100 Pa. 42. A way of necessity ceases as soon as there is another way which the dominant owner can use. *Holmes v. Goring*, 2 Bing. 76. But see *Proctor v. Hodgson*, 10 Exch. 824.

⁴⁶ *Tutwiler Coal, Coke & Iron Co. v. Tuvin*, 158 Ala. 657, 48 South. 79; *Pearne v. Manufacturing Co.*, 90 Tenn. 619, 18 S. W. 402.

⁴⁷ *Meinecke v. Smith*, 135 Wis. 220, 226, 115 N. W. 816; *Webber v. Vogel*.

fore one who has the right of way to drive beasts to one lot cannot drive beasts over that way to another lot also.⁴⁸ Where there is a misuse of a right of way, it will give the servient owner a right of action, but will not justify him in closing the way.⁴⁹ A right of way may be used by the servants and employés of its owner, and also by persons having the right of access to him.⁵⁰ In the absence of other arrangement, the owner of the dominant estate is required to keep the way in repair.⁵¹ If the owner of the servient estate has agreed to repair, and fails to do so, those entitled to the use of the way may go upon other land of the servient owner, when necessary, in order to pass around the obstructions of the unrepaired way.⁵²

175. HIGHWAYS—Highways are rights of way for the public in general.

A highway is a public right of way common to all the people.⁵³ In England public ways are distinguished as the king's highways, which lead from town to town, and as common ways, which lead from villages to fields, and are common only to the people of a cer-

159 Pa. 235, 28 Atl. 226; *Shaughnessey v. Leary*, 162 Mass. 102, 38 N. E. 197; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294; *Allan v. Gomme*, 11 Adol. & E. 759; *Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. Div. 362; *Henning v. Burnet*, 8 Exch. 187; *Corporation of London v. Riggs*, 13 Ch. Div. 798. But see *Newcomen v. Coulson*, 5 Ch. Div. 133; *Cannon v. Villars*, 8 Ch. Div. 415; *Abbott v. Butler*, 59 N. H. 317.

⁴⁸ *Howell v. Rex*, 1 Mod. 190. And see *Skull v. Glenister*, 16 C. B. (N. S.) 81; *Davenport v. Lampson*, 21 Pick. (Mass.) 72; *French v. Marstin*, 32 N. H. 316; *Kirkham v. Sharp*, 1 Whart. (Pa.) 323, 29 Am. Dec. 57; *Lewis v. Carstairs*, 6 Whart. (Pa.) 193. Cf. *Williams v. James*, L. R. 2 C. P. 577; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

⁴⁹ *Walker v. Gerhard*, 9 Phila. (Pa.) 116; *Hayes v. Di Vito*, 141 Mass. 233, 4 N. E. 828.

⁵⁰ *Tutwiler Coal, Coke & Iron Co v. Tuvin*, 158 Ala. 657, 667, 48 South. 79; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519; *Griffith v. Rigg*, 37 S. W. 58, 18 Ky. Law Rep. 463. See *Gunson v. Healy*, 100 Pa. 42.

⁵¹ *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Taylor v. Whitehead*, 2 Doug. 745. See *Gerrard v. Cooke*, 2 Bos. & P. N. R. 109.

⁵² So when the servient owner has obstructed. *Farnum v. Platt*, 8 Pick. (Mass.) 339, 19 Am. Dec. 330; *Leonard v. Leonard*, 2 Allen (Mass.) 543; *Kent v. Judkins*, 53 Me. 160, 87 Am. Dec. 544; *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176. But cf. *Taylor v. Whitehead*, 2 Doug. 745; *Williams v. Saford*, 7 Barb. (N. Y.) 309.

⁵³ "A highway is a right of passage for the public in general." *Leake, Uses of Land*, 482. "A public right of way is a right of way common to all the king's subjects, and is called a highway." *Laws of Eng.* vol. 11, p. 284, citing *Rangeley v. Midland Rail Co.* (1868) 3 Ch. App. 306.

tain locality.⁵⁴ This distinction is not recognized, however, in this country.⁵⁵ Highways are created either by legislative authority out of the public lands,⁵⁶ or by the dedication of private lands, either by express dedication,⁵⁷ or by implied dedication resulting from long-continued use by the public.⁵⁸ A dedication of public streets and alleys may also be implied when the owner of a tract of land plats it for building lots, with indicated streets and alleys between them.⁵⁹ In any case a dedication can be made only by the owner of the fee.⁶⁰ A person who lays out public streets, the effect of which is to donate them to the public, must of necessity have title to the property to be affected by his act.⁶¹ A dedication of a highway may, moreover, be for special purposes only.⁶² Highways may also be acquired by the exercise of the right of eminent domain, in which case compensation must be made for the land taken.⁶³ No deed or other formal act is necessary for the dedication of a high-

⁵⁴ See 2 Blk. Comm. 35; 2 Min. Inst. 17, 18.

⁵⁵ 1 Lewis, Em. Domain, § 91c. A distinction has, however, been made, in some cases in this country, between city or village streets and country roads as to the legitimate use that may be made of the same; it being intimated that there is only a right of passage over country roads, while in the case of city streets the public authorities have the legal right to use them for all public utility purposes, such as the laying of sewer and gas pipes, or for the construction of transportation lines. *Abbott v. Duluth*, 104 Fed. 833, 837; *Harding v. Medway*, 10 Metc. (Mass.) 465, 469; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142, 149, 16 Pac. 125; *Commonwealth v. Gammons*, 23 Pick. (Mass.) 201, 202; *Kister v. Reeser*, 98 Pa. 1, 4, 42 Am. Rep. 608.

⁵⁶ See Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), with reference to section lines in connection with the government survey of public lands.

⁵⁷ *Commonwealth v. Inhabitants of Newbury*, 2 Pick. (Mass.) 51; *Warren v. President, etc., of Town of Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610.

⁵⁸ *James v. Sammis*, 132 N. Y. 239, 30 N. E. 502; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23.

⁵⁹ *Taylor v. Hopper*, 62 N. Y. 649; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639. Land may be dedicated for public parks in the same manner as for streets. *City of Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452. So as to a burial place. *Beatty v. Kurtz*, 2 Pet. 566; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407.

⁶⁰ *Baughan v. Mann*, 59 Ill. 492; *Lee v. Lake*, 14 Mich. 12, 90 Am. Dec. 220; *Warren v. Brown*, 31 Neb. 8, 47 N. W. 633.

⁶¹ *Porter v. Stone*, 51 Iowa, 373, 1 N. W. 601.

⁶² *Ayres v. Railroad Co.*, 52 N. J. Law, 405, 20 Atl. 54; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

⁶³ And the owner is entitled to further compensation for an additional burden, such as a railroad, *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651; or street railway, *Craig v. Railway Co.*, 39 N. Y. 404; or pipes for natural gas, *Bloomfield & R. Natural Gaslight Co. v. Calkins*, 62 N. Y. 386. But otherwise as to sewers and reservoirs, *Stoudinger v. Newark*, 28 N. J. Eq. 187; *West v. Bancroft*, 32 Vt. 367; or telegraph lines, *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

way to the public. The dedication is complete when made and accepted by the public,⁶⁴ and use as a highway may be sufficient to constitute an acceptance.⁶⁵ Until there is an acceptance by the public, it does not become bound to keep the road in repair, or liable for injuries caused by its being out of repair.⁶⁶ Statutes now generally provide that the dedication of private land to public use may be evidenced by filing in an office of public records the plats of the dedicated streets or alleys, together with a certificate of the donor's intention. Such dedications are known as "statutory dedications," in distinction from dedications at common law. Strictly speaking, highways, as already stated,⁶⁷ are not easements, since they are ways in gross, and are not connected with any dominant estate.⁶⁸ As said in a leading English case:⁶⁹ "A public road or highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing. It is clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement." The question of the ownership of the fee of a highway depends upon the facts of its creation. The fee may be in the state or the municipality.⁷⁰ The presumption, however, in absence of evidence to the contrary, is that the fee is in the abutting owners;⁷¹ the public having merely an easement therein. In highways laid out through the land of individuals by right of eminent domain, the public has only an easement, a right of passage; the soil and the fee remain in the individual whose lands have been taken for that purpose.⁷² When a highway is only an easement, the owners on each side of the road hold the fee to the middle line, subject to the right of the public use.⁷³ "The adjoining owners, therefore, are entitled to the trees, minerals, and all other rights of the soil."⁷⁴ "The owner, who dedi-

⁶⁴ *Bangor House Proprietary v. Brown*, 33 Me. 309. Repairing may not show acceptance. *State v. Bradbury*, 40 Me. 154.

⁶⁵ *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Witter v. Damitz*, 81 Wis. 385, 51 N. W. 575; *Brakken v. Railroad Co.*, 29 Minn. 41, 11 N. W. 124; *Rex v. Inhabitants of Leake*, 5 Barn. & Adol. 469.

⁶⁶ *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662.

⁶⁷ *Supra*.

⁶⁸ See *Deerfield v. Railroad Co.*, 144 Mass. 325, 11 N. E. 105; *Com. v. Low*, 3 Pick. (Mass.) 408; *Nudd v. Hobbs*, 17 N. H. 524.

⁶⁹ *Cairns, L. J.*, in *Rangeley v. Midland Rail Co.* (1868) 3 Ch. App. 306, 311.

⁷⁰ *Washb. Easem. & Serv.* (4th Ed.) 252.

⁷¹ *Leake, Uses of Land*, 482.

⁷² *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Makepeace v. Worden*, 1 N. H. 16.

⁷³ *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

⁷⁴ *Makepeace v. Worden*, 1 N. H. 16; *Tucker v. Eldred*, 6 R. I. 404; *Daily*

cates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith."⁷⁵ If, for any cause, a highway is abandoned, the land reverts to the owner of the fee. After the discontinuance of a public way, a private way may be acquired by prescription over the same land.⁷⁶ This is not possible, however, as long as it remains a public way.⁷⁷ For injuries to highways and obstructions of them, the right of action is in the public. If, however, any person is specially damaged, he may have an individual action.⁷⁸

176. LIGHT AND AIR—Easements of light and air are rights to the uninterrupted flow of light and air to the windows or apertures of a building from over adjoining land. These rights may be acquired by grant, but not, as a rule, in this country, by prescription.

Easements of light and air are usually referred to as one easement, namely, the easement of light and air. They are, however, entirely separate easements,⁷⁹ although the easement of air is similar to the easement of light.⁸⁰ At common law there is no natural

v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578. And see *Lade v. Shepherd*, 2 Strange, 1004; *Reg. v. Pratt*, 4 El. & Bl. 860; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Codman v. Evans*, 5 Allen (Mass.) 308, 81 Am. Dec. 748; *State v. Davis*, 80 N. C. 351, 30 Am. Rep. 86.

⁷⁵ *St. Mary Newington v. Jacobs*, L. R. 7 Q. B. 47.

⁷⁶ *Lansing v. Wiswall*, 5 Denio (N. Y.) 213; *Palmer v. Jones*, 1 Ont. L. R. 382.

⁷⁷ *Providence F. R. & N. Steamboat Co. v. Fall River*, 187 Mass. 45, 72 N. E. 338; *Jones v. Girard*, 11 Pa. Dist. R. 285, 26 Pa. Co. Ct. R. 385. See *South Covington & C. St. R. Co. v. Turnpike Co.*, 110 Ky. 691, 62 S. W. 687, 23 Ky. Law Rep. 68. Contra in Nebraska prior to 1899. *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236.

⁷⁸ *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5. And see *Bateman v. Bluck*, 18 Q. B. Div. 870; *McKee v. Perchment*, 69 Pa. 342. For the right to go on adjoining land when a highway is impassable, see *Absor v. French*, 2 Show. 28; *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 723.

⁷⁹ *Laws of Eng.* vol. 11, § 581. But see *American Bank-Note Co. v. Railroad Co.*, 129 N. Y. 252, 29 N. E. 302; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Barnett v. Johnson*, 15 N. J. Eq. 481.

⁸⁰ *Cable v. Bryant*, [1908] 1 Ch. 259, 263.

right to the uninterrupted flow of light,⁸¹ or of air,⁸² from over adjoining land. Such rights may, however, be acquired by grant, either express⁸³ or implied.⁸⁴ By the common law of England such rights may also be acquired by prescription, although no easement in a mere view or prospect, as a matter of delight, can be so acquired.⁸⁵ Under the English Prescription Act of 1832,⁸⁶ the right to light may also be acquired,⁸⁷ although it is held that this act does not alter the common law as to the acquiring of such an easement by the doctrine of ancient lights.⁸⁸ It merely changes the length of time from immemorial usage to that of twenty years.⁸⁹ At common law, when one had a building near the boundary line of his land, with windows opening on the adjoining lot, and had enjoyed the access of light over such lot, during the period required for the acquisition of an easement, he was held to have a right to have the light unobstructed.⁹⁰ This right would be infringed by the erection of a wall or building which would unlawfully shut out the light from the windows of the building of the dominant estate.⁹¹

⁸¹ *Tapling v. Jones* (1865) 11 H. L. Cas. 290; *Higgins v. Betts*, [1905] 2 Ch. 210, 214.

⁸² *Cable v. Bryant*, [1908] 1 Ch. 259; *Aldred's Case* (1610) 9 Co. Rep. 57b, 58a.

AIR.—The statement that one has no natural right, at common law, to the flow of air to his premises, should not be confounded with the natural right to have the air unpolluted. Every one has a natural right to enjoy the air pure and free from noxious smells or vapors, and any one who sends on or over his neighbors' land that which makes the air impure is guilty of a nuisance. *Laws of Eng.* vol. 11, § 641; *Chastey v. Ackland*, [1895] 2 Ch. 389, C. A.

⁸³ *Higgins v. Betts*, *supra*; *Dalton v. Angus* (1881) 6 App. Cas. 740, 794; *Or by covenant. Moore v. Rawson*, 3 B. & C. 332, 340; *Dalton v. Angus*, *supra*.

⁸⁴ So held in some cases, where there is a conveyance or lease of land with buildings upon it overlooking a vacant lot of the grantor. *DARNELL v. COLUMBUS SHOWCASE CO.*, 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N. S.) 333, 121 Am. St. Rep. 206, *Burdick Cas. Real Property*; *U. S. v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Pollard v. Gare*, [1901] 1 Ch. 834; *Palmer v. Fletcher*, 1 Lev. 122; *Aldin v. Latimer Clark, etc., Co.*, [1894] 2 Ch. 437, 446.

⁸⁵ *Aldred's Case*, 9 Coke, 57b; *Moore v. Rawson*, 3 B. & C. 332; *Butt v. Gas Co.*, 2 Ch. App. 158. But see *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457; *Kessler v. Letts*, 7 Ohio Cir. Ct. R. 108.

⁸⁶ 2 & 3 Wm. IV, c. 71, § 3.

⁸⁷ *Kelk v. Pearson* (1871) 6 Ch. App. 809.

⁸⁸ *Kelk v. Pearson*, *supra*; *Colls v. Home & Colonial Stores*, [1904] A. C. 179, 198.

⁸⁹ *Colls v. Home & Colonial Stores*, *supra*.

⁹⁰ *Cross v. Lewis*, 2 Barn. & C. 686; *Compton v. Richards*, 1 P. fice, 27; *Renshaw v. Bean*, 18 Q. B. 112. Cf. *White v. Bass*, 7 Hurl. & N. 722; *Haynes v. King*, [1893] 3 Ch. 439; *Callis v. Laughner*, [1894] 3 Ch. 659.

⁹¹ The inconvenience caused must be appreciable. *Back v. Stacey*, 2 Car. & P. 465; *Wells v. Ody*, 7 Car. & P. 410; *Arcedeckne v. Kelk*, 2 Giff. 683.

In a recent English case, reviewing the law upon this subject, it is said that it is impossible to lay down any precise general rule as to the amount of light to which the owner of the easement is entitled.⁹² One is not necessarily entitled to all the light that formerly came to his building, but the rule to govern each case is whether the light, after the erection of the obstruction, makes the building to an appreciable degree less fit for the ordinary purposes of business or occupation.⁹³ The acquisition of this easement by prescription may, however, be prevented by the erection of any structure which shuts off the light before the full period has elapsed which is required by the statute of limitations.⁹⁴ When the right exists, the burden on the servient estate must not be increased by the opening of new windows or the enlargement of old ones.⁹⁵ If the old building is destroyed or pulled down, the easement can be claimed for a new structure erected in its place only when the windows are substantially the same as before.⁹⁶ A change in the use of the building, however, does not destroy nor enlarge the right.⁹⁷ In this country the English common-law doctrine that easements of light and air may be acquired by prescription is generally repudiated, on the ground that it is not adapted to our circumstances or conditions.⁹⁸

177. LATERAL AND SUBJACENT SUPPORT—The right of lateral support is the right to have one's land supported in its natural state, so that it will not sink when an adjoining owner makes an excavation. It exists only for the land itself, and not for erections on the land. The right of subjacent support is a similar right when the surface of the land and the strata beneath are owned by different persons.

⁹² *Colls v. Home & Colonial Stores*, [1904] A. C. 179, 198. See, also, *Fifty Associates v. Tudor*, 6 Gray (Mass.) 255; *Brooks v. Reynolds*, 106 Mass. 31.

⁹³ *Colls v. Home & Colonial Stores*, [1904] A. C. 179, 210.

⁹⁴ *Bury v. Pope*, Cro. Eliz. 118. And see, *Pearson, P. J.*, in *Shell v. Kemmerer*, 13 Phila. (Pa.) 502. And the easement may be lost by abandonment. *Moore v. Rawson*, 3 Barn. & C. 332. But cf. *Stokoe v. Singers*, 8 Ed. & Bl. 31; *Ecclesiastical Com'rs v. Kino*, 14 Ch. Div. 213.

⁹⁵ *Blanchard v. Bridges*, 4 Adol. & E. 176.

⁹⁶ *Cherrington v. Abney Mil*, 2 Vern. 646.

⁹⁷ *Martin v. Goble*, 1 Camp. 320.

⁹⁸ *Kotz v. Railroad Co.*, 188 Ill. 578, 59 N. E. 240; *Paine v. Boston*, 4 Allen (Mass.) 168; *Sweeney v. St. John*, 28 Hun (N. Y.) 634; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Haverstick v. Sipe*, 33 Pa. 368. See *DARNELL v. COLUMBUS SHOWCASE CO.*, 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N. S.) 333, 121 Am. St. Rep. 206, *Burdick Cas. Real Property*.

The right of support,⁹⁹ either lateral or subjacent, as defined above, is a natural right, an incident of the ownership of land.¹ It is not an easement, although often called so. It is a right that passes with the land.² The right exists, however, only for the land itself, and not when the burden has been increased by greater weight placed upon the ground by the erection of buildings or other structures.³ Moreover, this right does not require that one's neighbor shall retain his land in its natural state, but merely that he shall not deprive the adjoining owner of the support to which he is entitled, so as to cause damage to him.⁴ An adjoining owner may, however, substitute artificial support afforded by his land.⁵ In addition, however, to these natural rights of support, there may be easements of support. Such easements are rights, acquired by grant, express⁶ or implied,⁷ or by prescription,⁸ which either enlarge or diminish one's natural right.⁹ For example, the right to the support of land with the buildings on it is an easement, and may be acquired by prescription.¹⁰ The owner of land may also grant to his neighbor the right to excavate upon the latter's land, regardless of its effect upon the land of the former.¹¹ The same thing may likewise be true between the owners of different strata of the same land.¹² Although no easement for the support of buildings may exist, nevertheless the adjoining owner, when making excavations, must excavate in a reasonable manner, and give notice to the other party of his intention to excavate, so that the latter may take the necessary steps to prevent his buildings.

⁹⁹ *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. Cf. *Corporation of Birmingham v. Allen*, 6 Ch. Div. 284. As to support of a house by a house, see *Solomon v. Master, etc., of Mystery of Vintners*, 4 Hurl. & N. 585; *Richards v. Rose*, 9 Exch. 218.

¹ *Dalton v. Angus*, 6 App. Cas. 740, 791 (1881); *Humphries v. Brogden*, 12 Q. B. 739, 744.

² *Dalton v. Angus*, *supra*.

³ *Laws of Eng.* vol. 11, p. 321, g. h; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Smith v. Thackerah*, L. R. 1 C. P. 564. But see *Brown v. Robins*, 4 Hurl. & N. 186.

⁴ *Dalton v. Angus* (1881) 6 App. Cas. 740; Tiff. p. 669.

⁵ *Rowbotham v. Wilson*, 8 E. & B. 123, 157; Tiff. p. 669.

⁶ *Dalton v. Angus*, *supra*.

⁷ *Id.*

⁸ *Dalton v. Angus*, *supra*; *Lemaitre v. Davis* (1881) 19 Ch. D. 281.

⁹ *Dalton v. Angus* (1881) 6 App. Cas. 740; *Lore v. Bell* (1884) 9 App. Cas. 286.

¹⁰ *Hunt v. Peake*, Johns. Eng. Ch. 705; *Partridge v. Scott*, 3 Mees. & W. 220.

¹¹ *Ryckman v. Gillis*, 57 N. Y. 68, 15 Am. Rep. 464.

¹² Tiff. p. 690, § 58.

from settling.¹³ The right to subjacent support is also a natural right. This exists when the surface belongs to one owner and the right to the minerals imbedded in the soil to another. The latter must operate his mine so as not to cause the surface to fall or sink.¹⁴ The owner of the mines, however, is not required to furnish support for buildings which have been placed upon the land after the severance of the ownership of the mines and the surface, unless such an easement has been acquired by lapse of time. However, even when buildings have been thus placed upon the surface, there would be a liability for negligent excavations.¹⁵

Ownership of Separate Floors of Buildings

Where the different stories of a building are owned by different persons, the owner of the upper story or stories has a right to support from the owner of the lower portion, and a right to the use of the halls and stairs.¹⁶ The owner of the lower floors has the right of protection by the roof.¹⁷ The two owners must so use their property as not to injure each other. Some cases hold that the upper owner must keep the roof in repair;¹⁸ others say that if he fails to do so the lower owner may enter to make the necessary repairs; still other cases tend towards the civil-law rule, which holds that the expenses are to be borne equally.¹⁹

178. PARTY WALLS—The term "party wall" is used in different senses. It may be defined, in general, as a wall between two estates which is used for the common benefit of both.²⁰

¹³ *Lasala v. Halbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Austin v. Railroad Co.*, 25 N. Y. 334; *Shafer v. Wilson*, 44 Md. 268; *Dodd v. Holme*, 1 Adol. & El. 493; *Chadwick v. Trower*, 6 Bing. N. C. 1.

¹⁴ *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385; *Humphries v. Brogden*, 12 Q. B. Div. 739.

¹⁵ *Marvin v. Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Bonomi v. Backhouse*, El. Bl. & El. 622; *Rowbotham v. Wilson*, 8 H. L. Cas. 348.

¹⁶ *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Graves v. Berdan*, 26 N. Y. 501; *Mayo v. Newhoff*, 47 N. J. Eq. 31, 19 Atl. 837; *Rhodes v. McCormick*, 4 Iowa, 368, 68 Am. Dec. 663; *Humphries v. Brogden*, 12 Q. B. Div. 739; *Harris v. Ryding*, 5 Mees. & W. 60.

¹⁷ *Wright, C. J.*, in *Rhodes v. McCormick*, 4 Iowa, 368, 376, 68 Am. Dec. 663.

¹⁸ *Loring v. Bacon*, 4 Mass. 575; *Ottumwa Lodge v. Lewis*, 34 Iowa, 67, 11 Am. Rep. 135; *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396; *Keilw.* 98b, pl. 4; *Anon.*, 11 Mod. 7.

¹⁹ *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716; *Loring v. Bacon*, 4 Mass. 575.

²⁰ *Harber v. Evans*, 101 Mo. 661, 665, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. Rep. 646, quoting *Washburn, Real Prop.*

Party walls have been known from the time men began to build contiguous structures. In the laws of the Romans, the rights of adjoining owners in such walls were recognized, and were discussed under urban servitudes.²¹ In our law, a party wall, in the legal sense of the term, can exist only in two ways, either by contract or by statute. The common law creates no such right.²² It is possible, however, that such a right may arise by prescription.²³ It is said²⁴ that the term "party wall" may be used in four different senses; thus, it may be: (1) A wall of which two adjoining proprietors are tenants in common;²⁵ (2) a wall divided longitudinally into two strips, one belonging to each of the adjoining owners in severalty;²⁶ (3) a wall belonging wholly to one proprietor, subject to an easement or right held by the other to have it maintained as a party wall;²⁷ (4) a wall divided longitudinally into two moieties, each moiety subject to a cross-easement, a right of support in favor of the other.²⁸ Where the exact boundary line, or the circumstances under which the wall was built, are unknown, it will be presumed that the wall is owned by the adjoining owners as tenants in common.²⁹ Party walls are,

²¹ *Tigni immittendi*, the right to insert beams or joists in an adjoining wall. See D. 8, 5, 8, 2; 8, 5, 14 pr.

²² *Brown, J.*, in *List v. Hornbrook*, 2 W. Va. 340; *Smoot v. Heyl*, 34 App. Cas. (D. C.) 480. See, also, *Mercantile Library Co. v. University*, 220 Pa. 328, 69 Atl. 861; *Duncomb v. Randolph*, 107 Tenn. 89, 98, 64 S. W. 21, 89 Am. St. Rep. 915; *Trulock v. Parse*, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. (N. S.) 924.

²³ *Kiefer v. Dickson*, 41 Ind. App. 543, 84 N. E. 523; *Koenig v. Haddix*, 21 Ill. App. 53; *Fleming v. Cohen*, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572; *Schile v. Brokhahus*, 80 N. Y. 614; *McVey v. Durkin*, 136 Pa. 418, 20 Atl. 541.

²⁴ *Fry, J.*, in *Watson v. Gray* (1880) 14 Ch. D., 192, 194.

²⁵ "Party wall" may mean a wall of which the adjoining owners are tenants in common. *Montgomery v. Masonic Hall*, 70 Ga. 38; *Lederer & Straus v. Investment Co.*, 130 Iowa, 157, 158, 106 N. W. 357, 8 Ann. Cas. 317; *Hunt v. Ambruster*, 17 N. J. Eq. 208; *Cubitt v. Porter*, 8 Barn. & C. 257; *Watson v. Gray*, 14 Ch. Div. 192.

²⁶ *Matts v. Hawkins*, 5 Taunt. 20. Where one intending to construct a wall within the line of his lot by mistake extends his foundation slightly onto an adjoining lot, the wall does not thereby become a party wall. *Pile v. Pedrick*, 167 Pa. 296, 31 Atl. 646, 647, 46 Am. St. Rep. 677.

²⁷ *Spero v. Shultz*, 14 App. Div. 423, 425, 429, 43 N. Y. Supp. 1016; *Watson v. Gray*, 14 Ch. D. 192, 195, 44 J. P. 537, 49 L. J. Ch. 243, 42 L. T. Rep. U. S. 294; 28 Wkly. Rep. 438.

²⁸ *Thomp. Fict. & Easem.* 93; *Burton v. Moffitt*, 3 Or. 29; *Watson v. Gray*, 14 Ch. D. 192, 195. For other definitions, see the following cases: *Scott v. Baird*, 145 Mich. 116, 126, 108 N. W. 737; *Hunt v. Ambruster*, 17 N. J. Eq. 208, 213; *Musgrave v. Sherwood*, 54 How. Prac. (N. Y.) 338, 339; *Western Nat. Bank's Appeal*, 102 Pa. 171, 182.

²⁹ *Wiltshire v. Sidford*, 1 Man. & Ry. 404; *Cubitt v. Porter*, 8 B. & C. 257.

however, usually built so that the center of the wall coincides with the boundary line, half being on the land of each proprietor.³⁰ In such cases it is generally held that the wall is not owned in common, but each adjoining owner is an owner in severalty, each part of the wall being a part of the land upon which it stands; moreover, each half of the wall is entitled to support by the other,³¹ and each owner has an equal easement in the part owned by the other.³² In many jurisdictions the erection of party walls, and the rights and duties of adjoining owners therein, are regulated by statute,³³ or by city ordinances under statutory authority.³⁴

Rights and Duties of Owners

Where no statutory duty is imposed, an owner of property is under no legal duty to unite with his neighbor in the construction of a party wall.³⁵ Moreover, if a wall is built by one proprietor so that it rests half on the land of each, the adjoining owner need not pay one-half, or any part, of its cost without an express agreement.³⁶ By statute, in some states, an owner of land

³⁰ A wall may be a party wall for a part of its length, or for a part of its height, and a purely private wall for the rest of its length or height. *Weston v. Arnold*, 8 Ch. App. 1084 (1873); *Colbeck v. Girdless Co.*, 1 Q. B. D. 234. See *Howell v. Goss*, 128 Iowa, 569, 105 N. W. 61.

³¹ *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Ingals v. Plamondon*, 75 Ill. 118; *Andrae v. Haseltine*, 58 Wis. 395, 17 N. W. 18, 46 Am. Rep. 635. This easement of support is lost, however, by the destruction of the wall. *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786; *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491.

³² *Graves v. Smith*, 87 Ala. 450, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; *Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480. See *Normille v. Gill*, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441. Contra, *Montgomery v. Masonic Hall*, 70 Ga. 38.

³³ See the statutes in general. See, also, *Scott v. Baird*, 145 Mich. 116, 108 N. W. 737; *Kraft v. Stott*, 14 Fed. Cas. No. 7,929, 1 Hayw. & H. 33; *Lederer & Straus v. Investment Co.*, 130 Iowa, 157, 106 N. W. 357, 8 Ann. Cas. 317; *Bryant v. Sholars*, 104 La. 786, 29 South. 350. Within the county of London, the London Building Act of 1894 (57 & 58 Vict. c. 213), as amended in 1898 and 1905 (5 Edw. VII, c. 209), governs these questions.

³⁴ *Heine v. Merrick*, 41 La. Ann. 194, 5 South. 760, 6 South. 637; *Kraft v. Stott*, 14 Fed. Cas. No. 7,929, 1 Hayw. & H. 33; *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. 196; *Kirby v. Fitzpatrick*, 168 Pa. 434, 32 Atl. 53; *Nivin v. Stevens*, 5 Har. (Del.) 272.

³⁵ *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Ida Grove v. Armory Co.*, 146 Iowa, 690, 125 N. W. 866; *Richards v. Rose*, 2 C. L. R. 311, 9 Exch. 218, 23 L. J. Ch. 3.

³⁶ *Walker v. Stetson*, 162 Mass. 86, 38 N. E. 18, 44 Am. St. Rep. 350; *Wil-*

is permitted to build a party wall partly on the land of an adjoining proprietor, under certain restrictions.³⁷ In the absence of agreement,³⁸ one owner cannot place windows or other openings in a party wall,³⁹ since such a wall has come by custom to mean a solid wall.⁴⁰ Each owner, in using the wall, must do nothing to weaken it or otherwise to injure the adjoining proprietor.⁴¹ In case the wall becomes ruinous, either owner may repair and compel contribution by the other.⁴² If, however, the wall has been destroyed, there is no implied right to compel the other party to stand half of the expenses of rebuilding.⁴³

Partition Fences

Partition fences are in some respects like party walls. They are usually erected one-half on the land of each adjoining owner. The duty to maintain such fences may exist by reason of a statute,⁴⁴ or it may arise from agreement or prescription.⁴⁵ Other-

kings v. Jewett, 139 Mass. 29, 29 N. E. 214; *McCord v. Herrick*, 18 Ill. App. 423; *Preiss v. Parker*, 67 Ala. 500.

³⁷ *Mercantile Library Co. v. University*, 220 Pa. 328, 69 Atl. 861; *Switzer v. Davis*, 97 Iowa, 266, 66 N. W. 174; *Scott v. Baird*, 145 Mich. 116, 108 N. W. 737; *Heron v. Houston*, 217 Pa. 1, 66 Atl. 108, 118 Am. St. Rep. 898; *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214. And see 1 Stim. Am. St. Law, § 2170.

³⁸ *Grimley v. Davidson*, 133 Ill. 116, 24 N. E. 439; *Weigmann v. Jones*, 163 Pa. 330, 30 Atl. 198; *Dunscorn v. Randolph*, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915.

³⁹ *Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946; *Normille v. Gill*, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441; *De Baun v. Moore*, 167 N. Y. 598, 60 N. E. 1110; *Milne's Appeal*, 81 Pa. 54.

⁴⁰ *Graves v. Smith*, 87 Ala. 450, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786; *Cutting v. Stokes*, 72 Hun, 376, 25 N. Y. Supp. 365. See *Everly v. Driskill*, 24 Tex. Civ. App. 413, 58 S. W. 1046.

⁴¹ *Fleming v. Cohen*, 186 Mass. 323, 71 N. E. 563, 104 Am. St. Rep. 572; *Potter v. White*, 6 Bosw. (N. Y.) 644; *Ferguson v. Fallons*, 2 Phila. (Pa.) 168; *Miller v. Brown*, 33 Ohio St. 547; *Dowling v. Hemings*, 20 Md. 179, 83 Am. Dec. 545; *Brodbee v. Mayor, etc., of London*, 4 Man. & G. 714.

⁴² *Bright v. Bacon*, 131 Ky. 848, 116 S. W. 268, 20 L. R. A. (N. S.) 386; *Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570. Cf., however, *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716.

⁴³ *Frisbie v. Masonic Lodge*, 133 Ky. 588, 118 S. W. 359; *Hawkes v. Hoffman*, 56 Wash. 120, 105 Pac. 156, 24 L. R. A. (N. S.) 1038; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632.

⁴⁴ *Boyd v. Lammert*, 18 Ill. App. 632; *Rust v. Low*, 6 Mass. 90; *Carpenter v. Vail*, 36 Mich. 226; *Carpenter v. Halsey*, 60 Barb. (N. Y.) 45; 1 Stim. Am. St. Law, art. 218.

⁴⁵ *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Bronson v. Coffin*, 108

wise, however, there is no duty to maintain such a fence.⁴⁶ Such fences are usually divided into halves, each owner being required to maintain his half. Moreover, the statutes regulating partition fences usually provide that questions relative to the duties of maintenance and repair, in case the owners cannot agree, shall be determined by the inspection and decision of officials known as "fence viewers."⁴⁷

179. WATER RIGHTS—The owner of land fronting on a natural stream or water course has, at common law, a right to have it maintained in its natural channel, without diminution of its quantity, or impairment of its quality, excepting the reasonable use of the same by other riparian owners.

Such a right, however, is a natural right, and is not an easement. Easements in water courses are usually found in connection with water flowing in artificial channels. There may be, however, easements in connection with natural streams.

Natural Water Courses

Easements in water courses are quite different from natural rights to the same. An easement confers a right, or imposes a burden, over and above a natural right.⁴⁸ The common-law rights of riparian owners in natural streams are not easements, but are connected with the land itself, and are enjoyed as an incident of its ownership.⁴⁹ Flowing water in a natural stream is not a subject-matter of ownership, although it may be used,⁵⁰ and rights in water in its natural state consist almost entirely in rights to

Mass. 175, 11 Am. Rep. 335; *Adams v. Van Alstyne*, 25 N. Y. 232; *Cowles v. Balzer*, 47 Barb. (N. Y.) 562.

⁴⁶ *Thayer v. Arnold*, 4 Metc. (Mass.) 589; *Lantis v. Reithmiller*, 95 Mich. 45, 54 N. W. 713; *Chamberlain v. Reed*, 14 Hun (N. Y.) 403; *Roberts v. Shipley*, 2 Wkly. Notes Cas. (Pa.) 406.

⁴⁷ *Hill v. Tohill*, 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423; *Currier v. Esty*, 116 Mass. 577; *Adams v. Van Alstyne*, 25 N. Y. 232; *Hale v. Andrews*, 75 Ill. 252; *Stoner v. Hunsicker*, 47 Pa. 514.

⁴⁸ *Dalton v. Angus*, 6 App. Cas. 740, 830 (1881); *Wright v. Howard*, 1 Sim. & St. 190.

⁴⁹ *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Fosgate v. Hudson*, 178 Mass. 225, 59 N. E. 809; *Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335; *In re City of New York*, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500; *Hough v. Doylestown Borough*, 4 Brewst. (Pa.) 333; *Pine v. New York*, 103 Fed. 337.

⁵⁰ *Race v. Ward*, 4 E. & B. 702; *Mitchell v. Warner*, 5 Conn. 497, 518; *Smith v. Rochester*, 92 N. Y. 463, 480, 44 Am. Rep. 393.

use it, as contrasted with ownership of it. At common law, when there is a defined natural water course, one who owns the land over which it flows, or who owns land on either bank of the stream, has a right to have the flow continue, both as to quantity and quality, without unreasonable interference by the riparian owners, either above or below him.⁵¹ In order that there may be such a water course, a continuous flow is not necessary. It is sufficient if water flows in the channels at certain seasons of the year.⁵² A riparian owner has a right to use the water in a reasonable way,⁵³ but he must not divert it from its course,⁵⁴ or detain it more than a reasonable time.⁵⁵ So he has no right to corrupt the water which flows over his land, unless such right is acquired as an easement.⁵⁶ Furthermore, he must not dam up the

⁵¹ *People ex rel. Ricks Water Co. v. Lumber Co.*, 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; *Druley v. Adam*, 102 Ill. 177; *Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Union Mill & Mining Co. v. Dangberg*, 81 Fed. 73; *Darlington v. Painter*, 7 Pa. 473; *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; *Omelyany v. Jaggers*, 2 Hill (S. C.) 634, 27 Am. Dec. 417; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Embrey v. Owen*, 6 Exch. 353; *Williams v. Morland*, 2 Barn. & C. 910; *Miner v. Gilmour*, 12 Moore, P. C. 131; *Wood v. Waud*, 3 Exch. 748; *Earl of Sandwich v. Railway Co.*, 10 Ch. Div. 707; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590.

⁵² *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; *Spink v. Corning*, 172 N. Y. 626, 65 N. E. 1122; *Wolf v. Crothers*, 21 Pa. Co. Ct. R. 627; *Shields v. Arndt*, 4 N. J. Eq. 234; *Eulrich v. Richter*, 41 Wis. 318; *New York, C. & St. L. R. Co. v. Speelman*, 12 Ind. App. 372, 40 N. E. 541; *Rigney v. Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

⁵³ *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Board of Trustees of Illinois & M. Canal v. Haven*, 11 Ill. 554; *Barrett v. Parsons*, 10 Cush. (Mass.) 367; *De Baun v. Bean*, 29 Hun (N. Y.) 236.

⁵⁴ *Hogg v. Water Co.*, 168 Pa. 456, 31 Atl. 1010; *Green Bay & M. Canal Co. v. Water Power Co.*, 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443, 48 Am. St. Rep. 937; *Southern Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531; *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762. But a stream may be diverted if it is returned to the established channels before passing off the land of the one diverting it. *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249.

⁵⁵ *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156; *Elliot v. Railway Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Garwood v. Railroad Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645; *Blodgett v. Stone*, 60 N. H. 167; *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762. Cf. *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657. As to custom to show reasonable use, see *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

⁵⁶ *Jackman v. Arlington Mills*, 137 Mass. 277; *Smith v. Cranford*, 84 Hun, 318, 32 N. Y. Supp. 375; *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *Hayes*

water so as to cause it to flow back on the lands of the owners above,⁵⁷ although, of course, an easement of this kind also may be acquired,⁵⁸ and in some states the riparian owner who first erects a dam and appropriates the water power for mill purposes has the right to maintain it, although it prevents other owners above or below the stream from obtaining such power.⁵⁹ Rights to change the natural uses of water are easements, and must be acquired in the same ways as other conventional easements.⁶⁰ The rights of owners whose lands border on navigable streams are the same, as far as the common law is concerned, as the rights of other riparian owners; but they must not obstruct navigation.⁶¹ Where rivers are used by boom companies for the transportation of logs, the rule is that the first in has the first right to the use of the current; but he must not cause unnecessary obstruction.⁶²

Appropriation of Public Waters

In a number of states the common-law doctrine of the rights of riparian owners in natural streams has either not been accepted or else has been changed or modified by statute. This is particularly true in our Western states, where for beneficial purposes, such as irrigation, mining, and manufacturing, the doctrine of

v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; *People ex rel. Ricks Water Co. v. Lumber Co.*, 107 Cal. 214, 40 Pac. 486, 48 Am. St. Rep. 121.

⁵⁷ *McCoy v. Danley*, 20 Pa. 85, 57 Am. Dec. 680; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *Railroad Co. v. Carr*, 38 Ohio St. 448, 43 Am. Rep. 428.

⁵⁸ *Ballard v. Struckman*, 123 Ill. 636, 14 N. E. 682; *Ludlow Mfg. Co. v. Orchard Co.*, 177 Mass. 61, 58 N. E. 181; *Hall v. Augsburg*, 46 N. Y. 622; *Reidelman v. Foulk*, 5 Watts (Pa.) 308. But see *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

⁵⁹ *Lincoln v. Chadbourne*, 56 Me. 197; *Otis Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 70 N. E. 1009, 104 Am. St. Rep. 563; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

⁶⁰ *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Postlethwaite v. Payne*, 8 Ind. 104; *Smith v. Russ*, 17 Wis. 234, 84 Am. Dec. 739. Cf. *Shury v. Piggot*, 3 Bulst. 339.

⁶¹ *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Gifford v. McArthur*, 55 Mich. 535, 22 N. W. 28; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; *Field v. Driving Co.*, 67 Wis. 569, 31 N. W. 17. And see *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. Div. 713. The public are not entitled to a tow path along a navigable river. *Ball v. Herbert*, 3 Term R. 253. *Contra, Reg. v. Inhabitants of Cluworth*, 6 Mod. 163; *Young v. —*, 1 Ld. Raym. 725.

⁶² *Butterfield v. Gilchrist*, 53 Mich. 22, 18 N. W. 542; *Sullivan v. Jernigan*, 21 Fla. 264. Cf. *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Gwaltney v. Land Co.*, 115 N. C. 579, 20 S. E. 465. As to what streams are "floatable," see *Commissioners of Burke County v. Lumber Co.*, 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829.

"prior appropriation" obtains; that is, the one first appropriating for beneficial purposes the water of streams flowing through the public lands obtains the exclusive use and control of the water to the extent of his appropriation.⁶³ This custom grew up among the early miners, and has become established as necessary to the conditions and requirements of the people.⁶⁴ Under some of the state laws, riparian ownership is necessary in order to obtain any rights of prior appropriation.⁶⁵ Under the federal law, however, mere occupancy of land, so far as the waters of the public land are concerned, is sufficient to authorize the right.⁶⁶

Artificial Water Courses

In contrast with natural streams, there is no natural right to water in an artificial water course.⁶⁷ Moreover, unless such a water course is maintained entirely upon one's own land, the question of an easement is necessarily involved, since an artificial water course cannot be constructed and established over another's land without his consent.⁶⁸ Such easements may arise, however, by express grant,⁶⁹ by implication of law,⁷⁰ or by prescription.⁷¹ The most common illustrations of artificial water

⁶³ Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Parks Canal & Mining Co. v. Hoyt, 57 Cal. 44; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258; Krall v. U. S., 79 Fed. 241, 24 C. C. A. 543; Smith v. O'Hara, 43 Cal. 371; Schilling v. Rominger, 4 Colo. 100; Barnes v. Sabron, 10 Nev. 217; Wimer v. Simmons, 27 Or. 1, 39 Pac. 6, 50 Am. St. Rep. 685. Such appropriation on public lands is authorized by congress. Rev. St. U. S. §§ 2339, 2340 (U. S. Comp. St. 1901, p. 1437). The right may be lost by abandonment. Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Beaver Brook Reservoir & Canal Co. v. Fish Co., 6 Colo. App. 130, 40 Pac. 1066. See, also, Sampson v. Hoddinott, 1 C. B. (N. S.) 590; Embrey v. Owen, 6 Exch. 353; Creek v. Waterworks Co., 15 Mont. 121, 38 Pac. 459.

⁶⁴ Hoffman v. Stone, 7 Cal. 46; Basey v. Gallagher, 20 Wall. (U. S.) 670, 22 L. Ed. 452; Atchison v. Peterson, 20 Wall. (U. S.) 507, 22 L. Ed. 414.

⁶⁵ Gould v. Canal Co., 8 Ariz. 429, 76 Pac. 598; Slosser v. Canal Co., 7 Ariz. 376, 65 Pac. 332; Avery v. Johnson, 59 Wash. 332, 109 Pac. 1028.

⁶⁶ Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389; Patterson v. Ryan, 37 Utah, 410, 108 Pac. 1118; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. 493, 53 L. Ed. 822.

⁶⁷ Green v. Carotta, 72 Cal. 267, 13 Pac. 685; Detwiler v. Toledo, 13 Ohio Cir. Ct. R. 579, 6 Ohio C. D. 300; Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 35 N. W. 744; Kensit v. Great Eastern Rail Co., 27 Ch. Div. 122, C. A.

⁶⁸ Norton v. Volentine, 14 Vt. 239, 39 Am. Dec. 220; Klopp v. Railroad Co., 142 Iowa, 433, 119 N. W. 377.

⁶⁹ Montana Ore Purchasing Co. v. Mining Co., 20 Mont. 533, 52 Pac. 375; Miller v. Vaughn, 8 Or. 333; Finlinson v. Porter, L. R. 10 Q. B. 188.

⁷⁰ Bunting v. Hicks, 70 L. T. 455, C. A.

⁷¹ Campbell v. West, 44 Cal. 646; Cotton v. Manufacturing Co., 13 Metc.

courses are ditches, canals, drain pipes, sewer pipes, and water pipes.⁷² A riparian owner has no right to use the water, or to enjoy the benefits of the artificial water course, unless such rights are acquired by grant, or by prescription, especially when the waterway is intended to be permanent.⁷³ The person enjoying the benefit of an artificial water course is generally bound to keep it in repair,⁷⁴ and the right to maintain a water course on the land of another carries with it the right to enter on such land to make repairs.⁷⁵

Surface Waters

Surface waters are waters of a casual or vagrant character, which ooze through the soil or diffuse over the surface of the ground. They have no channel, no banks. They are derived from falling rains and melting snows. When such waters enter into a stream and flow within its banks, they lose their character of surface waters.⁷⁶ Under the common law there is a marked difference in the rules governing surface water and those applicable to water courses. One owner is under no obligation to receive upon his land surface waters from the land of another,⁷⁷ nor to permit them to flow from his land to that of another. In other words, surface water, is considered, at common law, a common enemy, that each

(Mass.) 429; *Vaughan v. Ruppel*, 69 Mo. App. 583; *Springer v. Lawrence*, 47 N. J. Eq. 461, 21 Atl. 41.

⁷² *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Bissell v. Grant*, 35 Conn. 288. Cf. *Amidon v. Harris*, 113 Mass. 59. See *SHAW v. PROFFITT*, 57 Or. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63, *Burdick Cas. Real Property*.

⁷³ *Stimson v. Brookline*, 197 Mass. 568, 83 N. E. 893, 125 Am. St. Rep. 382, 16 L. R. A. (N. S.) 280, 14 Ann. Cas. 907; *Cole v. Bradbury*, 86 Me. 380, 20 Atl. 1097; *Ranney v. Railroad Co.*, 137 Mo. App. 537, 119 S. W. 484.

⁷⁴ *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; *Brisbane v. O'Neill*, 3 Strobh. (S. C.) 348; *Franklin County v. Wilt*, 87 Neb. 132, 126 N. W. 1007, 31 L. R. A. (N. S.) 243.

⁷⁵ *Wessels v. Colebank*, 174 Ill. 618, 51 N. E. 639; *Jones v. Adams*, 162 Mass. 224, 38 N. E. 437; *Gilligan v. Feuschter*, 8 N. Y. St. Rep. 220; *Frailey v. Waters*, 7 Pa. 221. See *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161. So to enter and clean a railway for a mill. *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266.

⁷⁶ *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 782, 33 L. R. A. 376, 53 Am. St. Rep. 262; *Lawton v. Railroad Co.*, 61 S. C. 548, 39 S. E. 752, 753; *Jones v. Hannovan*, 55 Mo. 462, 467; *Morrissey v. Railroad Co.*, 38 Neb. 406, 56 N. W. 946; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Eulrich v. Richter*, 37 Wis. 226; *Id.*, 41 Wis. 318; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Bowlsby v. Speer*, 31 N. J. Law, 351, 86 Am. Dec. 216.

⁷⁷ *Schaefer v. Marthaler*, 34 Minn. 487, 26 N. W. 726, 57 Am. Rep. 73.

proprietor of land may and must fight for himself, with a view of protecting himself, and without any responsibility to others, providing he acts in a reasonable manner.⁷⁸ On the other hand, a landowner has a right to collect and use all the surface water upon his premises,⁷⁹ and an owner of land may acquire by express grant or reservation,⁸⁰ or by prescription,⁸¹ an easement to discharge surface waters upon the land of another. In direct conflict with the common-law view, the doctrine of the civil law has been accepted in a number of states. Under this doctrine the owner of the higher ground has a right to have surface water follow the natural slope of the land, and there is a servitude upon the lower land to receive such waters.⁸² Some states make a distinction with reference to urban and rural property, holding that in the case of city property the lower owner is under no obligation to receive surface waters upon his land. This, of course, is the common-law rule; but some states which have adopted the civil-law rule make this exception in case of city land. As a general rule, therefore, the owner of a town lot may so fill, or grade it to the street, that the surface water will be thrown back upon the formerly higher land.⁸³ In case, however, of negligence in changing the grade, and the consequent throwing of the surface water upon an adjoining owner's land, a landowner may be liable in damages.⁸⁴ Regardless of a landowner's right to get rid

⁷⁸ *Jackson v. Keller* (1910) 95 Ark. 242, 129 S. W. 296; *Benthall v. Selfert*, 77 Ind. 302; *Paola v. Garman*, 80 Kan. 702, 103 Pac. 83; *Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884, 19 L. R. A. (N. S.) 236; *Peterson v. Lundquist*, 106 Minn. 339, 119 N. W. 50; *Cox v. Railroad Co.*, 174 Mo. 588, 74 S. W. 854; *Jones v. Hannovan*, 55 Mo. 462, 467; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

⁷⁹ *Ashley v. Wolcott*, 11 Cush. (Mass.) 192; *Town v. Railroad Co.*, 50 Neb. 768, 70 N. W. 402; *Curtiss v. Agrault*, 47 N. Y. 73.

⁸⁰ *Jones v. Adams*, 162 Mass. 224, 38 N. E. 437; *Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

⁸¹ *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243; *Broadwell Special Drainage Dist. No. 1 v. Lawrence*, 231 Ill. 86, 83 N. E. 104; *Glenn v. Line*, 155 Mich. 608, 119 N. W. 1097; *Eshleman v. Martie*, 152 Pa. 68, 25 Atl. 178; *Smith v. Miller*, 11 Gray (Mass.) 145; *George v. New York*, 42 Misc. Rep. 270, 86 N. Y. Supp. 610.

⁸² *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163; *Baker v. Akron*, 145 Iowa, 485, 122 N. W. 926, 30 L. R. A. (N. S.) 619; *Trenton v. Rucker*, 162 Mich. 19, 127 N. W. 39, 34 L. R. A. (N. S.) 569; *Mirkil v. Morgan*, 134 Pa. 144, 19 Atl. 628.

⁸³ *Hall v. Rising*, 141 Ala. 431, 37 South. 586; *Cedar Falls v. Hansen*, 104 Iowa, 189, 73 N. W. 585, 65 Am. St. Rep. 439; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

⁸⁴ Where the owner of a city lot negligently changes the grade, so as to

of surface water, such waters cannot be collected in a pool or pond by one proprietor, and then be discharged in a body, and with a greater volume and force of flow, than would have resulted naturally.⁸⁵ Such accumulations of surface water may, however, be discharged into natural water courses, providing the quantity of such waters do not overflow the capacity of such streams.⁸⁶

Eaves-Drip

A proprietor of land may obtain by grant or by prescription⁸⁷ the right, or easement, to have water fall from the roof and eaves of his house onto the land of an adjoining owner.⁸⁸ Such a right is known as the right of eaves-drip. The adjacent owner acquires by prescription, however, no right to have the water continue to fall upon his land.⁸⁹

Subterranean Waters

Percolating waters, or underground waters, not flowing in a definite channel,⁹⁰ may, as a general rule, be diverted⁹¹ by the owner

throw the surface water on an adjoining owner, he is liable in damages. *Davidson v. Sanders*, 1 Pa. Super. Ct. 432; And see *Rielly v. Stephenson*, 222 Pa. 252, 70 Atl. 1097, 22 L. R. A. (N. S.) 947, 128 Am. St. Rep. 804.

⁸⁵ *Cox v. Odell*, 1 Cal. App. 682, 82 Pac. 1086; *Elser v. Gross Point*, 223 Ill. 230, 79 N. E. 27, 114 Am. St. Rep. 326; *Offley v. Garlinger*, 161 Mich. 351, 126 N. W. 434; *Foot v. Bronson*, 4 Lans. (N. Y.) 47; *Shavlik v. Walla*, 86 Neb. 768, 126 N. W. 376; *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Curtis v. Railroad Co.*, 98 Mass. 428; *Hogenson v. Railway Co.*, 31 Minn. 224, 17 N. W. 374; *Hurdman v. Railway Co.*, 3 C. P. Div. 168. When by the operation of pumps more water is discharged upon the land of a lower proprietor than would flow there naturally, the upper proprietor is liable for any damage which he could have prevented at a reasonable cost. *Pfeiffer v. Brown*, 165 Pa. 267, 30 Atl. 844, 44 Am. St. Rep. 660.

⁸⁶ *Broadwell Special Drainage Dist. No. 1 v. Lawrence*, 231 Ill. 86, 83 N. E. 104; *Baldwin v. Ohio Tp.*, 70 Kan. 102, 78 Pac. 424, 67 L. R. A. 642, 109 Am. St. Rep. 414; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Waffle v. Railroad Co.*, 53 N. Y. 11, 13 Am. Rep. 467; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Jackman v. Arlington Mills*, 137 Mass. 277.

⁸⁷ *Neale v. Seeley*, 47 Barb. (N. Y.) 314; *Thomas v. Thomas*, 2 C. M. & R. 34, 1 Gale, 61, 4 L. J. Exch. 179, 5 Tyrw. 804.

⁸⁸ *Neale v. Sealey*, 47 Barb. (N. Y.) 314. Cf. *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Harvey v. Walters*, L. R. 8 C. P. 162.

⁸⁹ *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311; *Wood v. Waud*, 3 Exch. 748; *Arkwright v. Gell*, 2 H. & H. 17, 8 L. J. Exch. 201, 5 M. & W. 203.

⁹⁰ See *Grand Junction Canal Co. v. Shugar*, 6 Ch. App. 483; *Dudden v. Guardians of Poor of the Clutton Union*, 1 Hurl. & N. 627; *West Cumberland Iron & Steel Co. v. Kenyon*, 6 Ch. Div. 773; *Burroughs v. Saterlee*, 67 Iowa, 396, 25 N. W. 808, 56 Am. Rep. 350; *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. 755; *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; *Williams v. Ladew*, 161 Pa. 283, 29 Atl. 54, 41 Am. St. Rep. 891.

⁹¹ *Bloodgood v. Ayres*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443;

of the land above such waters,⁹² or used absolutely, although by so doing the wells of adjoining landowners may be injured.⁹³ Upon the same principle, in working a mine, subterranean waters may be drawn off from the surrounding land without incurring liability.⁹⁴ Underground percolations must not be fouled, however, by the introduction of foreign substances.⁹⁵ No easements can be acquired by prescription in subterranean waters, because the use necessary to acquire such rights would be unknown, and therefore not adverse.⁹⁶ Where subterranean waters flow in definite channels, the same general rules apply as to natural water courses upon the surface of the land.⁹⁷ It is the presumption, however, that all underground waters are percolating, and one seeking to establish his rights in an alleged subterranean natural stream must first show that it is such a stream.⁹⁸

Brown v. Kistler, 190 Pa. 499, 42 Atl. 885; *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728; *Chatfield v. Wilson*, 28 Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93. But see *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72.

⁹² *Id.*

⁹³ *Bloodgood v. Ayres*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443. *Chasemore v. Richards*, 7 H. L. Cas. 349; and ante, p. 5. But see *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Hollingsworth & Vose Co. v. Water-Supply Dist.*, 165 Mass. 186, 42 N. E. 574. Some cases hold that the owner of the land can make only a reasonable use of percolating water. *Miller v. Water Co.*, 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772; *Meeker v. East Orange*, 77 N. J. Law, 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798.

⁹⁴ *Acton v. Blundell*, 12 Mees. & W. 324; *Popplewell v. Hodgkinson*, L. R. 4 Exch. 248. The use must not be malicious or extravagant. *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124. Cf. *Horner v. Watson*, 79 Pa. 242, 21 Am. Rep. 55.

⁹⁵ *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 South. 593. *Kinnaird v. Oil Co.*, 89 Ky. 468, 12 S. W. 937, 11 Ky. Law Rep. 692, 7 L. R. A. 451, 25 Am. St. Rep. 545; *Hauck v. Pipe Line Co.*, 153 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 34 Am. St. Rep. 710; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Wahle v. Reinbach*, 76 Ill. 322; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257. But see *Upjohn v. Board of Health*, 46 Mich. 542, 9 N. W. 845, 41 Am. Rep. 178.

⁹⁶ *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511. Cf. *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102; *Acton v. Blundell*, 12 Mees. & W. 324.

⁹⁷ *Miller v. Water Co.*, 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Bloodgood v. Ayres*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511.

⁹⁸ *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080,

PROFITS À PRENDRE

180. A profit à prendre is a right exercised by one man in the land of another, accompanied with participation in the profits of that land. In other words, it consists of a right to take a part of the soil, or produce of the land.

Profits à prendre⁹⁹ are distinguished from easements, in that an easement is a right to use or enjoy, but involves no right to take.¹ Moreover, a profit à prendre may exist in gross; that is, unconnected with any interest which the owner of the profits à prendre may have in the land.² A profit à prendre is, however, a servitude upon the land from which the profit is taken.³ It is a right to take something of profit off the land of another person.⁴ It is a right to enter another's land, and to take either a portion of the soil itself, such as sand,⁵ gravel, or other minerals, or to take some profit of the soil, in which there is a supposable value.⁶ Profits à prendre may be as various as the nature of the soil and the things which grow thereon or are imbedded in it will permit.⁷ For instance, there may be a right to mine for metals or for coal, a right to take wood or turf, or any other product of the land.⁸ A right of profit à prendre may be exercised exclusively by one person, or it may be exercised in common with one or more other persons, including the owner of the land. In such a case it is called a profit à prendre in common, or, more usually, a right of common.⁹ Rights of common were privileges which the lord of

64 L. R. A. 255, 100 Am. St. Rep. 365; *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933.

⁹⁹ From French *prendre*, Latin *prehendere*, to take.

¹ *Race v. Ward*, 4 El. & Bl. 702; *Wickham v. Hawker*, 7 Mees. & W. 63. And see *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 433; *Huntington v. Asher*, 96 N. Y. 604, 610, 48 Am. Rep. 652; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739; *Bingham v. Salene*, 15 Or. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

² *Chesterfield v. Harris*, 2 Ch. 397 (1908), C. A.

³ *Dalton v. Angus*, 6 App. Cas. 740, 796 (1881).

⁴ *Sutherland v. Heathcote*, 1 Ch. 475, C. A. (1892).

⁵ *Constable v. Nicholson*, 14 C. B. (N. S.) 23 D.

⁶ *PIERCE v. KEATOR*, 70 N. Y. 419, 26 Am. Rep. 612, *Burdick Cas. Real Property*; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656. The subject-matter of a profit à prendre must be something capable of ownership. *Race v. Ward*, 4 El. & B. 702.

⁷ A right to take water from a spring is not a profit à prendre. *Race v. Ward*, 4 El. & Bl. 702.

⁸ *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Hill v. Lord*, 48 Me. 83.

⁹ *Laws of Eng.* vol. 11, § 559.

an English manor granted to his tenants to take certain profits from his waste land. The principal rights of common were (1) common of pasture; (2) common of turbary; (3) common of estovers; (4) common of piscary. The first, or common of pasture, was a right in the tenants to turn their cattle out to graze on the lord's waste. The number of cattle which each tenant had a right to depasture was strictly regulated by the local customs.¹⁰ Common of turbary is the right to take turf or peat for fuel to burn in the tenant's house. The same term would apply to the right to take coal.¹¹ Common of estovers corresponded to the right of estovers which has already been mentioned.¹² Common of piscary is a right to fish in the lord's waters.¹³ Profits à prendre, when connected with a dominant and servient estate, are either appendant or appurtenant.¹⁴ A profit à prendre appendant was a right created prior to the statute of quia emptores.¹⁵ Before that statute, an enfeoffment by the lord of the manor of arable land entitled, ipso facto, the feoffee to certain rights with respect to other lands in the manor.¹⁶ After the passage of the statute, these rights no longer arose in connection with a grant. Consequently all profits à prendre appendant must have come into existence prior to 1290.¹⁷ They never, of course, existed in the United States. Such profits à prendre existed only in connection with arable land, and gave a right to pasture only beasts of the plow.¹⁸ Profits à prendre appurtenant are rights attached to the ownership of a certain piece of land. They depend not upon original tenure, but arise by grant or prescription. They can be enjoyed only with the dominant estate.¹⁹ With rights of common, or any

¹⁰ *Whitelock v. Hutchinson*, 2 Moody & R. 205; *Carr v. Lambert*, L. R. 1 Exch. 168.

¹¹ 2 Bl. Comm. 34. See *Wilkinson v. Proud*, 11 Mees. & W. 33; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697.

¹² *Ante*.

¹³ 2 Bl. Comm. 34. The right to fish is now very largely regulated by the fish and game laws in the various states. The right to fish in another man's waters may, however, be created by express grant or acquired by prescription. *Freary v. Cooke*, 14 Mass. 488; *Melvin v. Whiting*, 7 Pick. (Mass.) 79; *Smith v. Kemp*, 2 Salk. 637; *Benett v. Costar*, 8 Taunt. 183; *Seymour v. Courtenay*, 5 Burrows, 2814.

¹⁴ See 2 Bl. Comm. 33.

¹⁵ 18 Edw. I, c. 1.

¹⁶ 2 Co. Inst. 85; *Dunraven v. Llewellyn*, 15 Q. B. 791, 810.

¹⁷ *Laws of Eng.* vol. 11, § 661.

¹⁸ *Anon.*, Y. B. 26 Hen. VIII, p. 4, pl. 15.

¹⁹ *Cowlam v. Slack*, 15 East, 108; *Commissioners of Sewers v. Glasse*, L. R.

other profits à prendre, there is no obligation upon the servient land to maintain a supply of the things to which the right attaches.²⁰ In their method of creation, commons are similar to easements.²¹ They are subject to merger,²² and common appurtenant is extinguished by an alienation of a part of the land to which the right is attached.²³ They descend with the land, but cannot be devised separate from the land.²⁴ Rights of common are rare in the United States, but a number of cases have come before the courts, in which these rights have been considered.²⁵ Profits à prendre other than rights of common are merely matters of contract rights between the owner of the land and the grantee of the profit.²⁶ They may be created by grant²⁷ or by prescription.²⁸ Profits à prendre should not be confused with licenses. A license is a personal matter between the licensor and the licensee. It is not transferable, and is always revocable. It is not an interest in land. Profits à prendre, on the other hand, are in-

19 Eq. 134; *Baylis v. Tyssen-Amhurst*, 6 Ch. Div. 500; *Warrick v. Queens College*, 6 Ch. App. 716 (1871).

²⁰ See *Rivers v. Adams*, 3 Exch. Div. 361; *Chilton v. Corporation of London*, 7 Ch. Div. 735.

²¹ *Tottel v. Howell*, Noy, 54; *Duke of Somerset v. Fogwell*, 5 Barn. & C. 875; *Bailey v. Stephens*, 12 C. B. (N. S.) 91; *Pitt v. Chick*, Hut. 45; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652. Common appendant can be acquired only by prescription. 2 Blk. Comm. 33. And see *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Smith v. Gafewood*, Cro. Jac. 152.

²² *Bradshaw v. Eyre*, Cro. Eliz. 570; *Saundays v. Oliff*, Moore, 467.

²³ *Tyringham's Case*, 4 Coke, 36b; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Watts v. Coffin*, 11 Johns. (N. Y.) 495; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30; *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; *Bell v. Railroad Co.*, 25 Pa. 161, 64 Am. Dec. 687. But see *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715.

²⁴ *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592. But see *Welcome v. Upton*, 6 Mees. & W. 536; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30. As to apportionment of commons, see *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287.

²⁵ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592; *Inhabitants of Worcester v. Green*, 2 Pick. (Mass.) 425; *Bell v. Railroad Co.*, 25 Pa. 161, 64 Am. Dec. 687; *Trustees of Western University v. Robinson*, 12 Serg. & R. (Pa.) 29; *Carr v. Wallace*, 7 Watts (Pa.) 394; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Peck v. Lockwood*, 5 Day (Conn.) 22.

²⁶ *Anon.*, Dyer, 285, pl. 40. See *Wilson v. Mackreth*, 3 Burrows, 1824; *Cox v. Glue*, 5 C. B. 533.

²⁷ *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.

²⁸ *Warrick v. Queen's College* (1871) 6 Ch. App. 716.

terests in land, and fall within the statute of frauds.²⁹ Profits à prendre are not revocable at the will of the grantor, but continue throughout the duration of the estate or interest for which they are created.³⁰

RENTS

181. Rents are profits issuing out of land, which are to be rendered or paid periodically by the tenant. Rents, at common law, are of the following kinds:

- (a) Rent service.
- (b) Rent charge.
- (c) Rent seck.

Rents charge and seck are also known as "fee farm rents."

Rent, as usually understood, may be defined as a compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the tenant thereof.³¹ The term "rent" is used, however, in different senses, and in its largest sense it means all the profits issuing out of lands in return for their use.³² In the sense that rents issue out of the thing granted, and are no part of the thing, or of the land, itself, they are incorporeal hereditaments.³³ In other words, they are collateral to corporeal hereditaments.³⁴

Rent Service

At common law, there are three species of rent, rent service, rent charge, and rent seck.³⁵ Rent service is a reservation of rent out of land conveyed to another, and it was the only kind of rent originally known to the common law. It was called "rent service," because it was given as compensation for military or other service for which the land was originally liable.³⁶ Rent service was accompanied by tenure, and arose where the tenant held by fealty or homage, as well as by a certain rent.³⁷ The right of distress

²⁹ Webber v. Lee, 9 Q. B. D. 315, C. A. ³⁰ Laws of Eng. vol. 11, § 668.

³¹ Bouvier, Dict; 3 Kent, Comm. (12th Ed.) 460; Gugel v. Isaacs, 21 App. Div. 503, 506, 48 N. Y. Supp. 594; Clarke v. Cobb, 121 Cal. 595, 600, 54 Pac. 74.

³² Schuricht v. Broadwell, 4 Mo. App. 160, 161; Armstrong v. Cummings, 58 How. Prac. (N. Y.) 331, 332.

³³ Co. Litt. 49a; 2 Blk. Comm. 41; Payn v. Beal, 4 Denio (N. Y.) 405, 412; In re Brewer, 1 Ch. Div. 409 (1875).

³⁴ Id.

³⁵ Litt. c. 12, § 213.

³⁶ Wallace v. Harmstad, 44 Pa. 492, 501.

³⁷ Litt. §§ 213-216; Co. Litt. § 213; Ehrman v. Mayer, 57 Md. 612, 622; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342.

was an inseparable incident to it, so long as it was payable to the lord to whom fealty was due.³⁸ The statute of quia emptores, by abolishing subinfeudation, prevented the creation of a relation of tenure between the grantor and grantee when a fee was conveyed; consequently, after the passage of that statute, rent service (depending upon tenure) could not be reserved by a grantor in fee.³⁹ Such rents may exist, however, in those states in which the statute of quia emptores has not been adopted,⁴⁰ and they may exist in all states when the rent reserved is less than a fee simple.⁴¹

Rent Charge

As observed in the preceding paragraph, a rent service is a reservation of rent out of lands conveyed.⁴² A rent charge, on the other hand, is a grant of rent out of lands retained.⁴³ It is an annual, or other periodic, sum issuing out of lands, the payment of which is secured by a right of distress.⁴⁴ It is called a "rent charge," because the land is charged with a distress.⁴⁵ It arises where a man seised of lands grants by deed or will a rent to issue out of the land in fee, in tail, for life, or for years, with a clause of distress.⁴⁶ In jurisdictions where the statute of quia emptores prevails, a rent charge is also said to be created where an owner conveys his whole estate in fee simple, yet reserves to himself and to his heirs a certain rent, with right to distrain.⁴⁷ Since, after the passage of the statute of quia emptores, one conveying in fee could not reserve a rent service to himself,⁴⁸ a reservation of a rent in fee in such a case, with the right of distress, is regarded as a rent charge.⁴⁹

³⁸ Wallace v. Harmstad, 44 Pa. 492, 501; Keneg v. Elliot, 9 Watts (Pa.) 258.

³⁹ Litt. §§ 215-217; Co. Litt. 143b; Van Rensselaer v. Read, 26 N. Y. 563; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278; Bradbury v. Wright, 2 Doug. 624.

⁴⁰ See Ground Rents, *infra*.

⁴¹ Litt. §§ 214, 215; 2 Washb. Real Prop. (5th Ed.) 286.

⁴² Litt. c. 12, § 214.

⁴³ Litt. c. 12, § 218.

⁴⁴ Van Rensselaer v. Read, 26 N. Y. 558; Hosford v. Ballard, 39 N. Y. 147; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278.

⁴⁵ Co. Litt. 143b, 144a, 218; Laws of Eng. vol. 24, § 904.

⁴⁶ Franciscus v. Reigart, 4 Watts (Pa.) 98, 116; Horner v. Dellinger, 18 Fed. 495, 499.

⁴⁷ Co. Litt. § 217; People v. Haskins, 7 Wend. (N. Y.) 463, 467.

⁴⁸ See *supra*.

⁴⁹ Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104; Franciscus v. Reigart, *supra*. See Ground Rents, *infra*.

Rent Seck

A rent seck,⁵⁰ or a barren rent, is one created by agreement of the parties, or reserved, or granted by deed, without, however, any right of distress.⁵¹ There was no remedy for its recovery except the tenant's personal liability upon his covenant.⁵²

Fee Farm Rent

Rent, charge and rent seck are also designated as "fee farm rents," differing only in the incident of distress. Fee farms are lands held in fee, and so called because a farm rent is reserved upon the grant of land in fee.⁵³ A fee farm rent is therefore a rent issuing out of an estate in fee, or a perpetual rent reserved on a conveyance in fee simple.⁵⁴ The term "fee farm rent" is seldom used in this country; in fact, such rents are rarely created here.⁵⁵ The phrase is well known in England, however, and the term frequently occurs, as a synonym for rent charges, in the legislation relating to land in Ireland.⁵⁶

Ground Rents

In Pennsylvania, a form of conveyance known as a ground-rent deed is well known.⁵⁷ A ground rent is defined as a rent reserved to a grantor and his heirs, in connection with a grant of land

⁵⁰ From Latin *siccus*, dry, barren.

⁵¹ 2 Blk. Comm. 42; *Cornell v. Lamb*, 2 Cow. (N. Y.) 652, 659; *People v. Haskins*, 7 Wend. (N. Y.) 463, 467; *Wallace v. Harmstad*, 44 Pa. 492, 501.

⁵² *Rochester Lodge, No. 21, A. F. & A. M., v. Graham*, 65 Minn. 457, 68 N. W. 79, 37 L. R. A. 404. A right of distress was given, however, by the statute of 4 Geo. II, c. 28, § 5.

⁵³ Co. Litt. 143b, n. 5; *Bradbury v. Wright*, 2 Doug. (K. B.) 624, 627; *De Peyster v. Michael*, 6 N. Y. 467, 497, 57 Am. Dec. 470.

⁵⁴ *De Peyster v. Michael*, *supra*; *Edwards v. Noel*, 88 Mo. App. 434, 440.

⁵⁵ For an early illustration in this country of a fee farm rent, see *Scott v. Lunt*, 7 Pet. (U. S.) 596, 8 L. Ed. 797, setting forth a grant, in 1799, by George and Martha Washington to Lunt, his heirs and assigns, forever, a parcel of land in Alexandria, and reserving to Gen. Washington, his heirs and assigns, a rental of \$73, to be paid yearly, forever, by Lunt, his heirs and assigns.

⁵⁶ See, for example, Land Law (Ireland) Act, 1881, 44 & 45 Vict. c. 49, §§ 11, 12, 26, 29.

⁵⁷ While the practice of conveying lands with a reservation of rent has been, perhaps, more common in Pennsylvania than in other states, yet the formerly common manorial leases in New York, consisting of a perpetual grant subject to a perpetual rent, and the forever renewable lease known in Maryland, are to all practical purposes the same thing in result as the ground-rent deeds of Pennsylvania. See *Millard v. McMullin*, 68 N. Y. 345; *Tyler v. Heidorn*, 46 Barb. (N. Y.) 439; *Banks v. Haskie*, 45 Md. 207; *Kraft v. Egan*, 76 Md. 243, 25 Atl. 469. See, also, *Stephenson v. Haines*, 16 Ohio St. 478; *Swoll v. Oliver*, 61 Ga. 248.

in fee simple, out of the land conveyed.⁵⁸ It thus corresponds to a rent charge, as influenced by the effect of the statute *quia emptores*.⁵⁹ Where, however, that statute is not a part of the common law, as in Pennsylvania,⁶⁰ such a reservation of rent is held to be a rent service, and not a rent charge.⁶¹ Being a rent service, it is real estate,⁶² and may be sold under an execution sale as such.⁶³ It is assignable,⁶⁴ and the heirs and assigns of the original grantor may recover the land in case the rent is not paid.⁶⁵ It is also apportionable.⁶⁶ Owing, however, to the fact that a ground rent is a separate estate from the ownership of the land itself, the owner of the rent is not bound to know the manner of the apportionment of the rent among the possibly various owners of the land.⁶⁷

Estates in Rents

For the purpose of creating estates in rent, the same words of limitation are to be used as in creating estates in corporeal property.⁶⁸ Estates so created, however, are good only to the extent of the grantor's interest in the rent or in the land out of which the rent issues. Estates in rent are subject to dower and curtesy, like corresponding corporeal estates;⁶⁹ and when the estate in rent is one of inheritance it descends to the heirs.⁷⁰ Rents may

⁵⁸ *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 183; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; *Bouvier, Law Dict.*

⁵⁹ *Supra*; *Kenege v. Elliott*, 9 Watts (Pa.) 258; *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 183; *Bouvier, Law Dict.*

⁶⁰ *Wallace v. Harmstad*, 44 Pa. 492.

⁶¹ *In re WHITE'S ESTATE*, 167 Pa. 206, 31 Atl. 569, *Burdick Cas. Real Property*; *Farmers' & Mechanics' Bank v. Schreiner*, 1 Miles (Pa.) 291. See *Van Derzee v. Van Derzee*, 30 Barb. (N. Y.) 331; *Wallace v. Harmstad*, 44 Pa. 492.

⁶² *Cobb v. Biddle*, 14 Pa. 444; *In re WHITE'S ESTATE*, 167 Pa. 206, 31 Atl. 569, *Burdick Cas. Real Property*. See *McCammon v. Cooper*, 69 Ohio St. 366, 69 N. E. 658.

⁶³ *Hurst v. Lithgrow*, 2 Yeates (Pa.) 24, 1 Am. Dec. 326; *Farmers' & Mechanics' Bank v. Schreiner*, 1 Miles (Pa.) 291.

⁶⁴ *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁶⁵ *Robert v. Ristine*, 2 Phila. (Pa.) 62; *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Van Rensselaer v. Barringer*, 39 N. Y. 9.

⁶⁶ *Voegtly v. Railroad Co.*, 2 Grant, Cas. (Pa.) 243; *Paul v. Vannie*, 1 Clark (Pa.) 332; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357, 31 Am. Dec. 513.

⁶⁷ *McQuigg v. Morton*, 39 Pa. 31.

⁶⁸ *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Van Rensselaer v. Read*, 26 N. Y. 558.

⁶⁹ *Litt.* § 35; *Co. Litt.* 29a, 30a; 2 Washb. *Real Prop.* (5th Ed.) 288.

⁷⁰ See *Sacheverel v. Frogate*, 1 Vent. 161. But it may be a chattel only, as when reserved on a lease for years. *Knolles' Case*, *Dyer*, 5b.

be created either by deed⁷¹ or by prescription.⁷² When created by deed, it may be a grant of a rent to a person to whom no estate in the land is conveyed, or by a reservation of a rent out of land granted.⁷³ Rents may be created by any form of conveyance which is sufficient to transfer other incorporeal hereditaments, and they also may be granted in trust, or conveyed by way of uses. After a rent has been created, it may be transferred like any other estate.⁷⁴

The rules governing assignments of rent of the land out of which they issue, and of the reversion, if there be one, have already been considered.⁷⁵ Although the rule was otherwise at common law, the owner of a rent may now divide it, or it may descend to several heirs.⁷⁶ Moreover, when the owner of a rent service purchases part of the land out of which the rent issues, or releases a part of the rent to the owner of that land, the rent is apportioned *pro rata*.⁷⁷ With a rent charge, however, it is otherwise, and the same acts would cause an extinguishment of the rent, because no apportionment is possible, except by a new agreement of the parties.⁷⁸ It is otherwise, however, when part of the land has come to the owner of the land by descent, instead of by his own act.⁷⁹ An eviction of the tenant from the land out of which the rent is reserved will extinguish the rent, and if the eviction is by the owner of the rent, even from only a part of the land, the rent is extinguished.⁸⁰ The doctrine of merger applies to rents.⁸¹ Dis-

⁷¹ *Wallace v. Harmstad*, 44 Pa. 492; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; *Taylor v. Vale*, Cro. Eliz. 166. Cf. *Williams v. Hayward*, 1 El. & El. 1040.

⁷² *Wallace v. Presbyterian Church*, 111 Pa. 164, 2 Atl. 347.

⁷³ *Scott v. Lunt*, 7 Pet. (U. S.) 596, 8 L. Ed. 797; *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

⁷⁴ *Scott v. Lunt*, 7 Pet. (U. S.) 596, 8 L. Ed. 797; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. Cf. *Trulock v. Donahue*, 76 Iowa, 758, 40 N. W. 696; *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁷⁵ *Ante*, Transfer of Estates for Years.

⁷⁶ *Cook v. Brightly*, 46 Pa. 439; *Farley v. Craig*, 11 N. J. Law, 262. But see *Ryerson v. Quackenbush*, 26 N. J. Law, 236.

⁷⁷ Co. Litt. § 222; *Paul v. Vannie*, 1 Clark (Pa.) 332; *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337.

⁷⁸ *Dennett v. Pass*, 1 Bing. N. C. 388. But see *Farley v. Craig*, 11 N. J. Law, 262. See, also, *Church v. Seeley*, 110 N. Y. 457, 18 N. E. 117.

⁷⁹ *Cruger v. McLaury*, 41 N. Y. 219, 223.

⁸⁰ Co. Litt. 148b; 6 Bac. Abr. 49; *Lewis v. Payn*, 4 Wend. (N. Y.) 423. Compare *Folts v. Huntley*, 7 Wend. (N. Y.) 210. And see *Watts v. Coffin*, 11 Johns. (N. Y.) 499.

⁸¹ *Cook v. Brightly*, 46 Pa. 439; *Philips v. Clarkson*, 3 Yeates (Pa.) 124;

treas, as a remedy for rent, has already been considered, as well as covenants for the payment of rent, and conditions of re-entry for its nonpayment.⁸² The remedy, at common law, by which rent may be recovered by action, may be governed by the form of instrument creating the rent. For example, if the deed contains a covenant, or if the rent is created by indenture, covenant is the proper form of action;⁸³ while, if the creation is by a deed poll, that is, sealed and signed only by the creator of the rent, assumpsit would be the remedy.⁸⁴ Debt for rent lies, however, in nearly all cases.⁸⁵

FRANCHISES

182. A franchise is a special privilege or immunity of a public nature, conferred upon individuals by legislative grant, and which cannot legally be exercised without such grant.⁸⁶

Franchises are often called incorporeal hereditaments.⁸⁷ They may be bought and sold, and may descend to heirs, and may be

Bunting's Estate, 16 Wkly. Notes Cas. (Pa.) 335; *Van Rensselaer v. Gifford*, 24 Barb. (N. Y.) 349.

⁸² See *Estates for Years, Landlord and Tenant*, ante.

⁸³ *Brown v. Johnson*, 4 Rawle (Pa.) 146; *Maule v. Weaver*, 7 Pa. 329; *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252. And see *Thursby v. Plant*, 1 Lev. 259; *Stevenson v. Lambard*, 2 East, 575. But cf. *Milnes v. Branch*, 5 Maule & S. 411.

⁸⁴ *Goodwin v. Gilbert*, 9 Mass. 510; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Hinsdale v. Humphrey*, 15 Conn. 431. And cf. *Falhers v. Corbret*, 2 Barnard, 386; *Johnson v. May*, 3 Lev. 150. By statute in Pennsylvania, the remedy of covenant is given for rent in arrears, regardless of the former common-law distinction between a deed poll and a deed of indenture. See *Louer v. Hummel*, 21 Pa. 450, 454.

⁸⁵ *Farewell v. Dickenson*, 6 Barn. & C. 251; *Reade v. Johnson*, Cro. Eliz. 242; *Newcomb v. Harvey*, Carth. 161; *Stroud v. Rogers*, 6 Term R. 63, note; *Case of Loringe's Ex'rs*, Y. B. 26 Edw. III, p. 10, pl. 5; *Gibson v. Kirk*, 1 Q. B. 850; *Thomas v. Sylvester*, L. R. 8 Q. B. 368. But see *Marsh v. Brace*, Cro. Jac. 334; *Bord v. Cudmore*, Cro. Car. 183; *Pine v. Leicester*, Hob. 37; *Humble v. Glover*, Cro. Eliz. 328; *Webb v. Jiggs*, 4 Maule & S. 113.

⁸⁶ See *Thompson v. Moran*, 44 Mich. 602, 604, 7 N. W. 180, 181; *Maestri v. Board of Assessors*, 110 La. 517, 34 South. 658, 661.

⁸⁷ 2 Blk. Comm. 21, 37; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *Wilmington & W. R. Co. v. Reid*, 13 Wall. (U. S.) 264, 20 L. Ed. 568.

devised.⁸⁸ "All the elementary writers treat franchises as real property, though incorporeal in their nature."⁸⁹ With reference, however, to franchises held by corporations, as most franchises are in modern times, the term hereditament is applied "with some impropriety," as pointed out by Chancellor Kent,⁹⁰ since such franchises have no heritable quality, inasmuch as a corporation, in absence of express limitation, is supposed never to die.⁹¹ Moreover, corporate franchises are not generally subject to sale or transfer,⁹² unless the right is given by statute,⁹³ and, in recent years, franchises are usually granted for a term of years, rather than in fee.⁹⁴ A franchise is defined by Blackstone⁹⁵ as a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.⁹⁶ It is otherwise defined as a special privilege conferred by the government on individuals, and which does not belong to the citizens of a country generally by common right.⁹⁷ Franchises contain, as said by Chancellor Kent, "an implied covenant on the part of the government not to invade the rights vested, and, on the part of the grantees, to execute the conditions and duties

⁸⁸ *Enfield Tollbridge Co. v. Railroad Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716; *Norwich Gaslight Co. v. Gas Co.*, 25 Conn. 19; 2 Washb. Real Prop. (5th Ed.) 310; *Greer v. Haugabook*, 47 Ga. 282. But see *Foster v. Fowler*, 60 Pa. 27; *Yellow River Imp. Co. v. Wood Co.*, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92.

⁸⁹ *Randolph v. Larned*, 27 N. J. Eq. 557, 561. The word "franchise" is a term of broad and various meanings. For example, in a popular sense, political rights are often called "franchises," as the electoral franchise. *Pierce v. Emery*, 32 N. H. 484, 507.

⁹⁰ 3 Kent, Comm. 459.

⁹¹ A railroad franchise is regarded, however, as an incorporeal hereditament, as distinguished from land, which is a corporeal hereditament. *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700.

⁹² *Randolph v. Larned*, 27 N. J. Eq. 557; *Carpenter v. Mining Co.*, 65 N. Y. 43; *Wright v. Light Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979.

⁹³ *Wright v. Light Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74; *Chapman Valve Mfg. Co. v. Water Co.*, 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830.

⁹⁴ *McGowen v. Stark*, 1 Nott & McC. (S. C.) 387, 9 Am. Dec. 712; *Clark v. White*, 5 Bush (Ky.) 353; *Conway v. Taylor*, 1 Black (U. S.) 603, 17 L. Ed. 191.

⁹⁵ 2 Comm. 37, following the definition of Finch, 164. See, also, 3 Cruise, Dig. 278.

⁹⁶ And see *State v. City of Topeka*, 30 Kan. 657, 2 Pac. 587; *Lasher v. People*, 183 Ill. 226, 232, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103; *Thompson v. People*, 23 Wend. (N. Y.) 537, 578; *Thompson v. Moran*, 44 Mich. 602, 604, 7 N. W. 180.

⁹⁷ *Martens v. People*, 186 Ill. 314, 318, 57 N. E. 871; *St. Louis Gas Light Co. v. Power Co.*, 16 Mo. App. 52, 72; *Rhinehart v. Redfield*, 93 App. Div. 410, 414, 87 N. Y. Supp. 789; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 595, 10 L. Ed. 274.

prescribed in the grant."⁹⁸ All franchises are supposed to be for the public good,⁹⁹ and a franchise is in the nature of a contract, being, on the one hand, a grant by the state or a municipality of certain rights and privileges which could not be otherwise exercised, in consideration for certain benefits to the public, to be supplied by the grantee. A failure of the grantees to carry out the purposes for which the franchise was granted gives cause for forfeiture of the franchise. Forfeiture, however, can be obtained only at the suit of the government.¹ A franchise may be a monopoly,² but it is not necessarily so.³ Where an exclusive franchise has been granted, it assumes the character of a contract which is protected by the constitutional provisions against impairing the obligation of the contract, and therefore no conflicting franchises can be granted.⁴ An exclusive franchise, however, like other property, may be taken under the right of eminent domain.⁵

Among the familiar illustrations of franchises may be mentioned rights to collect tolls and charges in connection with public ferries,⁶ turnpike roads,⁷ public markets,⁸ public wharves,⁹ and public

⁹⁸ 3 Kent, Comm. 458, quoted in *Thompson v. People*, 23 Wend. (N. Y.) 537, 578.

⁹⁹ *Rochester, H. & L. R. Co. v. Railroad Co.*, 44 Hun (N. Y.) 206.

¹ *Chicago City Ry. Co. v. People*, 73 Ill. 541; *City of Jeffersonville v. The John Shallcross*, 35 Ind. 19; *Greer v. Haugabook*, 47 Ga. 282.

² *Slingerland v. Contracting Co.*, 43 App. Div. 215, 60 N. Y. Supp. 12; *Reg. v. Halifax County Ct. Judge* [1891] 1 Q. B. 793. Compare *Knoup v. Bank*, 1 Ohio St. 603, 614.

³ *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571; *Milhan v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938.

⁴ *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; *Boston & L. R. Corp. v. Railroad Co.*, 2 Gray (Mass.) 1; *McRoberts v. Washburne*, 10 Minn. 23 (Gil. 8). But see *Hopkins v. Railroad Co.*, 2 Q. B. Div. 224; *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44.

⁵ *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535; *In re Towanda Bridge Co.*, 91 Pa. 216.

⁶ *Dyer v. Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *In re Fay*, 15 Pick. (Mass.) 243; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314.

⁷ *Matter of People of New York*, 70 Misc. Rep. 72, 128 N. Y. Supp. 29; *Powell v. Sammons*, 31 Ala. 552; *Blood v. Woods*, 95 Cal. 78, 30 Pac. 129; *State v. Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

⁸ *Maestri v. Board of Assessors*, 110 La. 517, 34 South. 658; *Twelfth St. Market Co. v. Railroad Co.*, 142 Pa. 580, 21 Atl. 902, 989.

⁹ *Sullivan v. Lear*, 23 Fla. 463, 2 South. 846, 11 Am. St. Rep. 388; *Flandreau v. Elsworth*, 151 N. Y. 473, 45 N. E. 853; *Pelham v. The B. F. Woolsey*, 16 Fed. 418.

bridges;¹⁰ rights to construct and operate railroads;¹¹ and rights to construct and maintain water plants,¹² gas plants,¹³ and electric light plants.¹⁴ One of the most usual franchises in earlier times was the right to maintain and operate a public ferry,¹⁵ and the decisions relating to such rights have served to shape the law regulating franchises in general.

Thus, it is held that a ferry is an incorporeal hereditament,¹⁶ and that it can be transferred only by deed.¹⁷ "A ferry is not granted for the benefit of the owner, but for the benefit of the public and the ferry owner must give attendance at due times, keep a boat in proper order, and take but reasonable toll."¹⁸

A riparian owner has no right to establish a ferry on a navigable river without authority from the state.¹⁹ When a franchise for a ferry has been accepted by the grantees, they are bound to provide accommodation for the public, and are liable for injuries caused by defect in their boats and other appliances.²⁰ On the other hand, they become entitled to take toll.²¹ If an exclusive franchise has been granted for maintaining a ferry, it includes the right to enjoy it, free from interference by contiguous and injurious competition,²² and if another ferry should be established so near

¹⁰ *Truckee & T. Turnpike Road Co. v. Campbell*, 44 Cal. 89; *Southampton v. Jessup*, 162 N. Y. 122, 56 N. E. 538; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938.

¹¹ *Driscoll v. Railroad Co.*, 65 Conn. 230, 32 Atl. 354, 357; *Denver & S. Ry. Co. v. Railway Co.*, 2 Colo. 673, 682.

¹² *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Frankfort v. Stone*, 108 Ky. 400, 56 S. W. 679, 22 Ky. Law Rep. 25; *State ex rel. Attorney General v. Water Co.*, 107 Wis. 441, 83 N. W. 697.

¹³ See "Gas," in Cyc.

¹⁴ *Purnell v. McLean*, 98 Md. 589, 56 Atl. 830.

¹⁵ *Ipswich v. Browne*, Sav. 11; *Peter v. Kendal*, 6 Barn. & C. 703, 711; *Mabury v. Ferry Co.*, 9 C. C. A. 174, 60 Fed. 645. In Iowa, such a right has been held to be personal property. *Lippencott v. Allander*, 27 Iowa, 460, 1 Am. Rep. 299.

¹⁶ *Peter v. Kendal*, 6 B. & C. 703.

¹⁷ *Bird v. Higginson*, 2 Ad. & El. 696, 6 Ad. & El. 824.

¹⁸ *Laws of Eng.* vol. 14, p. 558; *Dibden v. Skirrow* (1807) 1 Ch. 437; *Simpson v. A. G.* [1904] A. C. 476, 490.

¹⁹ *Mills v. Learn*, 2 Or. 215; *Prosser v. Wapello County*, 18 Iowa, 327. But see *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Cooper v. Smith*, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658.

²⁰ *Southcote's Case* (1601) 4 Co. Rep. 83b; *Willoughby v. Horridge*, 12 C. B. 742.

²¹ *Ferrell v. Woodward*, 20 Wis. 458; *Willoughby v. Horridge*, 12 C. B. 742.

²² *Huzzey v. Field*, 2 Crompt. M. & R. 432; *Loig v. Beard*, 7 N. C. 57; *Aikin v. Railway Corp.*, 20 N. Y. 370. So building a bridge may interfere with a ferry. *Gates v. McDaniel*, 2 Stew. (Ala.) 211, 19 Am. Dec. 49; *Smith*

as to produce such effect, it would constitute a nuisance.²³ Franchises for bridges and turnpike roads are subject to the same general rules as those for ferries.²⁴

v. Harkins, 38 N. C. 613, 44 Am. Dec. 83. Cf. *Newton v. Cubitt*, 12 C. B. (N. S.) 32, affirmed 13 C. B. (N. S.) 864.

²³ *Midland Terminal & Ferry Co. v. Wilson*, 28 N. J. Eq. 537; *Collins v. Ewing*, 51 Ala. 101; *Walker v. Armstrong*, 2 Kan. 198.

²⁴ *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; *Norris v. Teamsters' Co.*, 6 Cal. 590, 65 Am. Dec. 535; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773.

PART III

MORTGAGES AND OTHER LIENS UPON REAL PROPERTY

CHAPTER XVIII

MORTGAGES

(A) GENERAL PRINCIPLES

- 183. Mortgages in the Early English and Roman Law.
- 184. Nature and Definition.
- 185. Parties to a Mortgage.
- 186. Subject-Matter of Mortgage.
- 187. Form of Mortgages.
- 188. Consideration of Mortgages.
- 189. Rights and Liabilities of Mortgagor and Mortgagee.
- 190. In General.
- 191. Possession and Use of Mortgaged Premises.
- 192. Accounting by the Mortgagee.
- 193. Insurance and Taxes.
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- 195. Injuries to the Premises.
- 196. Sale of the Mortgaged Property.
- 197. Assignment of Mortgages.

MORTGAGES IN THE EARLY ENGLISH AND ROMAN LAW

183. For an explanation of many of the principles relating to modern mortgages, it is necessary to refer to the early English and Roman law.

The mortgage or pledge of property to secure the performance of some act or obligation has been common in all ages, and among all peoples, wherever the notions of property and individual ownership have been recognized.¹ Among the ancient Romans, and in

¹ In Hebrew law, land could be mortgaged, but only till the next jubilee, which occurred every fifty years. At the jubilee, the original owner or his heirs were reinstated in the land which was discharged from all debt. The Hebrew word is "arab," to mortgage or pledge. See Neh. v. 3.

In Mohammedan law, there is no difference between the pledge of goods

the later imperial law of Rome, as well as in the modern civil law, we find the doctrine of mortgages well established.² Mortgages were known to the Anglo-Saxons in England long before the coming of William the Conqueror,³ and in later English times they became a substantial part of the jurisprudence of both the common law and of equity.⁴ In our own modern law, the subject of mortgages occupies one of the most important fields in the law of property.

Anything which may be considered as property, whether denominated in the law as real or personal property, may be the subject of mortgage.⁵ A mortgage of personal property is known as a "chattel mortgage," but the discussion of mortgages in this work will include only mortgages of real property.

The word "mortgage" is derived from the French words "mortgage," meaning "dead pledge." In early English law there were two forms of real property pledges. One was known as "vivum vadium," the other as "mortuum vadium."⁶ The first form disappeared from use, but the second form, the "mortuum vadium," developed in time into our common-law mortgage, and the French equivalent (mort gage) of the Latin mortuum vadium became es-

and the mortgage of land. Priority in either case depends upon the possession, not upon time. Lands, however, held of the church are not subject to mortgage. Morley, *Digest of Cases in India*, I, 455.

² *Infra*—fiducia, pignus, hypotheca.

³ The custom of mortgaging lands is shown by the land charters of the Anglo-Saxons. See Birch, *Cartularium, Saxonice*, III, 284, No. 1064. *Domesday Book* also evidences the custom. See P. & M. II, 118, note 1. The Teutonic nations, and, consequently, the Anglo-Saxons, were doubtless in the habit of pledging their lands in their native country or in that of their adoption, as may be clearly inferred even from Tacitus (*De Mor. Ger.*), long before they were acquainted with any part of the Roman law. Colquhoun, *Rom. Civil Law*, § 1495.

⁴ As to the different theories of a mortgage at common law and in equity, see *infra*.

⁵ *Curtis v. Root*, 20 Ill. 518, 522; *NELIGH v. MICHENOR*, 11 N. J. Eq. 539, *Burdick Cas. Real Property*.

⁶ In the *vivum vadium* (live pledge), the rent and profits of the land were taken by the gagee in possession and applied to the reduction of the debt. The pledge (gage) was alive; that is, it redeemed itself by working off the debt and interest. In the *mortuum vadium*, the rents and profits did not go in reduction of the debt, but were kept by the gagee in possession in addition to his claim for the debt and interest. The pledge was thus dead to the debtor. *Glanvil*, X, 6, 8; 2 *Blk. Comm.* 157. In the time of Littleton, another meaning was given to "mortuum vadium," namely, the pledge is dead to the debtor upon his failure to pay the debt at the time agreed, since, thereupon, the creditor's title became absolute. *Litt. III*, c. 5, § 332. There was also another form of mortgage known as a Welsh mortgage. This resembled the *vivum vadium* in part. The rents and profits were taken by the creditor merely as

established as the legal term.⁷ The party who gives a mortgage is known as the "mortgagor," while the party to whom it is given is known as the "mortgagee."

Mortgages in the Roman and Civil Law

A momentary reference to the forms of mortgage in the Roman and civil law should be of interest for a twofold reason. It will serve to show the evolution of the theory of mortgage in that great system of jurisprudence, and also the origin of the theory of mortgage that now prevails in most of our American states, since our equitable doctrines in regard to mortgages have been derived from that source.⁸

Fiducia

The first form of pledge, or mortgage, among the Romans was simple. The borrower made an actual conveyance of the property to the lender, entering into an agreement, known as "fiducia," that if the loan was paid at the stipulated time the lender would reconvey the property to the borrower. Ownership of the property was thus vested in the lender, who might sell the property at any time, leaving the borrower only a personal action against the lender. In fact, the borrower was left to the honor and faith (fides) of the lender, because, even if the borrower paid his debt, he could never be sure he would recover the property conveyed as security.⁹

Pignus

The unsatisfactory transaction of "fiducia" led, in time, to a change in the law. This was brought about by an edict of the prætor. Under the arrangement of "fiducia," the borrower obtained his loan at a great risk. The prætor provided, however, that while the property should, as before, be placed in the possession of the lender, nevertheless, the ownership of it should remain with the borrower. His transaction was known as "pignus," or pledge. The possession of the thing pledged, and even the right of sale (under certain con-

a substitute for the interest, but the principal debt had to be paid by the debtor. The creditor could not compel payment, and the debtor could redeem at any time, no matter how long, upon payment of the debt. He had a sort of perpetual right of redemption. Welsh mortgages are, however, practically obsolete. 2 Blk. Comm. 157; 1 Washb. Real Prop. 476; *Livingston v. Story*, 11 Pet. (U. S.) 388, 9 L. Ed. 746; *Talbot v. Braddil*, 1 Vern. 394; *Yates v. Hambley*, 2 Atk. 360; *Cassidy v. Cassidy* (1889) 24 L. R. Ir. 577. See Digby, *Hist. Real Prop.* (4th Ed.) 282, and 1 Jones, *Mortg.* (5th Ed.) § 1, for a description of the obsolete *vivum vadium*, and the Welsh mortgage.

⁷ Litt. III, c. 5, § 332; Co. Litt. II, 205a; 2 Blk. Comm. 157.

⁸ *Longwith v. Butler*, 8 Ill. 32, 36; *Gilman v. Telegraph Co.*, 91 U. S. 603, 615, 23 L. Ed. 405.

⁹ Hunter, *Rom. Law*, 430; *Sohm's Inst. Rom. Law*, 352.

ditions), were with the lender, but the borrower had all the rights and remedies of ownership against all persons. If the borrower paid his debts, and meanwhile the lender had sold the property, the borrower had a right, an owner's right, to recover it from any one who may have obtained possession of it.¹⁰

Hypotheca

It will be noted that in "fiducia" the ownership of the security passes to the lender, and that in "pignus" only the possession is given to him. The last step in the development of the Roman law of mortgage was brought about by a further prætorian edict some time later. It frequently happened under "pignus" that the lender did not care to have possession of the thing pledged, while, on the other hand, the borrower desired to retain it. By a new action granted by the prætor, "actio hypothecaria," a lender, if unpaid, was permitted to take possession of anything pledged, when it had been agreed between him and the borrower that it should be a pledge, although possession had not originally been given to the lender. This transaction became, therefore, the "hypotheca" of the Roman law. It gave the creditor a right, on nonpayment of the debt, to get possession of the thing hypothecated (i. e., placed under a charge, or obligation), and also a right to sell the thing for the satisfaction of his claim.¹¹ A practical security was thus developed, and in the "hypotheca" we see the origin of our English notion of the equitable theory of mortgage.¹²

¹⁰ Pignus. Sohm (3d Ed.) 353; Hunter, 432.

¹¹ Sohm, 354; Hunter, 433. And see *Lovell v. Cragin*, 136 U. S. 130, 10 Sup. Ct. 1024, 34 L. Ed. 372; *Code Pr. La.* art. 61; *Taylor v. Hudgins*, 42 Tex. 244, 247.

¹² In the modern civil law, in connection with the law governing security for debt, the technical terms "pledge," "antichresis," "privilege," and "hypothec" are met with. Pledge is an agreement by which a debtor hands over to his creditor property to secure a debt. A pledge of personal property is called a "pawn"; a pledge of real property is called "antichresis." The agreement of antichresis can be created only by writing, and by it the creditor acquires the right to collect the revenues of the realty, applying them to the interest on the debt, and also to the reduction of the principal, if sufficient for that purpose. It will be observed, therefore, that modern antichresis corresponds to the old *vivum vadium* of the English law. A "privilege" is a right which a creditor has to be preferred to other creditors. "Hypothec," or mortgage, is a right to subject immovable property to a charge for the satisfaction of an obligation. It applies only to immovables. Movable property cannot be subject to hypothec, or mortgage, in the civil law. See, in general, *French Civil Code*, §§ 2071-2119; *Spanish Civil Code* (applying also to *Puerto Rico* and the *Philippines*) §§ 1857-1875. As stated previously, however, in connection with the distinction between movables and immovables, in the civil law, immovables include things intended "by destination" for the use of the land. In this sense, therefore, a mortgage of a plantation may include a mule

NATURE AND DEFINITION OF A MORTGAGE

184. The definition of a mortgage depends upon the theory of its nature. In this country there are two well-recognized theories regarding mortgages. One is known as the common-law, or legal, or title theory; the other, as the equitable or lien theory.
- (a) The common-law theory regards a mortgage as an estate in land created by a conveyance, and the mortgagee as the owner of the land. It is an estate upon a condition subsequent.
 - (b) The equitable or lien theory regards a mortgage as a mere security for a debt, and the mortgagee as having only a lien. The title remains in the mortgagor.

The Common-Law or Title Theory

At common law, a mortgage of land is an absolute conveyance of the same by deed with a defeasance clause.¹³ It is a conveyance of an estate for the security of a debt, or for the performance of some act, to become void upon the payment, or performance of it.¹⁴ In former times, there was a deed of feoffment, accompanied with livery of seisin, although at the present time a deed of bargain and sale is generally used.¹⁵ At common law the title to the entire estate passes to the mortgagee, who is the owner, and entitled to exclusive possession. It is, however, an estate on condition subsequent; that is, the mortgagee has an estate which may be defeated by the performance on the part of the mortgagor of the condition. The time fixed in the deed for the payment of the debt, or for the performance of any other condition, was known as the "law day." Should the mortgagor fail upon the expiration of such day to pay the debt, or to perform the other condition, whatever it may have been, the estate became absolute in the mortgagee.¹⁶ If, however,

placed thereon, although a "chattel mortgage," as understood in our system, is unknown. See *Moussier v. Zuntz*, 14 La. Ann. 15.

¹³ 2 Washb. Real Prop. (5th Ed.) 36. And see *Mitchell v. Burnham*, 44 Me. 286; *Erskine v. Townsend*, 2 Mass. 493, 3 Am. Dec. 71; *Hoffman v. Mackall*, 5 Ohio St. 124, 130, 64 Am. Dec. 637; *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*.

¹⁴ 4 Kent, Comm. 133; *Eldridge v. Pierce*, 90 Ill. 474, 483; *Murray v. Walker*, 31 N. Y. 399, 400; *In re Bloom*, Fed. Cas. No. 1,557; *Helfenstein's Estate*, 135 Pa. 293, 294, 20 Atl. 151; *Gassert v. Bogh*, 7 Mont. 585, 597, 19 Pac. 281, 1 L. R. A. 240.

¹⁵ *Montgomery v. Bruere*, 4 N. J. Law, 300, 310. As to deeds of feoffment and bargain and sale, see post.

¹⁶ *Pickett v. Buckner*, 45 Miss. 226; *South Omaha Sav. Bank v. Levy*,

the debt was paid, or the other condition performed, at the agreed time, the estate of the mortgagee was defeated, and the mortgagor was entitled to a reconveyance to him of the land, which could be compelled, should the mortgagee refuse.¹⁷

The Equitable or Lien Theory

The English courts of equity, following the theory of the civil law, regarded a mortgage, although created by a deed of absolute conveyance with a defeasance clause, as a security either for a debt or for some other condition to be performed. The mortgagor was regarded as the real or beneficial owner, the mortgagee having only a lien on the land.¹⁸ The common-law doctrine that the estate of the mortgagee became absolute on the default of the mortgagor often resulted in injustice to both parties—to the mortgagee, because he had no remedy to recover the balance of his debt, if the mortgaged property was inadequate; and to the mortgagor, because the value of the estate mortgaged was often greatly in excess of the amount of the debt secured. This inequality in the law was remedied by the courts of equity. They recognized a right in the mortgagor to redeem, even after the "law day," by paying the amount due, with interest; that is, the real intention of the parties to give a security was effectuated.¹⁹ This right was termed the "equity of redemption."²⁰ Originally, after the right of redemption was recognized, a mortgagor was permitted to redeem at any time, no matter how long, after the "law day." Later, however, the mortgagee was permitted to file a bill in equity for the purpose of cutting off or foreclosing this right, by having a day set when the mortgagor must redeem, or else lose his right to do so.²¹ The mortgagee's interest in the land thus became absolute upon the failure of the mortgagor to redeem by the appointed day.²²

1 Neb. (Unof.) 255, 95 N. W. 603; *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293; *Brobst v. Brock*, 10 Wall. (U. S.) 519, 19 L. Ed. 1002.

¹⁷ *BARRETT v. HINCKLEY*, 124 Ill. 32, 43, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*.

¹⁸ *Schumann v. Sprague*, 189 Ill. 425, 59 N. E. 945; *Watkins v. Vrooman*, 51 Hun, 175, 5 N. Y. Supp. 172; *Craft v. Webster*, 4 Rawle (Pa.) 242; *VERNER v. BETZ*, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387, *Burdick Cas. Real Property*.

¹⁹ 1 Jones, *Mortg.* (5th Ed.) § 10.

²⁰ *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*.

²¹ 1 Jones, *Mortg.* (5th Ed.) 1538.

²² For the distinction between this form of foreclosure, known as "strict foreclosure," and foreclosure under an order of sale, see post.

Prevalence of the Equitable Theory

In a majority of our American states, either by force of statute or judicial decision, the common-law or title theory of mortgage is abrogated, and the equitable or lien theory adopted. In other words, a mortgage is a mere security or lien; the title to the mortgaged premises remaining in the mortgagor.²³

In a number of states, however, the common-law theory prevails, and the mortgagee is regarded as the owner.²⁴ In all such states, however, the common-law doctrine has been more or less modified by statute or by equitable principles. The mortgagor's equity of redemption is recognized in all of them. In some states, the theory of mortgage depends upon the character of the court in which the question arises; the common-law theory being upheld in courts of law, the equitable theory in courts of equity.²⁵ In a few states,

²³ *Booker v. Castillo*, 154 Cal. 672, 98 Pac. 1067; *Malsberger v. Parsons*, 1 Boyce (Del.) 254, 75 Atl. 698; *Phillips v. Bond*, 132 Ga. 413, 64 S. E. 456; *Baldwin v. Moroney*, 173 Ind. 574, 91 N. E. 3, 30 L. R. A. (N. S.) 761; *Fitzgerald v. Flannagan* (Iowa) 125 N. W. 995; *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151; *Gerhardt v. Ellis*, 134 Wis. 194, 114 N. W. 495; *McMahon v. Russell*, 17 Fla. 698; *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823; *Chick v. Willetts*, 2 Kan. 384; *Woolley v. Holt*, 14 Bush (Ky.) 788; *Duclaud v. Rousseau*, 2 La. Ann. 168; *Caruthers v. Humphrey*, 12 Mich. 270; *Adams v. Corrison*, 7 Minn. 456 (Gil. 365); *Gallatin Co. v. Beattie*, 3 Mont. 173; *Kyger v. Ryley*, 2 Neb. 20; *Hurley v. Estes*, 6 Neb. 386; *Hyman v. Kelly*, 1 Nev. 179; *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307; *Wright v. Henderson*, 12 Tex. 43.

²⁴ *Toomer v. Randolph*, 60 Ala. 356; *Kannady v. McCarron*, 18 Ark. 166; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Carroll v. Balance*, 26 Ill. 9, 79 Am. Dec. 354; *Nelson v. Pinegar*, 30 Ill. 473 (but see *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*); *McKim v. Mason*, 3 Md. Ch. 186; *Brown v. Cram*, 1 N. H. 169; *Kircher v. Schalk*, 39 N. J. Law, 335; *Hemphill v. Ross*, 66 N. C. 477; *State v. Ragland*, 75 N. C. 12; *Allen v. Everly*, 24 Ohio St. 97; *Rands v. Kendall*, 15 Ohio, 671; *Tryon v. Munson*, 77 Pa. 250; *Carpenter v. Carpenter*, 6 R. I. 542; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Hagar v. Brainerd*, 44 Vt. 294; *Lull v. Matthews*, 19 Vt. 322; *Faulkner's Adm'x v. Brockenbrough*, 4 Rand. (Va.) 245. Modifications of the common-law theory, holding that the mortgagor is owner until breach, exist in some states. / *Doe ex dem. Hall v. Tunnell*, 1 Houst. (Del.) 320; *Hill v. Robertson*, 24 Miss. 368; *Johnson v. Houston*, 47 Mo. 227; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Allen Co. v. Emerton*, 108 Me. 221, 79 Atl. 905; *Kinney v. Treasurer*, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912A, 902; *Standard Leather Co. v. Insurance Co.*, 131 Mo. App. 701, 111 S. W. 631.

²⁵ *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*. In equity a mortgage is regarded as mere security, but at law it conveys an estate to the mortgagee which entitles him to the immediate possession of the property, unless otherwise stipulated in the conveyance. *Cotton v. Carlisle*, 85 Ala. 175, 4 South. 670, 7 Am. St. Rep. 29;

the mortgagee has merely a lien until default, but upon default he is regarded as the owner, for the purpose, at least, of protecting his debt.²⁶

PARTIES TO A MORTGAGE

185. The parties to a mortgage must be competent to convey and to hold real property.

There must be both a mortgagor and a mortgagee to a mortgage. One cannot give a mortgage to himself, either directly or in some representative capacity.²⁷ Speaking in general, any one may be a mortgagor who has the capacity to transfer real property,²⁸ and any one may be a mortgagee who can hold real property.²⁹ A party may be either a natural person or a corporation. A mortgage may be executed by an agent of the owner,³⁰ or by joint owners.³¹ A mortgage may also be made to several persons as joint mortgagees.³²

SUBJECT-MATTER OF MORTGAGE

186. As a general rule, any interest in realty, whether corporeal or incorporeal, which is subject to sale and assignment, may be mortgaged.

As stated above, as a general rule any interest in realty, whether corporeal or incorporeal, which is subject to sale or assignment,

Coffey v. Hunt, 75 Ala. 236. But see, *Turner Coal Co. v. Glover*, 101 Ala. 389, 13 South. 478.

²⁶ *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045; *Walker's Adm'x v. Farmers' Bank*, 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 819; *Rev. Code Miss. 1880*, § 1204; *Rev. Laws Vt. 1880*, § 1258.

²⁷ *Rackliffe v. Seal*, 36 Mo. 317; *Gorham's Adm'r v. Meacham*, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

²⁸ 1 Jones, *Mortg.* (5th Ed.) § 102.

²⁹ 1 Jones, *Mortg.* (5th Ed.) § 131; *Parker v. Lincoln*, 12 Mass. 16. But see *Thompson v. Holladay*, 15 Or. 34, 14 Pac. 725. As to personal capacity, see post.

³⁰ *Alta Silver Min. Co. v. Mining Co.*, 78 Cal. 629, 21 Pac. 373; *Eaton v. Dewey*, 79 Wis. 251, 48 N. W. 523.

³¹ *Stroud v. Casey*, 27 Pa. 471. And see *Bowen v. May*, 12 Cal. 348; *Preston v. Compton*, 30 Ohio St. 299.

³² *Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719; *King v. Merchants' Exch. Co.*, 5 N. Y. 547; *Cooley v. Kinney*, 109 Mich. 34, 66 N. W. 674; *Bates v. Coe*, 10 Conn. 280; *Gilson v. Gilson*, 2 Allen (Mass.) 115.

may be mortgaged.³³ This interest, moreover, may be either in possession or in expectancy,³⁴ as, for example, vested estates in remainder or reversion,³⁵ or an executory devise.³⁶ It is not necessary that the mortgagor be an owner in fee, since a life estate,³⁷ or a leasehold,³⁸ may be the subject of a mortgage; the interest of the mortgagee being limited, of course, by the interest of the mortgagor. There may be, also, a mortgage of a bond for title,³⁹ or of a right to possession under a contract for purchase,⁴⁰ or of an option to purchase.⁴¹ A widow may mortgage her unassigned right of dower,⁴² and a devisee may, before settlement of the estate, mortgage land devised to him in which he has a vested interest.⁴³ There may be a mortgage of a mortgage,⁴⁴ of an equitable title,⁴⁵ or of rents.⁴⁶ A mortgage of land covers the buildings and fixtures thereon, and a mortgage of a building includes the land on which it stands.⁴⁷ A mortgage may also be made to cover subsequent im-

³³ *Curtis v. Root*, 20 Ill. 518, 522; *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S. W. 170, 9 Ky. Law Rep. 845; *Wright v. Shumway*, Fed. Cas. No. 18,093, 1 Biss. 23, 26; *NELIGH v. MICHENOR*, 11 N. J. Eq. 539, *Burdick Cas. Real Property*; *Miller v. Tipton*, 6 Blackf. (Ind.) 238; *Dorsey v. Hall*, 7 Neb. 460. As to mortgages of homesteads, see ante.

³⁴ *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *In re John and Cherry Sts.*, 19 Wend. (N. Y.) 659.

³⁵ *Curtis v. Root*, 20 Ill. 518. And see *Springer v. Savage*, 143 Ill. 301, 32 N. E. 520; *In re John & Cherry Sts.*, 19 Wend. (N. Y.) 659; *Wright v. Shumway*, Fed. Cas. No. 18,093, 1 Biss. 23.

³⁶ *Wilson v. Wilson*, 32 Barb. (N. Y.) 328.

³⁷ *Penny v. Weems*, 139 Ala. 270, 35 South. 883; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *McKibbin v. Williams*, 24 Ont. App. 122. Compare *Rathbone v. Nooney*, 58 N. Y. 463.

³⁸ *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232; *In re Speer*, 10 Pa. Super. Ct. 518.

³⁹ *Baker v. Colony*, 45 Ill. 264; *Crane v. Turner*, 67 N. Y. 437.

⁴⁰ *Bull v. Shepard*, 7 Wis. 449; *Sinclair v. Armitage*, 12 N. J. Eq. 174.

⁴¹ *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S. W. 170.

⁴² *Mutual Life Ins. Co. of New York v. Shipman*, 119 N. Y. 324, 24 N. E. 177.

⁴³ *Dreyfus v. Richardson*, 33 La. Ann. 602; *Horst v. Dague*, 34 Ohio St. 371; *Drake v. Paige*, 127 N. Y. 562, 28 N. E. 407. So an heir may mortgage his undivided interest. *Carter v. McDaniel*, 94 Ky. 564, 23 S. W. 507.

⁴⁴ *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Cutts v. Manufacturing Co.*, 18 Me. 190.

⁴⁵ *Christian v. Mortgage Co.*, 92 Ala. 130, 9 South. 219; *Lovering v. Fogg*, 18 Pick. (Mass.) 540; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *Lincoln Bldg. & Sav. Ass'n v. Hass*, 10 Neb. 581, 7 N. W. 327; *Laughlin v. Braley*, 25 Kan. 147; *Wilson v. Wright*, 91 Ga. 774, 18 S. E. 546.

⁴⁶ *Curtis v. Root*, 20 Ill. 518; *Wright v. Shumway*, Fed. Cas. No. 18,093, 1 Biss. 23; *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁴⁷ *Wilson v. Hunter*, 14 Wis. 683, 80 Am. Dec. 795.

provements and future accessions,⁴⁸ such as crops to be planted.⁴⁹ So a mortgage may be given to cover after-acquired property,⁵⁰ subject, of course, to liens which may exist on the property at the time it is acquired.⁵¹

FORM OF MORTGAGES

187. No particular form is necessary to constitute a mortgage. Any form which clearly shows the intention of the parties is sufficient.

The ordinary form, however, of a mortgage is that of a deed of absolute conveyance with a defeasance clause. A mortgage, however, may be created:

- (a) By a separate defeasance.
- (b) By a parol defeasance.
- (c) By a sale with an agreement to reconvey.
- (d) By a deed of trust.
- (e) By transactions operating as equitable mortgages, which may be, for example:
 - (1) An agreement to give a mortgage.
 - (2) An informal mortgage.
 - (3) An assignment of a contract to purchase.
 - (4) By deposit of title deeds (in a few states).
 - (5) A vendor's lien.
 - (6) A vendee's lien.

No particular formula and no particular words are required to constitute a mortgage. If the essentials of a mortgage are set forth, namely, an intention on the part of a mortgagor to convey to a mortgagee certain described property as a security for a debt or

⁴⁸ *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

⁴⁹ *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Jones v. Webster*, 48 Ala. 109.

⁵⁰ *Lagger v. Building Ass'n*, 146 Ill. 283, 33 N. E. 946; *PLATT v. RAILWAY CO.*, 9 App. Div. 87, 41 N. Y. Supp. 42, *Burdick Cas. Real Property*; *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29, 33 L. Ed. 256; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; *Parker v. Railroad Co.*, 33 Fed. 693; *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298, 18 S. W. 1101; *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 1025. But see *Harriman v. Light Co.*, 163 Mass. 85, 39 N. E. 1004; *Cook v. Prindle (Iowa)* 63 N. W. 187; *Id.*, 97 Iowa, 464, 66 N. W. 781, 59 Am. St. Rep. 424; *Paddock v. Potter*, 67 Vt. 360, 31 Atl. 784; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891.

⁵¹ *Wood v. Manufacturing Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. Rep.

other consideration, it is sufficient.⁵² While the usual form of a mortgage is a deed of absolute conveyance with a defeasance clause, yet in equity, whenever an instrument appears to have been intended for a mortgage, it will be construed and treated as a mortgage, regardless of its form, or even of its defective execution.⁵³ In some states, a short form for a mortgage is prescribed by the statutes,⁵⁴ although the employment of the statutory form is entirely optional.⁵⁵ With reference to the operative words in a formal mortgage, the covenants and conditions which it may contain, the description of the parties and of the property, and the execution, acknowledgment, delivery, and recording of the instrument, the general principles governing deeds are applicable, and these matters are discussed elsewhere in this work.⁵⁶ The characteristic condition in a formal mortgage deed is the defeasance clause; that is, the statement of the terms upon which the deed is to become inoperative, or null and void,⁵⁷ such as the payment of the debt or the performance of any other condition. Yet, as before, no particular form is required for a defeasance clause,⁵⁸ neither is it necessary that it be inserted in any particular part of the deed.⁵⁹

Defeasance in Separate Instrument

It is not essential that the defeasance clause of a mortgage be inserted in the deed at all, since, if it is inserted in a separate instru-

56. And see *Hobbs v. Trust Co.*, 15 C. C. A. 604, 68 Fed. 618; *Patterson v. Trust Co.*, 17 Ky. Law Rep. 234, 30 S. W. 872.

52 *Woodworth v. Guzman*, 1 Cal. 203; *Cross v. Commission Co.*, 153 Ill. 499, 88 N. E. 1038, 46 Am. St. Rep. 902; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. 507; *Norman v. Shepherd*, 38 Ohio St. 320; *New Orleans Nat. Banking Assoc. v. Adams*, 109 U. S. 211, 3 Sup. Ct. 161, 27 L. Ed. 910.

53 *White Water Valley Canal Co. v. Valette*, 21 How. 414, 16 L. Ed. 154; *FISKE v. MAYHEW*, 90 Neb. 196, 133 N. W. 196, Ann. Cas. 1913A, 1043, *Burdick Cas. Real Property*. And see *Beebe v. Loan Co.*, 117 Wis. 328, 93 N. W. 1103; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Morris v. Nixon*, 1 How. 118, 11 L. Ed. 69; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Gilson v. Gilson*, 2 Allen (Mass.) 115; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Stoeve v. Stoeve*, 9 Serg. & R. (Pa.) 434; *Rogan v. Walker*, 1 Wis. 527. And see *infra*.

54 See the statutes of the several states. And see *Lagger v. Building Ass'n*, 146 Ill. 283, 33 N. E. 946.

55 *Haffley v. Maier*, 13 Cal. 13; *Eikelman v. Perdew*, 140 Cal. 687, 74 Pac. 291.

56 See *Deeds*.

57 *Youngs v. Wilson*, 27 N. Y. 351.

58 *Johnson v. Building Ass'n*, 94 Ill. App. 260; *Steel v. Steel*, 4 Allen (Mass.) 417. See *Scott v. Hughes*, 124 Ga. 1000, 53 S. E. 453; *Mellon v. Lemmon*, 111 Pa. 56, 2 Atl. 56.

59 *Kent v. Allbritain*, 4 How. (Miss.) 317; *Perkins' Lessee v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *Stocking v. Fairchild*, 5 Pick. (Mass.) 181.

ment, the two writings will be construed together as a mortgage,⁶⁰ and parol evidence is admissible to show that the two instruments are parts of the same transaction, and constitute a mortgage.⁶¹ The separate defeasance clause must be executed contemporaneously, however, with the deed, since, if executed subsequently, without a supporting consideration, it will be void.⁶² Where, however, as a part of the same agreement and supported by the same consideration, a defeasance clause is executed subsequently to the deed, it will be valid, since it will relate back to the execution of the deed.⁶³ At common law, a separate defeasance clause must be executed with the same formal requirements as the deed itself.⁶⁴ Subsequent purchasers and grantees, however, will be protected against a separate defeasance, unless it is recorded, or they have notice thereof.⁶⁵ A separate defeasance, moreover, may be canceled by a subsequent agreement to release, in which case the estate of the grantee becomes absolute.⁶⁶

Deed Absolute on Face—Parol Defeasance

In a court of equity, the test of a mortgage is the intention of the parties to give a mortgage. Consequently, it is well settled that, in equity, a deed of conveyance, absolute and unconditional on its face, will nevertheless be regarded and treated as a mortgage if the parties so intended.⁶⁷ It follows, therefore, that a deed of

⁶⁰ *COOK v. BARTHOLOMEW*, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452, Burdick Cas. Real Property; *Moors v. Albo*, 129 Mass. 9; *Brown v. Dean*, 3 Wend. (N. Y.) 208; *Green v. Pierce*, 60 Wis. 372, 19 N. W. 427; *Lynch v. Jackson*, 123 Ill. 360, 14 N. E. 697; *Wilson v. Shoenberger*, 31 Pa. 295; *Dubuque Nat. Bank v. Weed*, 57 Fed. 513. Except in a few states where it is prohibited by statute, see 1 Stim. Am. St. Law, § 1856. And in some states the defeasance must be recorded, or the mortgagee takes nothing.

⁶¹ *Gay v. Hamilton*, 33 Cal. 686; *Preschbaker v. Feaman*, 32 Ill. 475; *Turner v. Cochran*, 30 Tex. Civ. App. 549, 70 S. W. 1024.

⁶² *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Griswold v. Fowler*, 6 Abb. Proc. (N. Y.) 113; *Potter v. Langstrath*, 151 Pa. 216, 25 Atl. 76. See *Thomas v. Livingston*, 155 Ala. 546, 46 South. 851.

⁶³ *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793; *Lovering v. Fogg*, 18 Pick. (Mass.) 540; *Reitenbaugh v. Ludwick*, 31 Pa. 131; *Jeffery v. Hursh*, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240.

⁶⁴ *French v. Sturdivant*, 8 Me. 246; *Scituate v. Hanover*, 16 Pick. (Mass.) 222; *Lohrer v. Russell*, 207 Pa. 105, 56 Atl. 333.

⁶⁵ *Brown v. Dean*, 3 Wend. (N. Y.) 208; *Walton v. Cronly's Adm'r*, 14 Wend. (N. Y.) 63; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182; *Friedley v. Hamilton*, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638.

⁶⁶ 1 Jones, *Mortg.* (5th Ed.) § 252.

⁶⁷ *Adams v. Hopkins* (Cal. 1902) 69 Pac. 228; *Smith v. Smith*, 53 Ala. 504, 45 South. 168; *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357; *White v. Redenbaugh*, 41 Ind. App. 580; 82 N. E. 110; *Veeder v. Veeder*, 141 Iowa, 492, 120

conveyance absolute on its face will be held, as between the parties, to be a mortgage, even though there be no written defeasance at all, where there was a precise and certain understanding between the parties that the conveyance was merely for the purpose of a security.⁶⁸ In other words, the defeasance may consist in a verbal agreement.⁶⁹ In a court of law a grantor will not be permitted to show by parol evidence that his deed, absolute in form, was in fact a mortgage,⁷⁰ but courts of equity permit such a parol defeasance to be established.⁷¹ A mortgage, however, cannot be set up in this way against subsequent purchasers from the grantee, without notice,⁷² although the mortgagee would be liable to account to the mortgagor either for the proceeds of the sale or the value of the land.⁷³ Some courts hold that a grantor will be permitted to establish a defeasance by parol only in cases of fraud, accident, or mistake;⁷⁴ but most courts grant this relief whenever

N. W. 61; *Hubbard v. Cheney*, 76 Kan. 222, 91 Pac. 793, 123 Am. St. Rep. 129; *Ruch v. Ruch*, 159 Mich. 231, 124 N. W. 52; *Duell v. Leslie*, 207 Mo. 658, 106 S. W. 489; *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480; *Lynch v. Ryan*, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427; *Calrera v. Bank*, 214 U. S. 224, 29 Sup. Ct. 623, 53 L. Ed. 974; *PEUGH v. DAVIS*, 96 U. S. 332, 24 L. Ed. 775, *Burdick Cas. Real Property*.

⁶⁸ *Bass v. Bell*, 64 S. C. 177, 41 S. E. 893. Compare *Rose v. Hickey*, 3 Ont. App. 309.

⁶⁹ *Deadman v. Yantis*, 230 Ill. 243, 82 N. E. 592, 120 Am. St. Rep. 291. See *Schmidt v. Barclay*, 161 Mich. 1, 125 N. W. 729, 20 Ann. Cas. 1194; *Lynch v. Ryan*, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427; *Jackson v. Lawrence*, 117 U. S. 679, 6 S. Ct. 915, 29 L. Ed. 1024. Compare *Wingenroth v. Dellenbach*, 219 Pa. 536, 69 Atl. 84.

⁷⁰ *Webb v. Rice*, 6 Hill (N. Y.) 219; *Gates v. Sutherland*, 76 Mich. 231, 42 N. W. 1112. Contra in some states. *Tillson v. Moulton*, 23 Ill. 648; *Wilcox v. Bates*, 26 Wis. 465; *Plato v. Roe*, 14 Wis. 453. And see *Jones, Mortg.* (5th Ed.) § 282, note 1.

⁷¹ *McArthur v. Robinson*, 104 Mich. 540, 62 N. W. 713; *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369; *Dunton v. McCook*, 93 Iowa, 258, 61 N. W. 977; *Montgomery v. Beecher* (N. J. Ch.) 31 Atl. 451; *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482. But see *Fuller v. Trust Co.*, 157 Pa. 646, 28 Atl. 148. Contra, by statute, in some states. 1 *Stim. Am. St. Law*, § 1856; 1 *Jones, Mortg.* (5th Ed.) §§ 282, 312.

⁷² *Jackson v. Lawrence*, 117 U. S. 679, 6 Sup. Ct. 915, 29 L. Ed. 1024; *Meehan v. Forrester*, 52 N. Y. 277; *Pancake v. Cauffman*, 114 Pa. 113, 7 Atl. 67; *Sweetzer v. Atterbury*, 100 Pa. 22. But see *Gibson v. Hutchins*, 43 S. C. 287, 21 S. E. 250.

⁷³ *MOONEY v. BYRNE*, 163 N. Y. 86, 57 N. E. 163, *Burdick Cas. Real Property*; *Jackson v. Stevens*, 108 Mass. 94; *Hlester v. Madeira*, 3 Watts & S. (Pa.) 384; *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799.

⁷⁴ *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709; *Green v. Sherrod*, 105 N. C. 197, 10 S. E. 986; *Washburn v. Merrills*, 1 Day (Conn.) 139, 2 Am. Dec. 59; *Brainerd v. Brainerd*, 15 Conn. 575. And see *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591.

necessary to effectuate the intention of the parties.⁷⁵ These cases are held not to be within the statute of frauds, because that statute is never permitted to be made an instrument of fraud.⁷⁶

The test of the real character of the transaction is, in all cases, the intention of the parties.⁷⁷ This is shown by their acts. For instance, continued possession by the mortgagor,⁷⁸ and his payment of interest and taxes,⁷⁹ the continuance of the relation of debtor and creditor, and the retention of the evidence of debt by the grantee,⁸⁰ as well as inadequacy of price, all go to show that the conveyance was in fact a mortgage.⁸¹ On the other hand, if the debt is canceled,⁸² and the mortgagee takes possession and makes improvements, the presumption is almost conclusive that no mortgage was intended.⁸³ To permit the establishment of a parol defeasance, it is not necessary that the conveyance be made by the debtor,⁸⁴ since the grantee may have purchased at a foreclosure or execution sale on behalf of the one claiming to be mortgagor, and the purchaser have taken title in his own name for security.⁸⁵ It may also be shown by parol evidence that an assignment of a mortgage, or of a contract to purchase, absolute in form, was intended as mere security.⁸⁶ In all cases, however, strict proof is required

⁷⁵ 1 Jones, *Mortg.* (5th Ed.) § 321; *Sanborn v. Sanborn*, 104 Mich. 180, 62 N. W. 371; *Emerson v. Atwater*, 7 Mich. 12; *Swetland v. Swetland*, 3 Mich. 482; *Klock v. Walter*, 70 Ill. 416; *Wynkoop v. Cowing*, 21 Ill. 570; *Workman v. Greening*, 115 Ill. 477, 4 N. E. 385; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Horn v. Keteltas*, 46 N. Y. 605; *Fiedler v. Darrin*, 50 N. Y. 437; *Rhines v. Baird*, 41 Pa. 256; *Plumer v. Guthrie*, 76 Pa. 441; *Rogan v. Walker*, 1 Wis. 527; *Wilcox v. Bates*, 26 Wis. 465.

⁷⁶ *Reigard v. McNeil*, 38 Ill. 400; *Landers v. Beck*, 92 Ind. 49; *Moore v. Wade*, 8 Kan. 380; *Klein v. McNamara*, 54 Miss. 90; *Sewell v. Price's Adm'r*, 32 Ala. 97.

⁷⁷ *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Darst v. Murphy*, 119 Ill. 343, 9 N. E. 887; *Workman v. Greening*, 115 Ill. 477, 4 N. E. 385; *Ingalls v. Atwood*, 53 Iowa, 283, 5 N. W. 160; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Cole v. Bolard*, 22 Pa. 431.

⁷⁸ *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671.

⁷⁹ *Boocock v. Phipard*, 52 Hun, 614, 5 N. Y. Supp. 228.

⁸⁰ *Ennor v. Thompson*, 46 Ill. 214.

⁸¹ *Helm v. Boyd*, 124 Ill. 370, 16 N. E. 85; *Wilson v. Patrick*, 34 Iowa, 362.

But see *Story v. Springer*, 155 Ill. 25, 39 N. E. 570.

⁸² *Rue v. Dole*, 107 Ill. 275; *People ex rel. Ford v. Irwin*, 18 Cal. 117.

⁸³ *Woodworth v. Carman*, 43 Iowa, 504.

⁸⁴ *Jourdain v. Fox*, 90 Wis. 99, 62 N. W. 936; *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251.

⁸⁵ *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57, 13 N. E. 222; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322.

⁸⁶ *McClintock v. McClintock*, 3 Brewst. (Pa.) 76; *Briggs v. Rice*, 130 Mass. 50; *Smith v. Cremer*, 71 Ill. 185.

of the one who seeks to show that the transaction was a mortgage.⁸⁷ A judgment creditor, or other person succeeding to the rights of the mortgagor, may show the true character of the transaction.⁸⁸ A parol defeasance, moreover, may be extinguished by a subsequent agreement.⁸⁹

Sale with Agreement to Reconvey

It becomes a matter of great importance at times, with reference to the rights and liabilities of parties, to distinguish a mortgage from other transactions. This has already been noted in connection with determining whether an instrument shall operate as an absolute conveyance or as a mortgage. Similarly the question may arise between a mortgage and a conditional sale. Thus a sale with an agreement to reconvey may be a mortgage,⁹⁰ or it may be a conditional sale;⁹¹ that is, the transaction may be a security for a debt, or it may be an actual purchase with an agreement to resell to the grantor on particular terms.⁹² The criterion is the intention of the parties at the time, as gathered from all the facts and circumstances of the transaction tending to show such intention.⁹³ The circumstances, for example, which tend to show that an absolute conveyance was in fact a mortgage, would also show that a

⁸⁷ *Magnusson v. Johnson*, 73 Ill. 156; *Case v. Peters*, 20 Mich. 298; *Tilden v. Streeter*, 45 Mich. 533, 8 N. W. 502; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265; *Pancake v. Cauffman*, 114 Pa. 113, 7 Atl. 67; *HOLLADAY v. WILLIS*, 101 Va. 274, 43 S. E. 616, *Burdick Cas. Real Property*.

⁸⁸ *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Judge v. Reese*, 24 N. J. Eq. 387; *Clark v. Condit*, 18 N. J. Eq. 358.

⁸⁹ And this may be by parol. *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866.

⁹⁰ *Keithley v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; *Shields v. Russell*, 142 N. Y. 290, 36 N. E. 1061; *Rempt v. Geyer* (N. J. Ch.) 32 Atl. 266; *Eckford v. Berry*, 87 Tex. 415, 28 S. W. 937; *Williams v. Chambers-Roy Co.* (Tex. Civ. App.) 26 S. W. 270; *Nelson v. Atkinson*, 37 Neb. 577, 56 N. W. 313.

⁹¹ *Blazy v. McLean*, 77 Hun, 607, 28 N. Y. Supp. 286; *Stowe v. Banks*, 123 Mo. 672, 27 S. W. 347; *Tygret v. Potter* (Ky.) 29 S. W. 976.

⁹² *Biedelman v. Koch*, 42 1st App. 423, 85 N. E. 977; *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480; *Slutz v. Desenberg*, 28 Ohio St. 371.

DISTINCTION BETWEEN MORTGAGE AND CONDITIONAL SALE.—"A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: That the former is a 'security for a debt,' while the latter is a purchase accompanied by an agreement to resell on particular terms." *Turner v. Kerr*, 44 Mo. 429, 431. And see *HOLLADAY v. WILLIS*, 101 Va. 274, 43 S. E. 616, *Burdick Cas. Real Property*.

⁹³ *Eiland v. Radford*, 7 Ala. 724, 4 Am. Dec. 610; *Jeffery v. Robbins*, 167 Ill. 375, 47 N. E. 725; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Yost v. Bank*, 66 Kan. 605, 72 Pac. 209; *King v. McCarthy*, 50 Minn. 222, 52 N. W. 648.

sale with an agreement to reconvey was a mortgage.⁹⁴ A transaction may be a conditional sale, if the intention of the parties so appears, either by their express declaration, or by the circumstances of the case.⁹⁵ Such intention may be shown by the fact that the debt previously due from the grantor is extinguished,⁹⁶ and that there is no agreement to pay,⁹⁷ and by an agreement that the grantee may buy the estate absolutely after a certain time.⁹⁸ The mere recording of the instrument as a mortgage does not prevent a showing that it was in fact a conditional sale.⁹⁹ In case of doubt, upon all the evidence, whether the transaction was a mortgage or a conditional sale, the courts will incline to regard the transaction as a mortgage.¹

Deed of Trust

A mortgage may also be created by a deed of trust in the nature of a mortgage; that is, a conveyance of real property to a trustee for the purpose of securing a debt.² In fact, this form of mortgage is used in many states. Such a deed should be distinguished, however, from an absolute deed of trust. An absolute deed of trust is an absolute conveyance, while a deed of trust in the nature of a mortgage contemplates the restoration of the property to the gran-

⁹⁴ 1 Jones, *Mortg.* (5th Ed.) §§ 274, 275.

⁹⁵ *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; *Hughes v. Sheaff*, 19 Iowa, 335; *Davis v. Stonestreet*, 4 Ind. 101; *Smith v. Crosby*, 47 Wis. 160, 2 N. W. 104; *Henley v. Hotaling*, 41 Cal. 22; *HOLLADAY v. WILKIS*, 101 Va. 274, 43 S. E. 616, *Burdick Cas. Real Property*.

⁹⁶ *Carroll v. Tomlinson*, 192 Ill. 398, 61 N. E. 484, 85 Am. St. Rep. 344; *Stahl v. Dehn*, 72 Mich. 645, 40 N. W. 922; *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321; *Rue v. Dole*, 107 Ill. 275; *Kraemer v. Adelsberger*, 122 N. Y. 467, 25 N. E. 859; *Bridges v. Linder*, 60 Iowa, 190, 14 N. W. 217.

⁹⁷ *Heaton v. Darling*, 66 Minn. 262, 68 N. W. 1087; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. 46; *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; *Flagg v. Munn*, 14 Pick. (Mass.) 467; *Hanford v. Blessing*, 80 Ill. 188. Compare *Decker v. Leonard*, 6 Lans. (N. Y.) 264.

⁹⁸ *Baker v. Thrasher*, 4 Denio (N. Y.) 493; *Macauley v. Porter*, 71 N. Y. 173.

⁹⁹ *Morrison v. Brand*, 5 Daly (N. Y.) 40.

¹ *Hull v. Burr*, 58 Fla. 432, 471, 50 South. 754; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Jeffery v. Robbins*, 167 Ill. 375, 47 N. E. 725; *Cornell v. Hall*, 22 Mich. 377; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927.

² *Elmes v. Sutherland*, 7 Ala. 262; *Comstock v. Howard*, Walk. Ch. (Mich.) 110; *Myer's Appeal*, 42 Pa. 518; *FISKE v. MAYHEW*, 90 Neb. 196, 133 N. W. 195, Ann. Cas. 1913A, 1043, *Burdick Cas. Real Property*; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Southern Pac. R. Co. v. Doyle*, 11 Fed. 253; *McLane v. Paschal*, 47 Tex. 366. The trustee is the agent of both parties, and so must be impartial. *Peninsular Iron Co. v. Eells*, 15 C. C. A. 189, 68 Fed. 24; *Sherwood v. Saxton*, 63 Mo. 78. Cf. *Moran v. Hagerman*, 12 C. C. A. 239, 64 Fed. 499. See *Fitch v. Wetherbee*, 110 Ill. 475.

tor on the performance of the obligation secured by it.³ The usual form of such a deed of trust is a conveyance to the trustee to hold in trust to reconvey to the grantor if the debt secured is paid; otherwise, to sell the land and apply the proceeds to the payment of the debt, and pay the balance to the grantor.⁴ Statutes which relate to mortgages are held to include such deeds of trust, without express mention. Therefore such deeds are subject to the same requirements as to execution and recording as ordinary mortgage deeds.⁵

Other Allied Transactions

There are other transactions which, at times, may involve the question of whether they are, or are not, mortgages. For example, whether a transaction was an assignment for the benefit of creditors or a mortgage,⁶ or whether it was a lease or a mortgage,⁷ may be sometimes of importance. In distinguishing mortgages, however, from other transactions, the essential characteristics of a mortgage should be kept in mind. A mortgage is a security for a debt or other obligation. It imports both a defeasance and an equity of redemption. There can be no mortgage, unless there is a reciprocal right to foreclose and to redeem.⁸

Once a Mortgage, Always a Mortgage

There is a familiar maxim in equity which runs, "Once a mortgage, always a mortgage." By this it is meant that, when a transaction is established as a mortgage, the right to redeem continues until the debt is paid or the right is lawfully barred.⁹ The right to redeem cannot be cut off by an advance agreement; neither can the grantor of a deed absolute in form, if in fact a mortgage, be deprived of his redemption right. If the parties intended the trans-

³ *Lance's Appeal*, 112 Pa. 456, 4 Atl. 375; *Bateman v. Burr*, 57 Cal. 480; *Cushman v. Stone*, 69 Ill. 516; *Cooper v. Whitney*, 3 Hill (N. Y.) 95.

⁴ 2 Jones, *Mortg.* (5th Ed.) § 1770.

⁵ *Woodruff v. Robb*, 19 Ohio, 212; *Crosby v. Huston*, 1 Tex. 203.

⁶ *Morris v. Blackman*, 179 Ill. 103, 53 N. E. 547; *Grow v. Crittenden*, 66 Iowa, 277, 23 N. W. 667; *Austin v. Bank*, 100 Mich. 613, 59 N. W. 597; *Cunningham v. Britton*, 101 Wis. 378, 77 N. W. 740; *Union Nat. Bank v. Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341.

⁷ *Barroilhet v. Battelle*, 7 Cal. 450; *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299; *Graham v. Way*, 38 Vt. 19.

⁸ *Purser v. Irrigation Co.*, 111 Cal. 139, 43 Pac. 523; *Walton v. Cody*, 1 Wis. 420; See *Ellis v. Brown*, 29 Mich. 259; *McKinney v. Rheem*, 4 Leg. Gaz. (Pa.) 85.

⁹ *Tennery v. Nicholson*, 87 Ill. 464; *Loeb v. McAlister*, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378; *Macaulay v. Smith*, 57 Hun, 585, 10 N. Y. Supp. 578; *Richmond v. Richmond*, Fed. Cas. No. 11,801; *MOONEY v. BYRNE*, 163 N. Y. 86, 57 N. E. 163, *Burdick Cas. Real Property*.

action to be a mortgage at the beginning, it will continue to be a mortgage.¹⁰ The character of the transaction may, however, be changed by the subsequent agreement of the parties; if based upon equitable consideration and good faith.¹¹

Equitable Mortgages—Agreement to Give a Mortgage

In addition to the transactions and conveyances already considered, there are certain other transactions which in courts of equity will operate as mortgages. In construing transactions as mortgages, courts of equity are not governed by the strict rules of the common law, but will regard the substance rather than the form of the transaction,¹² and especially the intention of the parties to create a security for an obligation, irrespective of the form of the transaction. An equitable mortgage is defined, in England, as a contract which creates a charge on the property, but does not pass the legal estate to the creditor.¹³ An equitable mortgage, therefore, does not refer to the mortgage of an equitable interest, but to instruments or transactions having the effect of mortgages, which are recognized only in equity. An absolute deed with a parol defeasance, which has been considered, is one of these.¹⁴ An agreement to give a mortgage is, in equity, treated as a mortgage, on the principle that equity treats that as done which ought to be done.¹⁵ To have this effect, however, some specific property to be mortgaged must be designated,¹⁶ and there must be a valid agreement to give a mortgage.¹⁷ The agreement, however, need not be in writing, if there is sufficient part performance to satisfy the statute of frauds,¹⁸ although, as a rule, such an agreement will not be en-

¹⁰ *Bearss v. Ford*, 108 Ill. 16; *Johnson v. Building Ass'n*, 94 Ill. App. 260.

¹¹ *Carpenter v. Carpenter*, 70 Ill. 457; *Haggerty v. Bower*, 105 Iowa, 395, 75 N. W. 321; *Richmond v. Richmond*, Fed. Cas. No. 11,801.

¹² *Carter v. Holman*, 60 Mo. 498; *Wayt v. Carwithen*, 21 W. Va. 216; *Flagg v. Mann*, 9 Fed. Cas. 202, No. 4,847, 2 Sumn. 486; *Brown v. Brown*, 103 Ind. 23, 2 N. E. 233.

¹³ *Laws of Eng.* vol. 21, p. 74.

¹⁴ 1 *Jones, Mortg.* (5th Ed.) § 162.

¹⁵ *Edwards v. Scruggs*, 155 Ala. 568, 46 South. 850; *Baltimore & O. R. Co. v. R. Co.*, 168 Fed. 770; *Chadwick v. Clapp*, 69 Ill. 119; *Whitney v. Foster*, 117 Mich. 643, 76 N. W. 114; *Starks v. Redfield*, 52 Wis. 349, 9 N. W. 169; *Ott's Ex'x v. King*, 8 Grat. (Va.) 224; *FOSTER LUMBER CO. v. BANK*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, *Burdick Cas. Real Property*.

¹⁶ *Day v. Griffith*, 15 Iowa, 104; *Seymour v. Railway Co.*, 25 Barb. (N. Y.) 284; *Langley v. Vaughn*, 10 Heisk. (Tenn.) 553; *Adams v. Johnson*, 41 Miss. 258; *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52. And see cases in preceding note.

¹⁷ *Gill v. McAttee*, 2 Md. Ch. 255; *Hart v. Maguire*, 18 Nova Scotia, 541. See *Dow v. Ker*, *Speers Eq.* (S. C.) 413.

¹⁸ *Coster's Ex'rs v. Bank*, 24 Ala. 37; *McCarty v. Brackenridge*, 1 Tex. Civ.

forced unless in writing.¹⁹ Particularly, as against subsequent purchasers or encumbrancers without notice, such agreements will not be enforced, unless duly recorded.²⁰ Where the agreement is specific, a written instrument to give a mortgage may, at the option of the mortgagee, be specifically enforced.²¹

Informal or Defective Mortgages

An informal or defective mortgage—that is, one invalid at law by reason of some defect in its execution, as, for example, defects in the form of words,²² lack of a seal,²³ omission of the signature,²⁴ or formal attestation,²⁵ or defects in the name of parties,²⁶ or description of property²⁷—may, nevertheless, providing it shows an intention to create a mortgage, be made effective as a mortgage in equity.²⁸

App. 170, 20 S. W. 997; *Dean v. Anderson*, 34 N. J. Eq. 496; *Baker v. Baker*, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; *Burdick v. Jackson*, 7 Hun (N. Y.) 488.

¹⁹ *Edwards v. Scruggs*, 155 Ala. 568, 46 South. 850; *Washington Brewery Co. v. Carry* (Md. 1892) 24 Atl. 151. And see *Dean v. Anderson*, 34 N. J. Eq. 496; *Burdick v. Jackson*, 7 Hun (N. Y.) 488.

²⁰ *Atlantic Trust Co. v. Holdsworth*, 167 N. Y. 532, 60 N. E. 1106. See *Ulrich v. Ulrich*, 1 N. Y. Supp. 777; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745.

²¹ *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; *Nelson v. Bank*, 27 Md. 51; *McClintock v. Laing*, 22 Mich. 212.

²² NO WORDS OF CONVEYANCE.—An instrument may thus operate as a mortgage in equity, although it would not be good at law because it contains no words of conveyance. *Newlin v. McAfee*, 64 Ala. 357; *Cradock v. Scottish Providence Inst.*, 63 N. J. Ch. 15, 69 L. T. Rep. N. S. 380.

²³ *Racouillat v. Sansevain*, 32 Cal. 376; *Abbott v. Godfrey*, 1 Mich. 178; *Watkins v. Vrooman*, 51 Hun, 175, 5 N. Y. Supp. 172; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

²⁴ *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503. And see *Dennistoun v. Fyfe*, 11 Grant, Ch. (U. C.) 372.

²⁵ *Abbott v. Godfrey*, 1 Mich. 178; *Watkins v. Vrooman*, 51 Hun, 175, 5 N. Y. Supp. 172; *Bryce v. Massey*, 35 S. C. 127, 14 S. E. 768.

²⁶ See *Love v. Mining Co.*, 32 Cal. 639, 652, 91 Am. Dec. 602.

²⁷ DEFECTIVE DESCRIPTION OF PROPERTY.—Although the instrument is not a legal mortgage on the land in question, for failure to give such a description of the property conveyed as would suffice to bind it at law, still it may be good as an equitable mortgage. *Ex parte Rucker*, 3 Deac. & C. 704, 1 Mont. & A. 481.

²⁸ *Edwards v. Hall*, 93 Ill. 326; *Gilson v. Gilson*, 2 Allen (Mass.) 115; *Payne v. Wilson*, 74 N. Y. 348; *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. 753; *Gest v. Packwood*, 39 Fed. 525; *Abbott v. Godfrey's Heirs*, 1 Mich. 179; *Lake v. Doud*, 10 Ohio, 415; *McQuie v. Peay*, 58 Mo. 56; *Daggett v. Rankin*, 31 Cal. 322; *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544. See *FOSTER LUMBER CO. v. HARLAN COUNTY BANK*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, *Burdick Cas. Real Property*.

Assignment of Contract to Purchase

Another form of equitable mortgage is an assignment to a third person, as security for a debt, of a contract to purchase, or of a bond to convey.²⁹ Such an assignment may be valid as a mortgage, even though the conveyance is dependent on the performance of a condition,³⁰ and the vendor and vendee cannot subsequently rescind the contract.³¹ Every such assignment carries whatever interest the mortgagor has.³² An assignment, as a security for debt, of a certificate of purchase or entry of public lands,³³ or an assignment of rents as a security, since a mortgage of such rents would in fact be an assignment of them,³⁴ may also be regarded as an equitable mortgage. The same may be true of a power to collect rents.³⁵

Deposit of Title Deeds

In England, an equitable mortgage may be created by the deposit of the title deeds of an estate, coupled with an intention that they be held as a security for debt.³⁶ It is not necessary, however, that all the deeds in the chain of title, or even the most important deeds, be deposited, since, if any deeds relating to the property are deposited with the intention of creating a charge, it is sufficient.³⁷ This form of security, however, is recognized in only a few of our states,³⁸ and it is quite inconsistent with our registry system.³⁹ A

²⁹ *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530; *Commercial Bank of Santa Ana v. Pritchard*, 126 Cal. 600, 59 Pac. 130; *Rhines v. Baird*, 41 Pa. 256; *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; *Fitzhugh v. Smith*, 62 Ill. 486; *Brockway v. Wells*, 1 Paige (N. Y.) 617; *Burrows v. Hovland*, 40 Neb. 464, 58 N. W. 947. See *Baker v. Colony*, 45 Ill. 264; *Sinclair v. Armitage*, 12 N. J. Eq. 174.

³⁰ *Curtis v. Buckley*, 14 Kan. 449.

³¹ After notice to the vendor. 1 Jones, *Mortg.* (5th Ed.) § 172.

³² *Muehlberger v. Schilling* (Sup.) 3 N. Y. Supp. 705.

³³ *Dwen v. Blake*, 44 Ill. 135; *Combs v. Nelson*, 1 Ind. 123; *Gunderman v. Gunnison*, 39 Mich. 313; *Murray v. Walker*, 31 N. Y. 399.

³⁴ *Gest v. Packwood*, 39 Fed. 525; *Hulett v. Soullard*, 26 Vt. 295.

³⁵ *Joseph Smith Co. v. McGuinness*, 14 R. I. 59.

³⁶ *Mandeville v. Welch*, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; *Lancon v. Allen*, 3 Drew 579, 26 L. J. Ch. 18; *Harrold v. Plenty*, [1901] 2 Ch. 314; *Russel v. Russel*, 1 Bro. C. C. 269; *Carter v. Wake*, 4 Ch. D. 605; *McMahon v. McMahon*, 55 L. T. 763; *Wardle v. Oakley*, 36 Beav. 27, 30.

³⁷ *Re Roche's Estate*, [1890] 25 L. R. Ir. 58, 284, C. A.; *Roberts v. Croft*, 24 Beav. 223; *Ex parte Wetherell*, 11 Ves. 398.

³⁸ *Bullock v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9; *Jarvis v. Dutcher*, 16 Wis. 307; *Gale's Ex'rs v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; *Hackett v. Reynolds*, 4 R. I. 512; *First Nat. Bank v. Caldwell*, 4 Dill. 314, Fed. Cas. No. 4,798. See *Woodruff v. Adair*, 131 Ala. 530, 32 South. 515.

³⁹ In *re Snyder*, 138 Iowa, 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206; *Pierce*

deposit of title deeds, accompanied by a written agreement to the effect that they are deposited to secure a debt, may, however, constitute an equitable mortgage.⁴⁰

Vendor's Lien

Where there is a conveyance of land, and the purchase price is not paid, an implied lien generally arises in favor of the vendor,⁴¹ although the existence of such a lien is denied in some cases,⁴² and in some states it has been expressly abolished by statute.⁴³ It is generally held, however, that such a lien does not amount to an equitable mortgage,⁴⁴ since it is merely personal, and does not pass by assignment.⁴⁵ Where, however, a lien for the unpaid purchase price is expressly reserved in the deed by a vendor, such an express

v. Parrish, 111 Ga. 725, 37 S. E. 79; Shitz v. Dieffenbach, 3 Pa. 233; Parker v. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

⁴⁰ Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Mallory v. Mallory, 86 Ill. App. 193; Carey v. Rawson, 8 Mass. 159; Luch's Appeal, 44 Pa. 519; Edwards' Ex'r v. Trumbull, 50 Pa. St. 509.

⁴¹ 2 Jones, Liens (2d Ed.) 1063; Shall v. Biscoe, 18 Ark. 142; Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Francis v. Wells, 2 Colo. 660; Wooten v. Bellinger, 17 Fla. 289; Moshier v. Meek, 80 Ill. 79; Keith v. Horner, 32 Ill. 524; Yaryan v. Shriner, 26 Ind. 364; Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336; Thornton v. Knox's Ex'r, 6 B. Mon. (Ky.) 74; Carr v. Hobbs, 11 Md. 285; Payne v. Avery, 21 Mich. 524; Duke v. Bulme, 16 Minn. 306 (Gil. 270); Dodge v. Evans, 43 Miss. 570; Bennett v. Shipley, 82 Mo. 448; Reese v. Kinkad, 18 Nev. 126, 1 Pac. 667; Herbert v. Scofield, 9 N. J. Eq. 492; Smith v. Smith, 9 Abb. Prac. N. S. (N. Y.) 420; Stafford v. Van Rensselaer, 9 Cow. (N. Y.) 316; Pease v. Kelly, 3 Or. 417; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Ross v. Whitson, 6 Yerg. (Tenn.) 50; Pinchain v. Collard, 13 Tex. 333; Willard v. Reas, 26 Wis. 540.

⁴² Godwin v. Collins, 3 Del. Ch. 189, affirmed 4 Houst. (Del.) 28; Simpson v. Munde, 3 Kan. 172; Philbrook v. Delano, 29 Me. 410; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Edminster v. Higgins, 6 Neb. 265; Womble v. Battle, 37 N. C. 182; Hiester v. Green, 48 Pa. 96, 86 Am. Dec. 569; Wragg v. Comptroller General, 2 Desaus. Eq. (S. C.) 509.

⁴³ 1 Stim. Am. St. Law, § 1950.

⁴⁴ Markoe v. Andras, 67 Ill. 34; Kimble v. Esworthy, 6 Ill. App. 517; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

⁴⁵ Crane v. Caldwell, 14 Ill. 468; Nottes' Appeal, 45 Pa. 361; Brown v. Budd, 2 Ind. 442. But see Nichols v. Glover, 41 Ind. 24; Hamilton v. Gilbert, 2 Heisk. (Tenn.) 680; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Webb v. Robinson, 14 Ga. 216; Keith v. Horner, 32 Ill. 524; Carpenter v. Mitchell, 54 Ill. 126; Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; White v. Williams, 1 Paige (N. Y.) 502; First Nat. Bank of Salem v. Salem Capital Flour-Mills Co., 39 Fed. 89; Tharpe v. Dunlap, 4 Heisk. (Tenn.) 674. But see Carlton v. Buckner, 28 Ark. 66; Dixon v. Dixon, 1 Md. Ch. 220; and, contra, Weaver v. Brown, 87 Ala. 533, 6 South. 354; Honore's Ex'r v. Bakewell, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493; Cannon v. McDaniel, 46 Tex. 305; Board v. Wilson, 34 W. Va. 609, 12 S. E. 778.

reservation is generally held to be an equitable mortgage.⁴⁶ Some cases also hold that such an express reservation may be made in a note given for the purchase price.⁴⁷

With reference to vendor's liens in general, all subsequent purchasers through the grantee, who have notice of the lien, take the land subject thereto,⁴⁸ and recitals in the vendor's deed that the purchase money is unpaid,⁴⁹ and continued possession by the vendor, are held to be notice to such purchasers.⁵⁰ A vendor's lien is not good, however, against judgment creditors of the vendee without notice.⁵¹ The vendor may waive his lien by acts which show an intention not to rely on it for security;⁵² but taking the vendee's note will not constitute a waiver, unless the note is negotiated.⁵³ It is waived, however, by taking the note of the vendee, with an indorser or guarantor,⁵⁴ or other collateral security.⁵⁵ So, too, it may be waived by express agreement.⁵⁶

⁴⁶ *Dingley v. Ventura Bank*, 57 Cal. 467; *Wright v. Trentman*, 81 Ill. 374; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829. And see *Pugh v. Holt*, 27 Miss. 461; *Lucas v. Hendrix*, 92 Ind. 54; *Carr v. Holbrook*, 1 Mo. 240.

⁴⁷ *Smith v. Hiles Carver Co.*, 107 Ala. 272, 18 South. 37; *Bell v. Pelt*, 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. Rep. 57. Compare *Prickett v. Sibert*, 71 Ala. 194; *Tedder v. Steele*, 70 Ala. 347.

⁴⁸ And those who are not purchasers for value. *Beal v. Harrington*, 116 Ill. 113, 4 N. E. 664; *Petry v. Ambroscher*, 100 Ind. 510; *Strohm v. Good*, 113 Ind. 93, 14 N. E. 901; *Webster v. McCullough*, 61 Iowa, 496, 16 N. W. 578; *Thomas v. Bridges*, 73 Mo. 530; *Butterfield v. Okie*, 36 N. J. Eq. 482.

⁴⁹ *De Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587; *Daughaday v. Paine*, 6 Minn. 443 (Gil. 304); *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328; *McRimmon v. Martin*, 14 Tex. 318.

⁵⁰ *Melross v. Scott*, 18 Ind. 250.

⁵¹ *Allen v. Loring*, 34 Iowa, 499; *Webb v. Robinson*, 14 Ga. 216; *Gann v. Chester*, 5 Yerg. (Tenn.) 205; *Adams v. Buchanan*, 49 Mo. 64; *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393; *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Johnson v. Cawthorn*, 21 N. C. 32, 27 Am. Dec. 250. But see *Poe v. Paxton's Heirs*, 26 W. Va. 607; *Lissa v. Posey*, 64 Miss. 352, 1 South. 500; *Lewis v. Caperton's Ex'r*, 8 Grat. (Va.) 148; *Bowman v. Faw*, 5 Lea (Tenn.) 472.

⁵² *Moshier v. Meek*, 80 Ill. 79; *Perry v. Grant*, 10 R. I. 334.

⁵³ *White v. Williams*, 1 Paige (N. Y.) 502; *Garson v. Green*, 1 Johns. Ch. (N. Y.) 308; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; *Baum v. Grigsby*, 21 Cal. 173, 81 Am. Dec. 153.

⁵⁴ *Hazeltine v. Moore*, 21 Hun (N. Y.) 355; *Durette v. Briggs*, 47 Mo. 356; *Haskell v. Scott*, 56 Ind. 564.

⁵⁵ *Orrick v. Durham*, 79 Mo. 174; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272; *Hunt v. Waterman*, 12 Cal. 301.

⁵⁶ *Donovan v. Donovan*, 85 Mich. 63, 48 N. W. 163; *McCarty v. Williams*, 69 Ala. 174; *Williams v. McCarty*, 74 Ala. 295.

Vendee's Lien

As the counterpart of a vendor's lien, is the equitable doctrine of a vendee's lien.⁵⁷ A vendee's or purchaser's lien does not exist at common law;⁵⁸ but it is enforceable in courts of equity,⁵⁹ and, in some states, it is recognized by express statutory provision.⁶⁰ In other words, where a purchaser of land has made payment, either in whole or in part, under an executory contract, and, before he acquires possession, the contract fails through no fault of the purchaser, but through the fault of the vendor, the purchaser has, in equity, a lien upon the land for the amount he has advanced.⁶¹ The legal title to the land remains in the vendor, but the vendee has a lien on the land as security for the purchase money he has paid.⁶² A subsequent grantee of the vendor takes the land subject to this lien, providing he has notice of it.⁶³ The vendee, however, after notice of a conveyance by the vendor, must pay the balance of the purchase price to the second vendee, who is in fact an assignor of the vendor's rights; if, however, the vendee has no notice of such assignment, and pays the purchase price to the vendor, he is protected.⁶⁴ The incidents of the vendee's lien are practically the same as of the vendor's lien.⁶⁵

⁵⁷ *Stults v. Brown*, 112 Ind. 370, 41 N. E. 230, 2 Am. St. Rep. 190; *Payne v. Atterbury*, Harr. (Mich.) 414; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819; *Wickman v. Robinson*, 14 Wis. 493, 80 Am. Dec. 789.

⁵⁸ *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819. See *Davis v. Realty Co.*, 192 N. Y. 128, 84 N. E. 943, 20 L. R. A. (N. S.) 175, 127 Am. St. Rep. 890.

⁵⁹ *Id.*

⁶⁰ See Civ. Code Cal. § 3050, and the statutes of the several states.

⁶¹ *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872; *Ayres v. Lumber Co.*, 150 Ill. App. 137; *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819; *Everett v. Mansfield*, 148 Fed. 374, 78 C. C. A. 188, 8 Ann. Cas. 956; *Lane v. Ludlow*, 6 Paige (N. Y.) 316 note; *Wickman v. Robinson*, 14 Wis. 535, 80 Am. Dec. 789; *Small v. Small*, 16 S. C. 64; *Cooper v. Merritt*, 30 Ark. 687; *Stewart v. Wood*, 63 Mo. 252; *Galbraith v. Reeves*, 82 Tex. 357, 18 S. W. 696.

⁶² "This lien is in all respects analogous to the vendor's lien for the unpaid purchase money. The legal title remains in the vendor, but the vendee has a lien on the land as security for the purchase money he has paid." *Fetter*, Eq. § 156 [quoted in *Elterman v. Hyman*, 192 N. Y. 113, 123, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819].

⁶³ *Clark v. Jacobs*, 56 How. Prac. (N. Y.) 519; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Stewart v. Wood*, 63 Mo. 252.

⁶⁴ *Rose v. Watson*, 10 H. L. Cas. 672.

⁶⁵ *Payne v. Atterbury*, Harr. (Mich.) 414; *Anderson v. Spencer*, 51 Miss. 869; *Mackreth v. Symmons*, 15 Ves. 345; *Burgess v. Wheate*, 1 W. Bl. 150.

CONSIDERATION OF MORTGAGES

188. In order that a mortgage may be enforceable, it must be supported by some consideration. There must be some debt or other obligation to give it effect as a lien.

As stated above, a valid mortgage must be supported by some valid consideration in order to make it enforceable.⁶⁶ The consideration, however, may precede, or may be subsequent to, as well as contemporaneous with, the mortgage.⁶⁷ Thus, a pre-existing debt will support a mortgage,⁶⁸ and an extension of time for the payment of a debt already due is a sufficient consideration.⁶⁹ A mortgage may also be given to secure future advances or loans to the mortgagor,⁷⁰ either for such future advances generally,⁷¹ or up to a specified maximum amount.⁷²

Although the consideration of a mortgage is usually a loan of money, yet it may be for the support of the mortgagee,⁷³ or for his

⁶⁶ *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Fisher v. Meister*, 24 Mich. 447; *BAIRD v. BAIRD*, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375, *Burdick Cas. Real Property*; *Mooris' Adm'r v. Davis*, 83 Va. 297, 8 S. E. 247. And see *Long v. Steele*, 10 Kan. App. 160, 63 Pac. 280; *Mossop v. His Creditors*, 41 La. Ann. 296, 6 South. 134.

⁶⁷ *Duncan v. Miller*, 64 Iowa, 223, 20 N. W. 161. *Contra*, *Peets v. Wilson*, 19 La. 478. See, also, *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 9 N. W. 569, 38 Am. Rep. 370.

⁶⁸ *Hewitt v. Powers*, 84 Ind. 295; *Rea v. Wilson*, 112 Iowa, 517, 84 N. W. 539; *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913; *Longfellow v. Barnard*, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

⁶⁹ *First Nat. Bank of Peoria v. Bank*, 171 Ind. 323, 86 N. E. 417; *First Nat. Bank of Richfield Springs v. Keller*, 127 App. Div. (N. Y.) 435, 111 N. Y. Supp. 729; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Sullivan Sav. Inst. v. Young*, 55 Iowa, 132, 7 N. W. 480.

⁷⁰ *Du Bois v. Bank*, 43 Colo. 400, 96 Pac. 169; *Preble v. Conger*, 66 Ill. 370; *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Citizens' Sav. Bank v. Kock*, 117 Mich. 225, 75 N. W. 458; *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Jones v. Guaranty Co.*, 101 U. S. 622, 25 L. Ed. 1030.

⁷¹ *Huntington v. Kneeland*, 105 App. Div. 629, 93 N. Y. Supp. 845; *Glenn v. Seeley*, 25 Tex. Civ. App. 523, 61 S. W. 959; *Citizens' Sav. Bank v. Kock*, 117 Mich. 225, 75 N. W. 458.

⁷² *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286.

⁷³ *COOK v. BARTHOLOMEW*, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452, *Burdick Cas. Real Property*; *French v. Case*, 77 Mich. 64, 43 N. W. 1056; *Hann v. Crickler* (N. J. Ch. 1899) 43 Atl. 1063; *Soper v. Guernsey*, 71 Pa. 219; *Flanders v. Lamphear*, 9 N. H. 201; *Hoyt v. Bradley*, 27 Me. 242; *Austin v. Austin*, 9 Vt. 420; *Hiatt v. Parker*, 29 Kan. 765. Unless otherwise provided, the obligation to support is a personal one, and cannot be assigned. *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Bethlehem v. Annis*,

indemnity against liability.⁷⁴ When a mortgage is given to secure a debt, it is usually accompanied by a note or other evidence of indebtedness, although this is not essential to the validity of the mortgage, since there may be a valid mortgage without any personal liability on the part of the mortgagor, as, for example, when the creditor's only right to payment is out of the mortgaged property,⁷⁵ or when the mortgage is given to secure a debt of another than the mortgagor.⁷⁶ It will not, moreover, be presumed that the mortgagor is personally liable, from the mere execution of the mortgage.⁷⁷ A mortgage may also be given to secure any and all claims of whatever nature the mortgagee may have against the mortgagor, either now due or hereafter to be incurred, no amount being specified.⁷⁸ Such a mortgage is sometimes called a "blanket mortgage." Upon the failure of the consideration, as where, for example, the money was never in fact loaned to the mortgagor, the mortgage is of no validity.⁷⁹ While a mortgage will be presumed to be based upon a valid consideration,⁸⁰ yet the contrary may be shown,⁸¹ as

40 N. H. 34, 77 Am. Dec. 700; *Bryant v. Erskine*, 55 Me. 153. But, contra, *Joslyn v. Parlin*, 54 Vt. 670. And see *Bodwell Granite Co. v. Lane*, 83 Me. 168, 21 Atl. 829.

⁷⁴ *Goddard v. Sawyer*, 9 Allen (Mass.) 78; *Williams v. Silliman*, 74 Tex. 626, 12 S. W. 534; *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; *Haden v. Buddensick*, 49 How. Prac. (N. Y.) 241; *Lyle v. Ducomb*, 5 Bin. (Pa.) 585; *Gardner v. Webber*, 17 Pick. (Mass.) 407; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719; *Duncan v. Miller*, 64 Iowa, 223, 20 N. W. 161.

⁷⁵ 1 Jones, *Mortg.* (5th Ed.) § 70; *Hodgdon v. Shannon*, 44 N. H. 572. As to description of the indebtedness, see *Usher v. Skate Co.*, 163 Mass. 1, 39 N. E. 416; *Merrill v. Elliott*, 55 Ill. App. 34; *Bowen v. Ratcliff*, 140 Ind. 393, 39 N. E. 860, 49 Am. St. Rep. 203; *Harper v. Edwards*, 115 N. C. 246, 20 S. E. 392.

⁷⁶ *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375; *Lee v. Kirkpatrick*, 14 N. J. Eq. 264; *Birdsall v. Wheeler*, 173 N. Y. 590, 65 N. E. 1114; *Chittenden v. Gossage*, 18 Iowa, 157; *New Orleans Canal & Banking Co. v. Hagan*, 1 La. Ann. 62.

⁷⁷ 1 Jones, *Mortg.* (5th Ed.) § 678; *Turk v. Ridge*, 41 N. Y. 201; *Smith v. Rice*, 12 Daly (N. Y.) 307; *Coleman v. Van Rensselaer*, 44 How. Prac. (N. Y.) 368.

⁷⁸ *Anglo-California Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077; *Chambers v. Prewitt*, 172 Ill. 615, 50 N. E. 145; *Commercial Bank v. Weinberg*, 70 Hun, 597, 25 N. Y. Supp. 235. Compare *Hach v. Hill*, 106 Mo. 18, 16 S. W. 948.

⁷⁹ *Sheats v. Scott*, 133 Ala. 642, 32 South. 573; *Mizner v. Kussell*, 29 Mich. 229; *Kramer v. Williamson*, 135 Ind. 655, 35 N. E. 388; *Fisher v. Meister*, 24 Mich. 447; *Falcon v. Boucherville*, 1 Rob. (La.) 337.

⁸⁰ *First Nat. Bank v. Bennett*, 215 Ill. 398, 74 N. E. 405. See *Forbes v. McCoy*, 15 Neb. 632, 20 N. W. 17.

⁸¹ *Bray v. Comer*, 82 Ala. 183, 1 South. 77. And see *Lefmann v. Brill*, 142 Fed. 44, 73 C. C. A. 230.

may also the fact that the actual consideration was not the same as that recited in the mortgage deed.⁸²

Although as between the parties the description of the mortgage debt need not be made with particular certainty,⁸³ yet to render the mortgage valid against third persons having interests in the mortgaged land, the real character of the indebtedness should be clearly identified.⁸⁴

RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE

189. The rights and liabilities of the mortgagor and mortgagee may be conveniently considered under the following topics:

- (a) In general.
- (b) Possession and use of mortgaged premises.
- (c) Accounting by the mortgagee.
- (d) Insurance and taxes.
- (e) Repairs and improvements.
- (f) Injuries to the premises.

SAME—IN GENERAL

190. Under the prevailing lien theory of mortgage, the mortgagor is owner of the mortgaged premises, and has the general rights of an owner as to all persons except the mortgagee.

Under the equitable or security theory of mortgage, the mortgagor is the owner of the mortgaged premises, with full power to control and dispose of the same as he will, subject only to the protection of the mortgagee's lien.⁸⁵ The mortgagor may sell his in-

⁸² *Babcock v. Lisk*, 57 Ill. 327; *Ruloff v. Hazen*, 124 Mich. 570, 83 N. W. 370; *McCaughy v. McDuffie* (Cal. 1903) 74 Pac. 751; *Huckaba v. Abbott*, 87 Ala. 409, 6 South. 48.

⁸³ *Cazort & McGehee Co. v. Dunbar*, 91 Ark. 400, 121 S. W. 270; *Uteley v. Smith*, 24 Conn. 290, 63 Am. Dec. 163; *Lewis v. De Forest*, 20 Conn. 427; *Barker v. Barker*, 62 N. H. 366.

⁸⁴ As to description of the mortgage debt, see *Burt v. Gamble*, 98 Mich. 402, 57 N. W. 261; *Dunham v. Provision Co.*, 100 Mich. 75, 58 N. W. 627; *Commercial Bank v. Weinberg*, 70 Hun, 597, 25 N. Y. Supp. 235; *Price v. Wood*, 76 Hun, 318, 27 N. Y. Supp. 691; *Snow v. Pressey*, 85 Me. 408, 27 Atl. 272; *Gleason v. Kinney's Adm'r*, 65 Vt. 560, 27 Atl. 208; *D'Oyly v. Capp*, 99 Cal. 153, 33 Pac. 736; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Bullock v. Batenhousen*, 108 Ill. 28.

⁸⁵ *Teachout v. Duffus* (Iowa) 115 N. W. 1010; *Lightcap v. Bradley*, 186 Ill.

terest to a third person,⁸⁶ or he may lease the property to a tenant;⁸⁷ such a grantee or lessee with notice taking the premises subject, of course, to the mortgagee's rights.⁸⁸ The mortgagor or his assignees do not hold adversely to the mortgagee,⁸⁹ and they are estopped to deny the validity of the mortgage.⁹⁰ The mortgagor, however, may disseise the mortgagee by repudiating the mortgage, and holding adversely from that time;⁹¹ but during the continuance of the mortgage, the mortgagor may be enjoined from committing any waste which would impair the mortgage security, such as cutting timber or removing buildings.⁹² The same remedy is also provided against the grantees of the mortgagor.⁹³ A mortgagor in possession is entitled to reasonable estovers,⁹⁴ and the mortgagee has no claim on the crops, since they belong to the mortgagor.⁹⁵ The mortgagor is not, however, entitled to emble-

510, 520, 58 N. E. 221; *Ladue v. Railway Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Norton v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *Wilkins v. French*, 20 Me. 111; *Turner Coal Co. v. Glover*, 101 Ala. 289, 13 South. 478.

⁸⁶ *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874; *Medley v. Elliott*, 62 Ill. 532; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Russell v. Ely*, 2 Black (U. S.) 575, 17 L. Ed. 258.

⁸⁷ *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Kennett v. Plummer*, 28 Mo. 142.

⁸⁸ *McDermott v. Burke*, 16 Cal. 580; *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Colton v. Smith*, 11 Pick. (Mass.) 311, 22 Am. Dec. 375; *Stoddard v. Whiting*, 46 N. Y. 627; *Warner v. Grayson*, 200 U. S. 257, 26 Sup. Ct. 240, 50 L. Ed. 470.

⁸⁹ *Wright v. Sperry*, 25 Wis. 617; *Seeley v. Manning*, 37 Wis. 574; *Doyle v. Mellen*, 15 R. I. 523, 8 Atl. 709.

⁹⁰ *Skelton v. Scott*, 18 Hun (N. Y.) 375; *Fisher v. Milmine*, 94 Ill. 328; *Kerngood v. Davis*, 21 S. C. 183.

⁹¹ *Benton County v. Czarlinsky*, 101 Mo. 275, 14 S. W. 114; *Jamison v. Perry*, 38 Iowa, 14. Contra, *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400. On the other hand, a disseisin of the mortgagor is a disseisin of the mortgagee also. *Poignand v. Smith*, 8 Pick. (Mass.) 272.

⁹² *Ingell v. Fay*, 112 Mass. 451; *State v. Decker*, 52 Kan. 193, 34 Pac. 780; *Tarbell v. Page*, 155 Mass. 256, 29 N. E. 585; *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782; *Fairbank v. Cudworth*, 33 Wis. 358; *Scott v. Webster*, 50 Wis. 53, 6 N. W. 363; *Dorr v. Dudderar*, 88 Ill. 107; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387; *Adams v. Corrison*, 7 Minn. 456 (Gil. 365). And see, as to the abandonment of an easement, *Duval v. Becker*, 81 Md. 537, 32 Atl. 308. Such an injunction may also be obtained by a surety of the mortgagor. *Johnson v. White*, 11 Barb. (N. Y.) 194.

⁹³ *Coker v. Whitlock*, 54 Ala. 180.

⁹⁴ *Hapgood v. Blood*, 11 Gray (Mass.) 400; *Wright v. Lake*, 30 Vt. 206; *Judkins v. Woodman*, 81 Me. 351, 17 Atl. 298, 3 L. R. A. 607.

⁹⁵ *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Rankin v. Kinsey*, 7 Ill. App. 215; *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Woodward v. Pickett*, 8 Gray

ments, when the mortgagee, being entitled to possession, enters on the mortgagor before harvest.⁹⁶ A tenant of the mortgagor under a lease executed subsequently to the mortgage is in the same position as the mortgagor, and, when ejected by the mortgagee, is not entitled to the crops.⁹⁷ The mortgagor's interest in the land may be sold upon execution.⁹⁸ It passes as real estate by devise, and descends as such to his heirs; the mortgagor's widow is also entitled to dower in it.⁹⁹

On the other hand, it is the duty of the mortgagor to protect the mortgagee's interest,¹ and the latter may at all times bring such suits as may be necessary for the preservation of his rights.²

SAME—POSSESSION AND USE OF MORTGAGED PREMISES

191. At common law, the mortgagee is entitled to possession. It may, however, be otherwise provided:

- (a) By statute, as in some states.
- (b) By agreement of the parties, which may be either:
 - (1) Express; or
 - (2) Implied.

Under the equitable or lien theory, the mortgagor is entitled to remain in possession.

Under the common-law doctrine of mortgage, the mortgagee may take possession at any time,³ and he may, as owner, eject the mort-

(Mass.) 617; *Allen v. Elderkin*, 62 Wis. 627, 22 N. W. 842; *Toby v. Reed*, 9 Conn. 216. But see *Coor v. Smith*, 101 N. C. 261, 7 S. E. 669.

⁹⁶ *Downard v. Groff*, 40 Iowa, 597; *Gillett v. Balcom*, 6 Barb. (N. Y.) 371; *Gilman v. Wills*, 66 Me. 273.

⁹⁷ *Jones v. Thomas*, 8 Blackf. (Ind.) 428.

⁹⁸ *Valette v. Bennett*, 69 Ill. 632; *North v. Dearborn*, 146 Mass. 17, 15 N. E. 129; *Piatt v. Oliver*, Fed. Cas. No. 11,115, 2 McLean, 267.

⁹⁹ *Lightcap v. Bradley*, 186 Ill. 510, 520, 58 N. E. 221.

¹ *Maxon v. Lane*, 102 Ind. 364, 1 N. E. 796; *Madaris v. Edwards*, 32 Kan. 284, 4 Pac. 313.

² *Milmine v. Bass*, 29 Fed. 632; *Baldwin v. Bordelon*, 49 La. Ann. 1088, 22 South. 196; *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

³ *Smith v. Shuler*, 12 Serg. & R. (Pa.) 240; *Youngman v. Railroad Co.*, 66 Pa. 278; *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*; *Mershon v. Castree*, 57 N. J. Law, 484, 31 Atl. 602. And see *Springer v. Lehman*, 50 Ill. App. 139; *Brundage v. Association*, 11 Wash. 277, 39 Pac. 666. Cf., however, *Armour Pack. Co. v. Wolff* 59 Mo. App. 665.

gagor from the premises, even before breach of condition.⁴ This harsh rule has been changed, however, by statute in some states, there being express provisions that the mortgagor shall be entitled to the possession until foreclosure.⁵ Under some of the statutes, at least, this right may be changed, however, by contract.⁶ Even in the absence of statute, the mortgage deed may provide who shall have possession,⁷ it being frequently stipulated that the mortgagor shall retain it, and such an agreement as to possession may be contained in a separate instrument.⁸ The intention of the parties that the mortgagor shall retain possession may also often be implied from the terms of the mortgage;⁹ as, for instance, where there is a provision that the mortgagor shall cultivate the farm mortgaged, and give one-half the crops to the mortgagee, to be applied in payment of the debt.¹⁰ By merely remaining in possession after the execution of the mortgage, the mortgagor does not, however, acquire a right to continue in possession.¹¹ When the mortgagor is rightfully in possession, he may bring any possessory action for the protection of the estate,¹² and he need not pay rent to the mortgagee, even in states where the latter is considered the owner of the legal title.¹³ Even under the common-law doctrine, the mortgagor is entitled to possession against every one except the mortgagee and those claiming under him.¹⁴ In most jurisdictions, at

⁴ *Woodward v. Parsons*, 59 Ala. 625; *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*; *Lackey v. Holbrook*, 11 Metc. (Mass.) 458; *Tryon v. Munson*, 77 Pa. 250.

⁵ *Skinner v. Buck*, 29 Cal. 253; *Becker v. McCrea*, 48 Misc. Rep. 341, 94 N. Y. Supp. 20; *Doe ex dem. Hanna v. Countryman*, 1 Ind. 493; *Humphrey v. Hurd*, 29 Mich. 44. See 1 Stim. Am. St. Law, §§ 1882, 1883. And see *Michigan Trust Co. v. Lansing Lumber Co.*, 103 Mich. 392, 61 N. W. 668; *Cullen v. Trust Co.*, 60 Minn. 6, 61 N. W. 818.

⁶ *Edwards v. Woodbury*, 3 Fed. 14, 1. McCrary, 429.

⁷ *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Becker v. McCrea*, 48 Misc. Rep. 341, 94 N. Y. Supp. 20; *Farmers' Loan & Trust Co. v. American Waterworks Co.*, 107 Fed. 23.

⁸ *Clay v. Wren*, 34 Me. 187. Compare *People v. Andre*, 153 Mich. 531, 117 N. W. 55.

⁹ *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Wilkinson v. Hall*, 3 Bing. N. C. 508, 3 Hodges, 56.

¹⁰ *Flagg v. Flagg*, 11 Pick. (Mass.) 475. And see *Hartshorn v. Hubbard*, 2 N. H. 453; *Flanders v. Lamphear*, 9 N. H. 201; *Lamb v. Foss*, 21 Me. 240.

¹¹ *Wakeman v. Banks*, 2 Conn. 445.

¹² *Morse v. Whitcher*, 64 N. H. 590, 15 Atl. 217; *Great Falls Co. v. Worster*, 15 N. H. 412.

¹³ 1 Jones, *Mortg.* (5th Ed.) § 670.

¹⁴ *Huckins v. Straw*, 34 Me. 166; *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591; *Ellison v. Daniels*, 11 N. H. 274; *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708; *Bartlett v. Borden*, 13 Bush (Ky.) 45.

the present time, the mortgagor is entitled to possession, irrespective of any agreement or statute, since under the prevailing equitable doctrine of mortgage the mortgagee has only a lien; the right of possession being in the mortgagor.¹⁶ In a number of states, either by force of statute or by a provision in the deed, although the mortgagor may be entitled to possession until default of condition, yet after such default the right of possession vests in the mortgagee.¹⁹

SAME—ACCOUNTING BY THE MORTGAGEE

192. A mortgagee, or his assignee, in possession, must make a due accounting.

DEBITS—He is liable for the rents and profits of the land, and also for damages caused by waste.

CREDITS—He is to be credited with amounts paid by him for repairs and reasonable improvements, for taxes paid, and for sums expended in removing incumbrances and in protecting the property.

A mortgagee in lawful possession of the mortgaged premises may retain the same until his debt is paid,¹⁷ or he may assign his possession to a third person.¹⁸ Such a mortgagee or assignee in possession is bound, however, to account for the rents and profits received, and to apply them to the reduction of the mortgage debt.¹⁹

¹⁶ *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Union Mut. L. Ins. Co. v. Lovitt*, 10 Neb. 301, 4 N. W. 986; *Souter v. La Crosse R. Co.*, Fed. Cas. No. 13,180, Woolw. 80.

¹⁶ *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Bolton v. Brewster*, 32 Barb. (N. Y.) 389; *Gillett v. Eaton*, 6 Wis. 30; *Walker v. Teal*, 5 Fed. 317, 7 Sawy. 39.

¹⁷ *Emory v. Keighan*, 88 Ill. 482; *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308; *Reading v. Waterman*, 46 Mich. 107, 8 N. W. 691; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82; *Brinkman v. Jones*, 44 Wis. 498; *Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. 802, 40 L. Ed. 1020.

¹⁸ *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Pickett v. Jones*, 63 Mo. 195; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576.

¹⁹ *Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442; *Weise v. Anderson*, 134 Mich. 502, 96 N. W. 575; *Huguley Mfg. Co. v. Cotton Mills*, 94 Fed. 269, 36 C. C. A. 236; *Reitenbaugh v. Ludwick*, 31 Pa. 131; *Chapman v. Porter*, 69 N. Y. 276; *Dawson v. Drake*, 30 N. J. Eq. 601; *Rooney v. Crary*, 11 Ill. App. 213; *Wood v. Whelen*, 93 Ill. 153; *Byers v. Byers*, 65 Mich. 598, 32 N. W. 831. But he must hold as mortgagee. *Daniel v. Coker*, 70 Ala. 260; *Young v. Omohundro*, 69 Md. 424, 16 Atl. 120; *Ayers v. Staley* (N. J. Ch.) 18 Atl. 1046; *Strang v. Allen*, 44 Ill. 438 (assignee must account).

The mortgagor is not entitled, however, to an accounting, unless he redeems the mortgage, or on foreclosure;²⁰ and a junior mortgagee, who redeems a prior mortgage, is entitled to an accounting from the prior mortgagee, if the latter has been in possession.²¹ An accounting may also be compelled by the assignee of the mortgage,²² as, likewise, by a mortgagor's creditors.²³

Debits

It is the duty of a mortgagee in possession to manage the premises in a reasonably prudent manner.²⁴ He is, consequently, liable for damages caused by waste and gross mismanagement.²⁵ While, as a rule, he is chargeable only with whatever he has collected as rents and profits of the mortgaged premises,²⁶ yet he may be charged with what he should have received if he had managed the estate as a prudent owner.²⁷ He may be liable for rents which he has not actually received, by reason of his negligence in leasing to an insolvent tenant, or by employing an incompetent agent.²⁸ A grantee under an absolute deed which is shown to be a mortgage is chargeable, however, only with the reasonable value of the use of the property.²⁹ If the mortgagee himself occupies the premises, he must credit the mortgagor with an amount equal to their fair rental value,³⁰ and the damages for any waste committed while the

²⁰ *Weeks v. Thomas*, 21 Me. 465; *Farris v. Houston*, 78 Ala. 250.

²¹ *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364.

²² *Ruckman v. Astor*, 9 Paige (N. Y.) 517; *Gelston v. Thompson*, 29 Md. 595.

²³ *Lewis v. De Forest*, 20 Conn. 427; *Patton v. Varga*, 75 Iowa, 368, 39 N. W. 647; *Spring Brook R. Co. v. Navigation Co.*, 1 Lack. Leg. N. (Pa.) 31; *New Orleans Nat. Banking Ass'n v. Le Breton*, 120 U. S. 765, 7 Sup. Ct. 772, 30 L. Ed. 821.

²⁴ *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Wann v. Coe*, 31 Fed. 369.

²⁵ *Barnett v. Nelson*, 54 Iowa, 41, 6 N. W. 49, 37 Am. Rep. 183; *Robinson v. Trust Co.*, 51 App. Div. 134, 64 N. Y. Supp. 525.

²⁶ *PEUGH v. DAVIS*, 113 U. S. 542, 5 Sup. Ct. 622, 28 L. Ed. 1127, *Burdick Cas. Real Property*; *Strang v. Allen*, 44 Ill. 428; *Donohue v. Chase*, 139 Mass. 407, 2 N. E. 84; *Brown v. Bank*, 148 Mass. 300, 19 N. E. 382; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Walsh v. Insurance Co.*, 13 Abb. Prac. (N. Y.) 33.

²⁷ *Harper v. Ely*, 70 Ill. 581; *Engleman Transp. Co. v. Longwell*, 48 Fed. 129; *Montague v. Railroad*, 124 Mass. 242.

ACCOUNTABLE FOR PROCEEDS RECEIVED.—A mortgagee in possession because of the default of the mortgagor is only liable to account for the proceeds actually received in the absence of willful wrong, neglect, or fraud. *Watson v. Perkins*, 88 Miss. 64, 40 South. 643.

²⁸ *Miller v. Lincoln*, 6 Gray (Mass.) 556; *Greer v. Turner*, 36 Ark. 17.

²⁹ *Appeal of Harper*, 64 Pa. 315; *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369. Or with what he has actually received, if he has not occupied personally. *Morris v. Budlong*, 78 N. Y. 543.

³⁰ *Montgomery v. Chadwick*, 7 Iowa, 114; *Holabird v. Burr*, 17 Conn. 556; *Sanders v. Wilson*, 34 Vt. 318.

mortgagee is in possession will be credited on the mortgage debt.⁸¹ The mortgagee in possession may cut and sell wood, or work a mine, on the mortgaged premises, if such is a proper mode of enjoying the profits of the estate.⁸² If he does so, however, a due accounting must be rendered.⁸³

Credits

For necessary and proper repairs made by a mortgagee in possession, he should be allowed due credit in his accounting,⁸⁴ but not for repairs that are merely ornamental or convenient, if not necessary for the protection and preservation of the property.⁸⁵ He will not, moreover, be allowed compensation for valuable or permanent improvements made by him, such improvements not being in the nature of necessary repairs,⁸⁶ unless they were agreed to by the mortgagor.⁸⁷ On the other hand, he is not chargeable with an increased rental value due to improvements made by him with which he is not credited.⁸⁸ When, however, a mortgagee is in possession under an honest, but mistaken, belief that he has absolute title, he will be allowed compensation for all improvements thus made by him in good faith.⁸⁹ With reference to compensa-

⁸¹ *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Daniel v. Coker*, 70 Ala. 260. Cf. *Whiting v. Adams*, 66 Vt. 679, 30 Atl. 32, 25 L. R. A. 598, 44 Am. St. Rep. 875.

⁸² *Irwin v. Davidson*, 38 N. C. 311; *Millett v. Davey*, 31 Beav. 470.

⁸³ *Place v. Sawtell*, 142 Mass. 477, 8 N. E. 343; *Irwin v. Davidson*, 38 N. C. 311.

⁸⁴ *American Freehold Land Mortg. Co. of London v. Pollard*, 132 Ala. 155, 32 South. 630; *Mosier v. Norton*, 83 Ill. 519; *Darling v. Harmon*, 47 Minn. 166, 49 N. W. 686; *Bourgeois v. Gapen*, 58 Neb. 364, 78 N. W. 639; *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374; *Hicklin v. Marco (C. C.)* 46 Fed. 424; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Woodward v. Phillips*, 14 Gray (Mass.) 132; *Malone v. Roy*, 107 Cal. 518, 40 Pac. 1040.

⁸⁵ *Woodward v. Phillips*, 14 Gray (Mass.) 132; *Hidden v. Jordan*, 28 Cal. 301; *Barnard v. Paterson*, 137 Mich. 633, 100 N. W. 893; *Fletcher v. Bank*, 182 Mass. 5, 64 N. E. 207, 94 Am. St. Rep. 632.

⁸⁶ *Whetstone v. McQueen*, 137 Ala. 301, 34 South. 229; *Malone v. Roy*, 107 Cal. 518, 40 Pac. 1040; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Merriam v. Goss*, 139 Mass. 77, 28 N. E. 449; *Appeal of Harper*, 64 Pa. 315; *Rowell v. Jewett*, 73 Me. 365. And see *American Button-Hole, Overseaming & Sewing Mach. Co. v. Association*, 68 Iowa, 326, 27 N. W. 271; *Mickles v. Dillaye*, 17 N. Y. 80.

⁸⁷ *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Mickles v. Dillaye*, 17 N. Y. 80; *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374; *Russell v. Blake*, 2 Pick. (Mass.) 505.

⁸⁸ *Hagthorp v. Hook's Adm'rs*, 1 Gill & J. (Md.) 270; *Bell v. Mayor, etc.*, 10 Paige (N. Y.) 49.

⁸⁹ *Miner v. Beekman*, 50 N. Y. 337; *Roberts v. Fleming*, 53 Ill. 196; *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328; *Hadley v. Stewart*, 65 Wis. 481, 27 N. W. 340; *Bacon v. Cottrell*, 13 Minn. 194 (Gil. 183); *Troost v. Davis*, 31 Ind. 34. And see *McAbee v. Harrison*, 50 S. C. 39, 27 S. E. 539, holding that where

tion for his own services in the management of the property, the general rule is that the mortgagee in possession is not entitled to any credit,⁴⁰ and it is also held that, in the absence of express agreement, he is not entitled to compensation for collecting the rents and proceeds of the premises.⁴¹ In some states, however, he may be allowed a commission for collecting the rents,⁴² and, in general, he may employ an agent, when necessary, to manage the property,⁴³ and charge for counsel fees necessarily expended in collecting rents.⁴⁴ The principal disbursements for which he may be credited are taxes and assessments,⁴⁵ money paid in discharging a prior incumbrance,⁴⁶ or otherwise protecting the title,⁴⁷ and expenses in preserving the property, as, for example, employing a watchman.⁴⁸ A tax, however, paid by the mortgagee upon his own mortgage interest in the property, as distinguished from the tax assessed against the property itself, cannot be recovered from the mortgagor.⁴⁹

SAME—INSURANCE AND TAXES ON MORTGAGED PREMISES

193. The mortgagor and the mortgagee each have an insurable interest in the mortgaged premises. It is the duty of the mortgagor to pay the taxes on the mortgaged property.

improvements are made by one in possession of land of another, held as security for a debt, merely under the expectation and belief that it would never be redeemed, he is not entitled to compensation therefor on redemption by the owner.

⁴⁰ *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Clark v. Smith*, 1 N. J. Eq. 121; *Elmer v. Loper*, 25 N. J. Eq. 475.

⁴¹ *Gilluly v. Shumway*, 144 Mich. 661, 108 N. W. 88.

⁴² 2 Jones, *Mortg.* (5th Ed.) § 1133.

⁴³ *Davis v. Dendy*, 3 Madd. 170; *Harper v. Ely*, 70 Ill. 581.

⁴⁴ *Hubbard v. Shaw*, 12 Allen (Mass.) 120.

⁴⁵ *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374; *Devin v. Eagleson*, 79 Iowa, 269, 44 N. W. 545; *Leavitt v. Bell*, 59 Neb. 595, 81 N. W. 614; *Windett v. Insurance Co.*, 144 U. S. 581, 12 Sup. Ct. 751, 36 L. Ed. 551; *Harper v. Ely*, 70 Ill. 581; *Dooley v. Potter*, 146 Mass. 148, 15 N. E. 499; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Gooch v. Botts*, 110 Mo. 419, 20 S. W. 192; *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922.

⁴⁶ *McCormick v. Knox*, 105 U. S. 122, 26 L. Ed. 940; *Davis v. Bean*, 114 Mass. 360; *Comstock v. Michael*, 17 Neb. 288, 22 N. W. 549; *Fitch v. Stallings*, 5 Colo. App. 106, 38 Pac. 393.

⁴⁷ *Hughes v. Johnson*, 38 Ark. 285.

⁴⁸ *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407, 12 N. E. 522.

⁴⁹ *Pond v. Causdell*, 23 N. J. Eq. 181.

Insurance

The mortgagor of real property,⁵⁰ and also the mortgagee,⁵¹ have a separate and distinct insurable interest in the mortgaged premises. Moreover, the insurable interest of the mortgagor is the full value of the property,⁵² even though it may be mortgaged to its full value.⁵³ His insurable interest also continues, even after a sale of his equity of redemption on execution, until his right to redeem from such sale is barred.⁵⁴ If he has assigned his equity of redemption, he still has an insurable interest, providing he remains personally liable on the debt;⁵⁵ and although his grantee has assumed the mortgage note, he retains an insurable interest, if he remains liable on the mortgage note as a surety.⁵⁶ A covenant is usually inserted in the mortgage deed that the mortgagor shall keep the premises insured for the benefit of the mortgagee. Such covenants are valid,⁵⁷ provided the amount of the insurance to be taken out is specified.⁵⁸ Where the mortgagor insures for his own benefit, being under no covenant to insure for the mortgagee, and acting entirely for himself, the proceeds of the insurance, should a loss occur, belong entirely to the mortgagor.⁵⁹ In case, however, the mortgagor has covenanted to insure for the benefit of the mort-

⁵⁰ *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Jackson v. Insurance Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Buffalo Steam Engine Works v. Insurance Co.*, 17 N. Y. 401; *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473.

⁵¹ *Foster v. Insurance Co.*, 2 Gray (Mass.) 216; *Tillou v. Insurance Co.*, 7 Barb. (N. Y.) 570; *Smith v. Insurance Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Dick v. Insurance Co.*, 10 Mo. App. 376.

⁵² *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473; *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *Stephens v. Insurance Co.*, 43 Ill. 327; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

⁵³ *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249; *Higginson v. Dall*, 13 Mass. 96.

⁵⁴ *Strong v. Insurance Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507.

⁵⁵ *Buck v. Insurance Co.*, 76 Me. 586; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Waring v. Loder*, 53 N. Y. 581.

⁵⁶ *Waring v. Loder*, 53 N. Y. 581.

⁵⁷ *Mann v. Mann*, 49 Ill. App. 472; *Swearingen v. Insurance Co.*, 56 S. C. 355, 34 S. E. 449.

⁵⁸ Such a covenant must specify the amount of insurance to be taken out for the mortgagee's benefit. If this is left blank, the covenant is of no effect. *McCaslin v. Manufacturing Co.*, 155 Ind. 298, 58 N. E. 67.

⁵⁹ *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 114; *Titus v. Insurance Co.*, 81 N. Y. 410; *Carter v. Rockett*, 8 Paige (N. Y.) 437; *Columbian Ins. Co. of Alexandria v. Lawrence*, 10 Pet. (U. S.) 507, 9 L. Ed. 512; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Ryan v. Adamson*, 57 Iowa, 30, 10 N. W. 287; *Plimpton v. Insurance Co.*, 43 Vt. 497, 5 Am. Rep. 297; *Nichols v. Baxter*, 5 R. I. 491.

gagee, if the mortgagor should insure in his own name, the mortgagee has a specific equitable lien on the insurance money.⁶⁰ When the mortgagor does insure for the benefit of the mortgagee, anything which makes the policy void as to the mortgagor makes it void as to the mortgagee also, unless there be a provision in the policy to the contrary.⁶¹ The mortgagor, moreover, cannot bind the mortgagee, for whose benefit he has taken insurance, by a release or adjustment.⁶² In case of a loss under a policy taken out by the mortgagor for the benefit of the mortgagee, the mortgagee must apply the insurance money to the mortgage debt.⁶³ If, however, it is not due, such application cannot be made without the consent of the mortgagor.⁶⁴ A provision in a policy of insurance forbidding alienation by the owner is not broken by a mortgage of the premises until the mortgage is foreclosed,⁶⁵ although such a mortgage might be a breach of a covenant against change of ownership.⁶⁶ Both the mortgagor and the mortgagee may insure their separate interests contemporaneously, and such transactions do not constitute double insurance.⁶⁷ The insurable interest of the mortgagee is equal to the amount of his lien, providing such amount

⁶⁰ *Grange Mill Co. v. Assurance Co.*, 118 Ill. 396, 9 N. E. 274; *Providence County Bank v. Benson*, 24 Pick. (Mass.) 204; *Ætna Ins. Co. v. Thompson*, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; *Wheeler v. Insurance Co.*, 101 U. S. 439, 25 L. Ed. 1055; *In re Sands Ale Brewing Co.*, 3 Biss. 175, Fed. Cas. No. 12,307; *Cromwell v. Insurance Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Wattengel v. Schultz*, 11 Misc. Rep. 165, 32 N. Y. Supp. 91; *Carter v. Rockett*, 8 Paige (N. Y.) 437; *Miller v. Aldrich*, 31 Mich. 408; *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137.

⁶¹ *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711.

⁶² *Hazard v. Draper*, 7 Allen (Mass.) 267.

⁶³ *Honore v. Insurance Co.*, 51 Ill. 409; *Home Ins. Co. v. Marshall*, 48 Kan. 235, 29 Pac. 161; *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97; *Connecticut Mut. Life Ins. Co. v. Scammon*, 117 U. S. 634, 6 Sup. Ct. 889, 29 L. Ed. 1007; *Waring v. Loder*, 53 N. Y. 581.

⁶⁴ *Fergus v. Wilmarth*, 117 Ill. 542, 7 N. E. 508; *Gordon v. Bank*, 115 Mass. 588.

⁶⁵ *Powers v. Insurance Co.*, 136 Mass. 108, 49 Am. Rep. 20; *Judge v. Insurance Co.*, 132 Mass. 521; *Conover v. Insurance Co.*, 3 Denio (N. Y.) 254; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Loy v. Insurance Co.*, 24 Minn. 315, 31 Am. Rep. 346. Otherwise in some states when the mortgage is by deed absolute. *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279. And see *Foote v. Insurance Co.*, 119 Mass. 259; *Tomlinson v. Insurance Co.*, 47 Me. 232.

⁶⁶ *Edmands v. Insurance Co.*, 1 Allen (Mass.) 311, 79 Am. Dec. 746.

⁶⁷ *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90. So a trustee under a deed of trust has an insurable interest. *Dick v. Insurance Co.*, 81 Mo. 103.

does not exceed the value of the property.⁶⁸ Different mortgagees of the same property have, likewise, insurable interests up to the amount of their respective loans.⁶⁹

The mortgagee's insurable interest continues after an assignment of the mortgage and the mortgage debt, if he is liable to the assignee, as by an indorsement of the note.⁷⁰ If the mortgagee insures for his own interests and benefit, he cannot charge to the mortgagor.⁷¹ the premiums paid, unless the latter has covenanted to insure, and has failed to do so.⁷² When the insurance is taken out by the mortgagee for his own interest, the loss is payable, whether the property remaining is sufficient security for the mortgage debt or not;⁷³ but the insurer is subrogated to the rights of the mortgagee, to the amount of the loss.⁷⁴ In such a case, however, the insurance is of no benefit to the mortgagor.⁷⁵ When the insurance, on the other hand, is in the name of the mortgagor, or is taken out by him for the benefit of the mortgagee, the insurer has no right to subrogation.⁷⁶

Taxes and Assessments

It is the duty of the mortgagor to pay the taxes and assessments levied on the mortgaged property.⁷⁷ Under the common-law

⁶⁸ *Excelsior Fire Ins. Co. v. Insurance Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541.

⁶⁹ *Fox v. Insurance Co.*, 52 Me. 333.

⁷⁰ *Williams v. Insurance Co.*, 107 Mass. 377, 9 Am. Rep. 41.

⁷¹ *Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; *Walton v. Hollywood*, 47 Mich. 385, 11 N. W. 209; *Faure v. Winans*, Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545.

⁷² *Baker v. Aalberg*, 183 Ill. 258, 55 N. E. 672; *Jehle v. Brooks*, 112 Mich. 131, 70 N. W. 440; *Northwestern Mut. Life Ins. Co. v. Drown*, 51 Wis. 419, 8 N. W. 237; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Fowley v. Palmer*, 5 Gray (Mass.) 549; *Garza v. Investment Co.* (Tex. Civ. App. 1894) 27 S. W. 1090.

⁷³ *Kernochan v. Insurance Co.*, 17 N. Y. 428, 435; *Excelsior Fire Ins. Co. v. Insurance Co.*, 55 N. Y. 343, 14 Am. Rep. 271.

⁷⁴ *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Foster v. Van Reed*, 70 N. Y. 20, 26 Am. Rep. 544; *Bound Brook Mut. Fire Ins. Ass'n v. Nelson*, 41 N. J. Eq. 485, 5 Atl. 590; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447.

⁷⁵ *Deming Inv. Co. v. Dickerman*, 63 Kan. 728, 66 Pac. 1029, 88 Am. St. Rep. 265; *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Russell v. Southard*, 12 How. (U. S.) 139, 13 L. Ed. 927; *White v. Brown*, 2 Cush. (Mass.) 412; *Ely v. Ely*, 80 Ill. 532; *Stinchfield v. Milliken*, 71 Me. 567.

⁷⁶ *Cone v. Insurance Co.*, 60 N. Y. 619.

⁷⁷ *Medley v. Elliott*, 62 Ill. 532; *Morrison v. Hampton's Adm'r*, 49 S. W. 781, 20 Ky. Law Rep. 1573; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Mann v. Mann*, 49 Ill. App. 472; *Mutual Life Ins. Co. of New York v. Newell*,

theory of mortgage, when the mortgagee is in possession, receiving the rents and profits, it is his duty to see that the taxes are paid;⁷⁸ but he is entitled to credit for such payments, and, in general, if at any time a mortgagee is compelled, in order to protect his security, to pay delinquent taxes, he may recover the same from the mortgagor as a part of the mortgage debt.⁷⁹ A tax, however, upon the mortgagee's property in the mortgage itself, as distinguished from a tax upon the mortgaged premises, is payable by the mortgagee, and he is entitled to no reimbursement for such payments.⁸⁰ Mortgage deeds usually contain covenants that the mortgagor will pay all taxes and assessments levied against the property,⁸¹ with provisions, at times, that upon a default in such duty by the mortgagor the mortgage debt shall be immediately due,⁸² and that foreclosure proceedings may be forthwith instituted.⁸³

SAME—REPAIRS AND IMPROVEMENTS

194. A mortgagor is under no obligation to make repairs, in absence of covenant to that effect. A mortgagee in possession is, however, bound to keep the property in a reasonably good condition. Improvements made by the mortgagor inure to the benefit of the mortgagee's security.

In absence of a covenant that he will keep the premises in repair, a mortgagor is not bound to make repairs,⁸⁴ or to restore

78 Hun, 293, 28 N. Y. Supp. 913. Cf. *Wood v. Armour*, 88 Wis. 488, 60 N. W. 791, 43 Am. St. Rep. 918; *Raymond v. Palmer*, 47 La. Ann. 786, 17 South. 312.

79 *Strang v. Allen*, 44 Ill. 428; *Shoemaker v. Bank*, 15 Phila. (Pa.) 297; *McAbee v. Harrison*, 50 S. C. 39, 27 S. E. 539; *Hood & Wheeler v. Clark*, 141 Ala. 397, 37 South. 550; *Tinslar v. Davis*, 12 Allen (Mass.) 79.

80 *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Loughridge v. Insurance Co.*, 180 Ill. 267, 54 N. E. 153; *Hogg v. Longstreth*, 97 Pa. 255; *Windett v. Insurance Co.*, 144 U. S. 581, 12 Sup. Ct. 751, 36 L. Ed. 551; *Spencer v. Levering*, 8 Minn. 461 (Gil. 410).

81 *Pond v. Causdell*, 23 N. J. Eq. 181.

82 *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; *Cleaver v. Burcky*, 17 Ill. App. 92; *New England Mortg. Security Co. v. Vader* (C. C.) 28 Fed. 265; *Equitable Life Assur. Soc. v. Von Glahn*, 107 N. Y. 637, 13 N. E. 793.

83 *Brickell v. Batchelder*, 62 Cal. 623; *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569; *O'Connor v. Shipman*, 48 How. Prac. (N. Y.) 126.

84 *Pope v. Durant*, 26 Iowa, 233; *Stancilift v. Norton*, 11 Kan. 218; *Northwestern Mut. Life Ins. Co. v. Allis*, 23 Minn. 337.

85 *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534.

buildings, burned or otherwise destroyed.⁸⁵ A mortgagee in possession must, however, keep the property in reasonable repair,⁸⁶ although this duty does not extend to deteriorations caused by natural waste and lapse of time.⁸⁷

A mortgagor may make what improvements he pleases upon the mortgaged premises, but all such improvements will inure to the benefit of the mortgagee, since they become a part of the mortgaged property.⁸⁸ A mortgagee in possession is never required to improve the premises, and, in fact, has no legal right to do so.⁸⁹

SAME—INJURIES TO THE PREMISES

195. For ordinary injuries to the mortgaged premises by third persons, the mortgagor may alone bring suit.

Both the mortgagor and the mortgagee may protect, by proper remedies, their respective interests from injury by each other.

The mortgagor in possession may sue third persons for injury to the mortgaged property.⁹⁰ There are some early decisions to the effect that, when the mortgagee is in possession, he alone is authorized to sue;⁹¹ but the better rule seems to be that the mortgagor, whether in possession or not, has the right of action.⁹²

For injuries of a serious character, impairing the value of the mortgage security, the mortgagee may also sue third persons,⁹³

⁸⁵ *Reid v. Bank*, 1 Sneed (Tenn.) 262; *Breed v. Investment Co.* (C. C.) 92 Fed. 760.

⁸⁶ *Dexter v. Arnold*, Fed. Cas. No. 3,858, 2 Sumn. 108; *Russell v. Smithies*, Anstr. 96; *Barnett v. Nelson*, 54 Iowa, 41, 6 N. W. 49, 37 Am. Rep. 183; *Dozier v. Mitchell*, 65 Ala. 511.

⁸⁷ *Dexter v. Arnold*, Fed. Cas. No. 3,858, 2 Sumn. 108. As to compensation for repairs, see *Accounting*, supra.

⁸⁸ *Baird v. Jackson*, 98 Ill. 78; *Morley v. Quimby*, 132 Mich. 140, 92 N. W. 943; *Gibson v. Trust Co.*, 58 Hun, 443, 12 N. Y. Supp. 444; *Ivy v. Yancey*, 129 Mo. 501, 31 S. W. 937. And see *Malone v. Roy*, 107 Cal. 518, 40 Pac. 1040.

⁸⁹ See, supra, *Accounting*, Credits.

⁹⁰ *Hamilton v. Griffin*, 123 Ala. 600, 26 South. 243; *Emory v. Keighan*, 88 Ill. 482; *Johnson v. White*, 11 Barb. (N. Y.) 194.

⁹¹ *Clark v. Beach*, 6 Conn. 142; *Sparhawk v. Bagg*, 16 Gray (Mass.) 583; *Seaver v. Durant*, 39 Vt. 103.

⁹² The mortgagor may sue for injuries to the mortgaged premises, whether in possession or not. *Frankenthal v. Mayer*, 54 Ill. App. 160; *Heitkamp v. Granite Co.*, 59 Mo. App. 244; *Atwood v. Pulp Co.*, 85 Me. 379, 27 Atl. 259.

⁹³ *James v. Worcester*, 141 Mass. 361, 5 N. E. 826; *Wilkinson v. Dunkley-Williams Co.*, 139 Mich. 621, 103 N. W. 170; *E. H. Ogden Lumber Co. v.*

but in cases of ordinary trespass the mortgagor alone may sue.⁹⁴ Neither the mortgagor nor the mortgagee may lawfully commit waste, so as to impair the permanent value of the property, and for acts of waste on the mortgagor's part, such actions as case,⁹⁵ trespass,⁹⁶ or even replevin,⁹⁷ may lie, or an application for a receiver be made;⁹⁸ also the remedy of injunction may be invoked by the mortgagee to prevent impairment of his security.⁹⁹

Likewise, in case of abuse and waste of the premises by a mortgagee in possession, he may be charged for the same in his accounting,¹ or in a proper case may be restrained by injunction.² A mortgagee, not entitled to possession, may also be sued for trespass.³

In some states, it is made a statutory offense for a mortgagor to remove any building from mortgaged premises with intent to defraud a mortgagee.⁴

SALE OF THE MORTGAGED PROPERTY

196. A mortgagor may sell and convey, either in whole or in part, the mortgaged land to a third person, transferring to such purchaser the mortgagor's rights, title, interests, or equities in the property.

Busse, 92 App. Div. 143, 86 N. Y. Supp. 1098. See *Morgan v. Gilbert* (C. C.) 2 Fed. 835, 2 Flipp. 645.

⁹⁴ *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Guthrie v. Kahle*, 46 Pa. 331.

⁹⁵ *Williams v. Exhibition Co.*, 86 Ill. App. 167; *Chelton v. Green*, 65 Md. 272, 4 Atl. 271; *Van Pelt v. McGraw*, 4 N. Y. 110.

⁹⁶ *Linscott v. Weeks*, 72 Me. 506; *Page v. Robinson*, 10 Cush. (Mass.) 99; *Girard Life Ins. Annuity & Trust Co. of Philadelphia v. Mangold*, 83 Mo. App. 281.

⁹⁷ *Waterman v. Matteson*, 4 R. I. 539.

⁹⁸ *Mooney v. Brinkley*, 17 Ark. 340.

⁹⁹ *Williams v. Exhibition Co.*, 188 Ill. 19, 58 N. E. 611; *Collins v. Rea*, 127 Mich. 273, 86 N. W. 811; *Ensign v. Colburn*, 11 Paige (N. Y.) 503; *Schmaltz v. Manufacturing Co.*, 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782; *Benson v. San Diego* (C. C.) 100 Fed. 158.

¹ *Place v. Sawtell*, 142 Mass. 477, 8 N. E. 343; *Maurer v. Grimm*, 84 App. Div. 575, 82 N. Y. Supp. 760; *Givens v. McCalmont*, 4 Watts (Pa.) 460; *Wragg v. Denham*, 6 L. J. Exch. 38, 2 Y. & C. Exch. 117.

² See *Brumly v. Fanning*, 1 Johns. Ch. (N. Y.) 501.

³ Where the right of possession was not reserved to the mortgagor, an action of trespass will not lie in his favor against the mortgagee for peaceably entering on the premises, and digging up and converting to his own use portions of the soil, although the mortgagee had no actual possession prior to such entry. *Furbush v. Goodwin*, 29 N. H. 321.

⁴ *Chute v. State*, 19 Minn. 271 (Gil. 230).

In case of such a sale or assignment, the following principles apply:

- (a) The assignee, with notice, takes subject to the mortgage.
- (b) The assignee does not, however, become personally liable for the mortgage debt unless he expressly assumes it.
- (c) In many states, if the assignee does assume the debt, the contract may be enforced by the mortgagee.
- (d) An equity of redemption cannot be assigned to the mortgagee at the time the mortgage is executed.

The mortgagor's interest may also be transferred by operation of law, as:

- (a) By descent.
- (b) By execution sale.

In General

The fact that land is mortgaged does not, in itself, prevent the mortgagor from transferring his interest therein. He may sell and convey the same to a third person,⁵ and he may transfer his rights and equities in the whole of the mortgaged premises or in a part thereof.⁶ He may also, under the lien theory, make successive mortgages.⁷

Rights and Liabilities of Purchaser

The grantee, or assignee, in a sale of mortgaged land, succeeds, ordinarily, to the title and interest of his grantor, including all the latter's rights and equities in the premises conveyed.⁸ If the grantee has notice of the mortgage, he takes subject to the rights of the mortgagee, regardless of the nature of the title or interest which the grantee obtains, which under the legal theory of mortgage would be a mere equity of redemption, or, under the equitable theory, a legal title incumbered with a lien.⁹

⁵ *Medley v. Elliott*, 62 Ill. 532; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Russell v. Ely*, 2 Black (U. S.) 575, 17 L. Ed. 258.

⁶ *Rice v. Dewey*, 54 Barb. (N. Y.) 455. Compare *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86.

⁷ *Hodson v. Treat*, 7 Wis. 263; *Buchanan v. Monroe*, 22 Tex. 537. See *Priority of Mortgages*, chapter XIX.

⁸ *Houghton v. Allen* (Cal. 1887) 14 Pac. 641, reversed 75 Cal. 102, 16 Pac. 532; *Robbins v. Arnold*, 11 Ill. App. 434; *Stone v. Lane*, 10 Allen (Mass.) 74. See *Burks v. Securities Corp.*, 108 Ga. 783, 33 S. E. 711.

⁹ *Kelly v. Staed*, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648; *Ruffners v. Lewis' Ex'rs*, 7 Leigh (Va.) 720, 30 Am. Dec. 513; *Warner v. Grayson*, 200 U. S. 257, 26 Sup. Ct. 240, 50 L. Ed. 470; *Kruse v. Scripps*, 11 Ill. 98; *Hartley v. Harrison*, 24 N. Y. 170.

The original mortgagee is a purchaser, to the extent of his claim, and as such is protected under the recording laws.¹⁰ He is entitled to have the whole of the mortgaged premises as security for his debt, and cannot be made to accept part of them as payment. Nor can a purchaser of the mortgagor's interest compel the mortgagee to make partition.¹¹ Where, however, a purchaser of mortgaged land buys the same in good faith and for a valuable consideration, with no notice, either actual or constructive, of an existing mortgage thereon, the mortgage being unrecorded, he will take the same freed from the rights of the mortgagee.¹² A purchaser of the mortgagor's rights, or, as he is often called, an "assignee of the equity of redemption," although he takes the land subject to the mortgage, may nevertheless acquire a paramount title, and set it up against the mortgagee,¹³ unless he is estopped by recitals in his deed.¹⁴ He may, however, in such case, show that the mortgage has been paid by the mortgagor, or other matter in discharge.¹⁵ The mortgagor may covenant to pay the mortgage, but otherwise his assignee is not entitled to compensation from the mortgagor if the mortgage is enforced against the land.¹⁶ Nor is a purchaser from the mortgagor entitled to collateral security held by the mortgagee.¹⁷ An assignee of the equity of redemption does not, how-

¹⁰ *Rowell v. Williams*, 54 Wis. 636, 12 N. W. 86; *Bass v. Wheless*, 2 Tenn. Ch. 531; *Moore v. Walker*, 3 Lea (Tenn.) 656; *Patton v. Eberhart*, 52 Iowa, 67, 2 N. W. 954; *Herff v. Griggs*, 121 Ind. 471, 23 N. E. 279.

¹¹ *Spencer v. Waterman*, 36 Conn. 342; *McConihe v. Fales*, 107 N. Y. 404, 14 N. E. 285; *Carpenter v. Koons*, 20 Pa. 222; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Daniel v. Wilson*, 91 Ga. 238, 18 S. E. 134.

¹² *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579; *Appeal of Eagle Beneficial Soc.*, 75 Pa. 226; *Lennartz v. Quilty*, 191 Ill. 174, 60 N. E. 913, 85 Am. St. Rep. 260; *Sheldon v. Holmes*, 58 Mich. 138, 24 N. W. 795. See *MOONEY v. BYRNE*, 163 N. Y. 86, 57 N. E. 163, *Burdick Cas. Real Property*.

¹³ *Knox v. Easton*, 38 Ala. 345.

¹⁴ Such as, that he takes subject to the mortgage, or assumes the mortgage. *Kennedy v. Borie*, 166 Pa. 360, 31 Atl. 98. But see *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883. Nor can the assignee deny its validity for failure of consideration, *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Haile v. Nichols*, 16 Hun (N. Y.) 37; or for usury, *Hartley v. Harrison*, 24 N. Y. 170; *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367, 6 L. Ed. 343; *Cleaver v. Burcky*, 17 Ill. App. 92; *Frost v. Shaw*, 10 Iowa, 491. But the mortgagor may confer on his grantee a right to contest the validity of the mortgage. *Bennett v. Bates*, 94 N. Y. 354; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150.

¹⁵ *Hartley v. Tatham*, 2 Abb. Dec. (N. Y.) 333; *Williams v. Thurlow*, 31 Me. 392; *Bennett v. Keehn*, 57 Wis. 582, 15 N. W. 776.

¹⁶ *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Gayle v. Wilson*, 30 Grat. (Va.) 166.

¹⁷ *Brewer v. Staples*, 3 Sandf. Ch. (N. Y.) 579.

ever, become personally liable for the mortgage debt unless he expressly assumes its payment,¹⁸ and the fact that the deed recites that the land is conveyed subject to a mortgage does not make the grantee personally liable, in absence of an express agreement on his part.¹⁹ When the grantee assumes the mortgage debt, the mortgagor becomes merely a surety for him, and if he is forced to pay the debt he may collect it from his grantee.²⁰ The mortgagee need not accept such an agreement between a mortgagor and his grantee;²¹ but, if he does accept, it constitutes a novation, and an extension of time given by the mortgagee to the grantee will discharge the mortgagor from personal liability, since he is merely a surety.²² When, however, it is expressed in a subsequent mort-

¹⁸ *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460; *Gage v. Jenkinson*, 58 Mich. 169, 24 N. W. 815; *Kellogg v. Ames*, 41 N. Y. 259; *Farmers' Loan & Trust Co. v. Glass Co.*, 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234; *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 732; *Middaugh v. Bachelder* (C. C.) 33 Fed. 706; *Comstock v. Hitt*, 37 Ill. 542; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Metzger v. Huntington*, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235; *Offut v. Cooper*, 136 Ind. 701, 36 N. E. 273; *Green v. Hall*, 45 Neb. 89, 63 N. W. 119. Such is the effect of a clause providing that "the mortgagee assumes a mortgage," etc. *Corning v. Burton*, 102 Mich. 86, 62 N. W. 1040; *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980; *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, 59 N. W. 115; *Wayman v. Jones*, 58 Mo. App. 313; *Williams v. Everham*, 90 Iowa, 420, 57 N. W. 901. And see *Lennox v. Brower*, 160 Pa. 191, 28 Atl. 839; *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30. But cf. *Carrier v. Paper Co.*, 73 Hun, 287, 26 N. Y. Supp. 414; *Hopper v. Calhoun*, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363. But not a provision that he takes "subject to the mortgage." *Tanguay v. Felthousen*, 45 Wis. 30; *Appeal of Moore*, 88 Pa. 450, 32 Am. Rep. 469; *Walker v. Goodsill*, 54 Mo. App. 631; *Lang v. Cadwell*, 13 Mont. 458, 34 Pac. 957. He may assume the debt by a parol agreement. *Merriman v. Moore*, 90 Pa. 78; *Lamb v. Tucker*, 42 Iowa, 118.

¹⁹ *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Canfield v. Shear*, 49 Mich. 313, 13 N. W. 605; *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456.

²⁰ *Flagg v. Geltmacher*, 98 Ill. 293; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Alt v. Banholzer*, 36 Minn. 57, 29 N. W. 674; *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30. The mortgagor may take an assignment of the mortgage, and foreclose it against his grantee. 1 Jones, *Mortg.* (5th Ed.) § 768. He may do this without a formal assignment. *Baker v. Terrell*, 8 Minn. 195 (Gil. 165); *Risk v. Hoffman*, 69 Ind. 137. The mortgagor may bring an action against his assignee to enforce the promise before he has himself paid the debt. *Rubens v. Prindle*, 44 Barb. (N. Y.) 336.

²¹ *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Connecticut Mut. Life Ins. Co. v. Tyler*, 8 Biss. 369, Fed. Cas. No. 3,109.

²² *Spencer v. Spencer*, 95 N. Y. 353; *Murray v. Marshall*, 94 N. Y. 611; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Union Mut. Life Ins. Co. v. Hanford* (C. C.) 27 Fed. 588; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269.

gage that the prior mortgage is assumed, the subsequent mortgagee does not become personally liable for the prior mortgage debt.²³ In many states the mortgagee may enforce an assumption of the mortgage debt by the purchaser of the mortgaged property.²⁴

Assignment of Equity of Redemption to Mortgagee

The equity of redemption cannot be waived, or assigned to the mortgagee, at the time the mortgage deed is executed.²⁵ Such a waiver or assignment would conflict with the very nature of a mortgage, since a mortgagor's equity of redemption is an inseparable incident of a mortgage. A mortgage cannot be created without an equity of redemption, and an instrument having such an effect would not be a mortgage, but an absolute conveyance, or a sale with a right to repurchase. The mortgagee may, however, purchase the equity of redemption at a subsequent time,²⁶ although such transactions are carefully scrutinized by the courts.²⁷

²³ *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Bassett v. Bradley*, 48 Conn. 224. Even if the mortgage be in form an absolute deed. *Pardee v. Treat*, 82 N. Y. 385; *Cole v. Cole*, 110 N. Y. 630, 17 N. E. 682; *Gaffney v. Hicks*, 131 Mass. 124.

²⁴ *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Whicker v. Hushaw*, 159 Ind. 1, 64 N. E. 460; *Coffin v. Adams*, 131 Mass. 133; *Webber v. Lawrence*, 118 Mich. 630, 77 N. W. 266; *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Winters v. Mining Co. (C. C.)* 57 Fed. 287; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Osborne v. Cabell*, 77 Va. 462. In these states the mortgagor cannot release the grantee from liability without the mortgagee's consent. *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; *Douglass v. Wells*, 18 Hun (N. Y.) 88. But see *Gold v. Ogden*, 61 Minn. 88, 63 N. W. 266. In other states the mortgagee is treated as merely subrogated to the mortgagor's security, and cannot sue the assignee directly at law. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Booth v. Insurance Co.*, 43 Mich. 299, 5 N. W. 381; *Crowell v. Currier*, 27 N. J. Eq. 152; *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609. In these states the mortgagor may release his grantee without the assent of the mortgagee. *O'Neill v. Clark*, 33 N. J. Eq. 444.

²⁵ *Bearss v. Ford*, 108 Ill. 16; *Faulkner v. Cody*, 45 Misc. Rep. 64, 91 N. Y. Supp. 633; *Johnson v. Gray*, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; *PEUGH v. DAVIS*, 96 U. S. 332, 24 L. Ed. 775, *Burdick Cas. Real Property*; *Willets v. Burgess*, 34 Ill. 494; *Bayley v. Bailey*, 5 Gray (Mass.) 505; *MOONEY v. BYRNE*, 163 N. Y. 86, 57 N. E. 163, *Burdick Cas. Real Property*.

²⁶ *McMillan v. Jewett*, 85 Ala. 476, 5 South. 145; *Batty v. Snook*, 5 Mich. 231; *Braun v. Vollmer*, 89 App. Div. 43, 85 N. Y. Supp. 319; *Ten Eyck v. Craig*, 62 N. Y. 406; *DE MARTIN v. PHELAN*, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115, *Burdick Cas. Real Property*.

²⁷ *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; *Phelan v. De Martin*, 85 Cal. 365, 24 Pac. 725; *Hinkley v. Wheelwright*, 29 Md. 341; *PEUGH v. DAVIS*, 96 U. S. 332, 24 L. Ed. 775, *Burdick Cas. Real Property*; *Oliver v. Cunningham (C. C.)* 7 Fed. 689.

Assignment by Operation of Law

On the death of the mortgagor, his interest passes to his heirs according to the rules of descent of realty.²⁸ If the mortgage is foreclosed in his lifetime, any surplus proceeds is personalty, and, on his death, goes to his personal representative. If, however, the foreclosure is not until after his death, his heirs are entitled to the surplus.²⁹ An equity of redemption may be sold on execution,³⁰ even by the mortgagee,³¹ but, in most states, not under an execution issuing on the mortgage debt.³² The same rules apply also to equitable mortgages.³³

ASSIGNMENT OF MORTGAGES

197. A mortgagee may assign his interest, or a part of it.

At law, the assignment of the mortgagee's legal title can be made only by deed. In equity, however, an assignment of a mortgage may be made by the delivery of the mortgage deed and note.

In many states, an assignment of a mortgage must be recorded in order to protect the assignee.

An assignment of the mortgage transfers to the assignee the rights, interests, and equities of the assignor, and, as a general rule, the assignee takes the mortgage subject only to the same equities as the mortgage debt.

In General

A mortgage may, generally, be assigned by the mortgagee.³⁴ Where, however, the mortgage is in the form of a trust deed, the

²⁸ *Rainey v. McQueen*, 121 Ala. 191, 25 South. 920; *Hunter v. Dennis*, 112 Ill. 568; *Zaegel v. Kuster*, 51 Wis. 31, 7 N. W. 781.

²⁹ *Dunning v. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Fliess v. Buckley*, 22 Hun (N. Y.) 551.

³⁰ *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Heimberger v. Boyd*, 18 Ind. 420; *Platt v. Oliver*, 19 Fed. Cas. No. 11,115, 2 McLean, 267; *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Fitch v. Pinckard*, 5 Ill. (4 Scam.) 69. And see *Bernstein v. Humes*, 71 Ala. 260.

³¹ *Cushing v. Hurd*, 4 Pick. (Mass.) 253; 16 Am. Dec. 335; *Seaman v. Hax*, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341.

³² *Young v. Ruth*, 55 Mo. 515; *Goring's Ex'x v. Shreve*, 7 Dana (Ky.) 64; *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 125; *Washburn v. Goodwin*, 17 Pick. (Mass.) 137. Contra, *Cottingham v. Springer*, 88 Ill. 90.

³³ *Clinton Nat. Bank v. Manwarring*, 39 Iowa, 281; *Turner v. Watkins*, 31 Ark. 429. But see *Gibson v. Hough*, 60 Ga. 588; *Phinizy v. Clark*, 62 Ga. 623.

³⁴ *Gould v. Newman*, 6 Mass. 239; *Kleeman v. Frisbie*, 63 Ill. 482; *Bryant v. Erskine*, 55 Me. 153. A bill in equity may be maintained to restrain the as-

trustee cannot assign, since the assignment must be made by the party owning the beneficial interest.³⁵ In case of the death of the mortgagee, an assignment can be made by his personal representative, but not by the heir.³⁶ The consent of the mortgagor is not necessary to the validity of an assignment,³⁷ unless there is a provision in the mortgage deed making it requisite.³⁸ Nor is it necessary, as far as the validity of an assignment is concerned, that an assignee should give notice of the assignment to the mortgagor.³⁹ Such notice may be important, however, for the protection of the assignee's interests.⁴⁰

Form of Assignment

At common law, under the theory that the mortgagee has the legal title, an assignment of a mortgage can be made only by a deed sufficient to convey the legal title.⁴¹ Under the equitable or lien theory of a mortgage, however, equity will recognize and enforce an assignment made by a delivery of the papers, where the intention to transfer the obligation and the security is clear.⁴² Moreover, there are many cases where an equitable assignment of a mortgage will be enforced, although there has been no transfer

assignment of a mortgage and compel its cancellation by one whose rights would be prejudiced by its assignment. *Hulsman v. Whitman*, 109 Mass. 411. A mortgage of indemnity cannot be assigned until the mortgagee has paid the debt. *Abbott v. Upton*, 19 Pick. (Mass.) 434; *Wallace v. Goodall*, 18 N. H. 439; *Jones v. Bank*, 29 Conn. 25. Contra, *Carper v. Mûnger*, 62 Ind. 481; *Murray v. Porter*, 26 Neb. 288, 41 N. W. 1111.

³⁵ *Gimbel v. Pignero*, 62 Mo. 240; *Appeal of Hatz*, 40 Pa. 209; *Bruegestrad v. Ludwig*, 184 Ill. 24, 56 N. E. 419.

³⁶ *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *La-Tourette v. Decker*, 64 Hun, 632, 18 N. Y. Supp. 840; *Hitchcock v. Merrick*, 15 Wis. 522; *Ex parte Blair*, 13 Metc. (Mass.) 126; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 531; *Crooker v. Jewell*, 31 Me. 306; *Baldwin v. Hatchett*, 56 Ala. 461; *Collamer v. Langdon*, 29 Vt. 32; *Douglass v. Durin*, 51 Me. 121; *Taft v. Stevens*, 3 Gray (Mass.) 504; *Collamer v. Langdon*, 29 Vt. 32; *Webster v. Calden*, 56 Me. 204.

³⁷ *Blake v. Broughton*, 107 N. C. 220, 12 S. E. 127; *Smith v. Bank*, 7 S. D. 465, 64 N. W. 529; *Jones v. Gibbons*, 9 Ves. Jr. 407, 7 Rev. Rep. 247.

³⁸ *Houseman v. Bodine*, 122 N. Y. 158, 25 N. E. 255; *Hidden v. Kretzschmar* (C. C.) 37 Fed. 465.

³⁹ *MULCAHY v. FENWICK*, 161 Mass. 164, 36 N. E. 689, *Burdick Cas. Real Property*; *Davies v. Jones*, 29 Misc. Rep. 253, 61 N. Y. Supp. 291.

⁴⁰ *Williams v. Pelley*, 96 Ill. App. 346. See *McCabe v. Farnsworth*, 27 Mich. 52. And see *infra*.

⁴¹ *Sanders v. Cassady*, 86 Ala. 246, 5 South. 503; *Stanley v. Kempton*, 59 Me. 472; *Warden v. Adams*, 15 Mass. 233; *Torrey v. Deavitt*, 53 Vt. 331.

⁴² *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Wilson v. Kimball*, 27 N. H. 300; *Hill v. Alexander*, 2 Kan. App. 251, 41 Pac. 1066; *Strause v. Josephthal*, 77 N. Y. 622.

at all, as, for example, a defective assignment,⁴³ an agreement to assign,⁴⁴ or a bequest of the mortgage.⁴⁵ Likewise, an assignment may be made by operation of law, as where a purchaser at a void foreclosure sale, having paid for the property, is considered as assignee of the mortgage.⁴⁶

An assignment at law may be made by a separate instrument,⁴⁷ or by a proper indorsement upon the mortgage deed itself.⁴⁸

Recording the Assignment

In many states, an assignment of a mortgage must be recorded, the same as a deed of conveyance, in order to make the assignment valid against subsequent purchasers or lienors without notice.⁴⁹ In some states, moreover, the recording of an assignment will, under the doctrine of constructive notice, protect the assignee against payments made to the mortgagee in good faith by the mortgagor who has no actual notice of the assignment.⁵⁰ In other jurisdictions, however, actual notice is necessary,⁵¹ and, in general, payments made in good faith to a mortgagee by a mortgagor, having neither actual nor constructive notice of an assignment of the mortgage, will be good against the assignee.⁵² When the mortgagee has assigned

⁴³ *Moreland v. Houghton*, 94 Mich. 548, 54 N. W. 285; *Raynor v. Raynor*, 21 Hun (N. Y.) 36; *Partridge v. Partridge*, 38 Pa. 78.

⁴⁴ *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57, 13 N. E. 222; *Freeburg v. Eksell*, 123 Iowa, 464, 99 N. W. 118; *Stelzich v. Weidel*, 27 Ill. App. 177; *Smith v. Hitchcock*, 130 Mass. 570; *White v. Knapp*, 8 Paige (N. Y.) 173.

⁴⁵ *Densmore v. Savage*, 110 Mich. 27, 67 N. W. 1103; *Proctor v. Robinson*, 35 Mich. 284.

⁴⁶ *Bruschke v. Wright*, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; *Muir v. Berkshire*, 52 Ind. 149; *Robinson v. Ryan*, 25 N. Y. 320.

⁴⁷ *Shurtleff v. Francis*, 118 Mass. 154; *Hutton v. Cuthbert*, 51 Mich. 229, 16 N. W. 386; *Aldrich v. Ward*, 68 App. Div. 647, 73 N. Y. Supp. 918; *Pringle v. Pringle*, 59 Pa. 281.

⁴⁸ *Ward v. Ward*, 108 Ala. 278, 19 South. 354; *Mallory v. Mallory*, 86 Ill. App. 193; *Hills v. Eliot*, 12 Mass. 26, 7 Am. Dec. 26.

⁴⁹ *Citizens' State Bank of Noblesville v. Julian*, 153 Ind. 655, 55 N. E. 1007; *Pritchard v. College*, 82 Mich. 587, 47 N. W. 31; *Breed v. Bank*, 171 N. Y. 648, 63 N. E. 1115. See *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655; *Passumpsic Sav. Bank v. Buck*, 71 Vt. 190, 44 Atl. 93. See, in general, Notice, chapter XIX.

⁵⁰ *Detwilder v. Heckenlaible*, 63 Kan. 627, 66 Pac. 653; *Merriam v. Bacon*, 5 Metc. (Mass.) 95; *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598.

⁵¹ See the statutes in the several states. And see *Goodale v. Patterson*, 51 Mich. 532, 16 N. W. 890; *Robbins v. Larson*, 69 Minn. 436, 72 N. W. 456, 65 Am. St. Rep. 572; *Barnes v. Investment Co.*, 88 App. Div. 83, 84 N. Y. Supp. 951; *Foster v. Carson*, 147 Pa. 157, 23 Atl. 342; *Id.*, 159 Pa. 477, 28 Atl. 356, 39 Am. St. Rep. 696.

⁵² *Napieralski v. Simon*, 198 Ill. 384, 64 N. E. 1042; *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36;

the mortgage, and then wrongfully discharges it of record, the cases are conflicting as to whether subsequent purchasers from the mortgagor are protected against the assignee of the mortgage.⁵³ They are, however, in states where the assignment of a mortgage must be recorded.⁵⁴ Such a discharge is not good, however, in favor of one who took his interest before the discharge was entered of record.⁵⁵

Assignment of a Part

A mortgagee may assign a part of the debt, together with its proportionate security,⁵⁶ as where, for example, a mortgage is given to secure several separate notes.⁵⁷

Effect of the Assignment

An assignee of the mortgage takes the mortgagee's interest,⁵⁸ and he can foreclose in his own name.⁵⁹ After an assignment,

Castle v. Castle, 78 Mich. 298, 44 N. W. 378; Van Keuren v. Corkins, 66 N. Y. 77; Foster v. Carson, 159 Pa. 477, 28 Atl. 356, 39 Am. St. Rep. 696; McVay v. Bridgman, 21 S. D. 374, 112 N. W. 1138; Hubbard v. Turner, Fed. Cas. No. 6,819, 2 McLean, 519.

⁵³ The weight of authority holds that they are. Ogle v. Turpin, 102 Ill. 148; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173. But see, contra, Lee v. Clark, 89 Mo. 553, 1 S. W. 142; Bamberger v. Geiser, 24 Or. 203, 33 Pac. 609. And cf. Roberts v. Halstead, 9 Pa. 32, 49 Am. Dec. 541.

⁵⁴ Ferguson v. Glassford, 68 Mich. 36, 35 N. W. 820; Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614; Van Keuren v. Corkins, 66 N. Y. 77; Bacon v. Van Schoonhoven, 87 N. Y. 446; Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655.

⁵⁵ Crumlish v. Railroad Co., 32 W. Va. 244, 9 S. E. 180.

⁵⁶ Sargent v. Howe, 21 Ill. 148; Foley v. Rose, 123 Mass. 557; Whitney v. Lowe, 59 Neb. 87, 80 N. W. 266; Blair v. White, 61 Vt. 110, 17 Atl. 49.

⁵⁷ Rolston v. Brockway, 23 Wis. 407; Norton v. Palmer, 142 Mass. 433, 8 N. E. 346; Blair v. White, 61 Vt. 110, 17 Atl. 49; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; McSorley v. Larissa, 100 Mass. 270; Wyman v. Hooper, 2 Gray (Mass.) 141. So part of the mortgage debt may be assigned, and with it all of the mortgage. Langdon v. Keith, 9 Vt. 299. In several states where notes secured by a mortgage are assigned successively, the one first due has the first right to the mortgage security. Horn v. Bennett, 135 Ind. 158, 34 N. E. 321, 956, 24 L. R. A. 800; Stanley v. Beatty, 4 Ind. 134; Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336; Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230. Contra, Cullum v. Erwin, 4 Ala. 452; State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. St. Rep. 565; Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4; First Nat. Bank of Aberdeen v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

⁵⁸ Hills v. Eliot, 12 Mass. 26, 7 Am. Dec. 26; Jackson v. Minkler, 10 Johns. (N. Y.) 480; Hastings v. Trust Co., 77 Fed. 347, 23 C. C. A. 191; Anderson v. Bank, 98 Mich. 543, 57 N. W. 808; Harrison v. Yerby (Ala.) 14 South. 321; Hunt v. Mortgage Security Co., 92 Ga. 720, 19 S. E. 27. Cf. Gray v. Waldron, 101 Mich. 612, 60 N. W. 288; Geiger v. Peterson, 164 Pa. 352, 30 Atl. 262.

⁵⁹ Irish v. Sharp, 89 Ill. 261; Barker v. Flood, 103 Mass. 474; Moreland v.

however, an agreement by the mortgagor and mortgagee cannot affect the assignee's rights, provided the mortgagor has had notice of the assignment.⁶⁰ If the mortgage is assigned without a transfer of the mortgage debt, it confers no rights at all upon the assignee.⁶¹ He may have the legal title, but he holds it as a trustee for the protection of the mortgage debt, when that is held by another than the mortgagee.⁶² In equity, however, an assignment of the mortgage may carry with it a transfer of the mortgage debt, under a presumption that such was the intention of the parties.⁶³

On the other hand, since the debt is the principal thing, the mortgage being its security, an assignment of the mortgage debt carries with it the benefit of the mortgage, and the assignor will hold it for the benefit of the assignee.⁶⁴ A mortgagee may set up an after-acquired title against his assignee, unless his assignment was with covenants of warranty,⁶⁵ and he may show that his assignment, though absolute in form, was for collateral security only.⁶⁶ An assignment of the mortgage generally carries with it all other collateral securities which the mortgagee has for

Houghton, 94 Mich. 548, 54 N. W. 285; Pratt v. Poole, 133 N. Y. 686, 31 N. E. 628; Bendey v. Townsend, 109 U. S. 665, 3 Sup. Ct. 482, 27 L. Ed. 1065.

⁶⁰ Black v. Reno (C. C.) 59 Fed. 917; Whipple v. Fowler, 41 Neb. 675, 60 N. W. 15; Parker v. Randolph, 5 S. D. 549, 59 N. W. 722, 29 L. R. A. 33. And see Cutler v. Clementson (C. C.) 67 Fed. 409.

⁶¹ Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602; Hamilton v. Browning, 94 Ind. 242; Fletcher v. Carpenter, 37 Mich. 412; Merritt v. Bartholick, 36 N. Y. 44; Wright v. Sperry, 21 Wis. 331; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. Ed. 313.

⁶² Bailey v. Gould, Walk. Ch. (Mich.) 478; Merritt v. Bartholick, 36 N. Y. 44; Aymar v. Bill, 5 Johns. Ch. (N. Y.) 570; Swan v. Yaple, 35 Iowa, 248; Peters v. Bridge Co., 5 Cal. 335, 63 Am. Dec. 134; Johnson v. Cornett, 29 Ind. 59; Thayer v. Campbell, 9 Mo. 280.

⁶³ Campbell v. Birch, 60 N. Y. 214; Earll v. Stumpf, 56 Wis. 50, 13 N. W. 701; Philips v. Bank, 18 Pa. 394. But see Fletcher v. Carpenter, 37 Mich. 412. And cf. Johnson v. Clarke (N. J. Eq.) 28 Atl. 558; State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. St. Rep. 565.

⁶⁴ McMillan v. Craft, 135 Ala. 148, 33 South. 26; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Briggs v. Hannowald, 35 Mich. 474; Partridge v. Partridge, 38 Pa. 78; Franke v. Neisler, 97 Wis. 364, 72 N. W. 887; Baldwin v. Raplee, 2 Fed. Cas. No. 801, 4 Ben. 433; Clark v. Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931. Larned v. Donovan, 31 Abb. N. C. 308, 29 N. Y. Supp. 825; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; Gumbel v. Boyer, 46 La. Ann. 762, 15 South. 84. But see Fitch v. McDowell, 145 N. Y. 498, 40 N. E. 205.

⁶⁵ Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554.

⁶⁶ Graydon v. Church, 7 Mich. 36; Pond v. Eddy, 113 Mass. 149. But see Harrison v. Burlingame, 48 Hun (N. Y.) 212, holding that an assignment of a mortgage does not amount to a mortgage of a mortgage, so as to bring the transaction within the statutes relating to chattel mortgages.

the same debt.⁶⁷ An assignment raises no implied warranty as to the solvency of the mortgagor,⁶⁸ but it does create a warranty that the mortgage debt has not been paid.⁶⁹ According to the general rule, an assignee of a mortgage and the note which it secures takes the mortgage free from all equities of which he has no notice, because the note itself, which is the principal thing, is free from such equities.⁷⁰ When, however, the note is overdue, or is nonnegotiable, the mortgage is subject, in the hands of the assignee, to all the equities which existed between the original parties before notice of assignment to the mortgagor.⁷¹

Not Subject to Attachment

Unless the mortgagee has acquired the mortgaged premises under a strict foreclosure, or has bid them in at a foreclosure sale, he has no interest which is subject to attachment, or to a sale on execution.⁷² The same is true of a beneficiary under a deed of trust,⁷³ since the mortgage is a mere incident to the mortgage debt; the creditor's remedy being against the debt, which is the principal thing.

⁶⁷ Byles v. Lawrence, 35 Mich. 458; Gordon v. Lewis, Fed. Cas. No. 5,613, 2 Sumn. 143; Howard v. Handy, 35 N. H. 315; Philips v. Bank, 18 Pa. 394. But see Smith v. Starr, 4 Hun (N. Y.) 123.

⁶⁸ Haber v. Brown, 101 Cal. 445, 35 Pac. 1035; French v. Turner, 15 Ind. 59; Nally v. Long, 71 Md. 585, 18 Atl. 811, 17 Am. St. Rep. 547.

⁶⁹ Waller v. Staples, 107 Iowa, 738, 77 N. W. 570; Ross v. Terry, 63 N. Y. 613; Lieberman v. Reichard, 7 Montg. Co. Law Rep'r (Pa.) 237; 1 Jones, Mortg. (5th Ed.) § 831; French v. Turner, 15 Ind. 59.

⁷⁰ Jordan v. Thompson, 117 Ala. 468, 23 South. 157; Watson v. Wyman, 161 Mass. 96, 36 N. E. 692; Woodcock v. Bank, 113 Mich. 236, 71 N. W. 477; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. Ed. 313; Dutton v. Ives, 5 Mich. 515; Jones v. Smith, 22 Mich. 360; Taylor v. Page, 6 Allen (Mass.) 86; Kenicott v. Wayne County, 16 Wall. (U. S.) 452, 21 L. Ed. 319; Preston v. Case, 42 Iowa, 549; Farmers' Nat. Bank of Salem v. Fletcher, 44 Iowa, 252; Swett v. Stark (C. C.) 31 Fed. 858; Barnum v. Phenix, 60 Mich. 388, 27 N. W. 577; Helmer v. Krolick, 36 Mich. 371; Gould v. Marsh, 1 Hun (N. Y.) 566; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173. Contra, Scott v. Magloughlin, 133 Ill. 33, 24 N. E. 1030.

⁷¹ Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671; Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Wood v. Safe-Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Fish v. French, 15 Gray (Mass.) 520; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999. That in New York he takes it subject also to latent equities in favor of third persons, see Bush v. Lathrop, 22 N. Y. 535.

⁷² Swan v. Yapple, 35 Iowa, 248; Courtney v. Carr, 6 Iowa, 238.

⁷³ Marsh v. Austin, 1 Allen (Mass.) 235; Jackson ex dem. Norton v. Willard, 4 Johns. (N. Y.) 41; Rickert v. Madeira, 1 Rawle (Pa.) 325; Nicholson v. Walker, 4 Ill. App. 404; Scott v. Mewhirter, 49 Iowa, 487; Buck v. Sanders, 1 Dana (Ky.) 187.

CHAPTER XIX

MORTGAGES (Continued)

(B) PRIORITY AND NOTICE

- 198. The Doctrine Stated.
- 199. Notice by Registration.
- 200. Notice by Recitals in Deeds.
- 201. Notice by Possession.
- 202. Notice by *Lis Pendens*.

THE DOCTRINE STATED

198. The rights of subsequent incumbrancers or purchasers of the same land depend upon the doctrines of priority and notice. Unless otherwise controlled by the registration laws, priority, or the precedence in time, in which mortgages and other liens attach and are entitled to be paid, is based upon two maxims of equity, namely:

- (1) Where the equities are equal, the first in time will prevail; and (2) Where the equities are equal, the legal title will prevail.

The doctrine of notice is also of equitable origin, and is a most important factor in determining the equality of equitable interests. No subsequent incumbrancer or purchaser can take priority over a lien or a conveyance of which he has notice.

Notice is either:

- (1) Actual, including express actual notice and implied actual notice; or
- (2) Constructive.

Constructive notice includes:

- (a) Notice by registration.
- (b) Notice by recitals in title deeds.
- (c) Notice by possession.
- (d) Notice by *lis pendens*.

NOTICE BY REGISTRATION

199. By recording instruments affecting real property in the manner provided by statute, constructive notice of the contents of such instruments is given to subsequent purchasers and incumbrancers.

Doctrine of Priorities Applies When

Where two or more successive mortgages are given upon the same land, the question of the priority, or precedence in time, of the liens thus created, may be an important one. At common law, legal titles are determined by the order of time. At law, when a legal conveyance of property is made, the grantor has no right remaining in such property which he can transfer to another, and the first conveyance has precedence over any subsequent conveyance, even if the subsequent grantee had no notice of the prior conveyance. Even the absence of a valid consideration does not affect priority at law, except where it is otherwise provided by statute.¹

The equitable doctrine concerning priorities resulting from the presence or absence of notice, or of a valuable consideration, or other incident, by which a precedence may be given contrary to the mere order of time, applies, says Mr. Pomeroy,² to conflicting legal and equitable estates or interests in the same subject-matter, and to successive equitable estates, equitable interests (such as liens and charges), and mere "equities," meaning thereby purely remedial rights, such as that of cancellation, reformation, and the like; and it applies to no other kinds of estates, interests, or rights. Independently of priority fixed by the recording laws, ordinarily mortgages of equitable titles are subject to the equitable doctrine of priority,³ and where mortgagees have equal equities, the mortgage first executed and delivered will have priority.⁴ Where, however, a mortgagee has, when taking his mortgage, actual or constructive notice of a prior conveyance, mortgage, or other lien upon the property, he takes subject thereto.⁵ A valid consideration is necessary to make a mortgagee a bona fide purchaser when conflicting rights arise,⁶ and the question of priority

¹ Eaton, Equity, p. 114, citing *Gainnes v. City of New Orleans*, 6 Wall. (U. S.) 642, 716, 18 L. Ed. 950; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Wade v. Withington*, 1 Allen (Mass.) 561.

² Eq. Jur. § 681.

³ *Bank of Kentucky v. Vance's Adm'rs*, 4 Litt. (Ky.) 168; *Goodbar v. Dunn*, 41 Miss. 618; *Ayers v. Staley* (N. J. Ch.) 18 Atl. 1046; *Central Trust Co. of New York v. Improvement Co.*, 169 N. Y. 314, 62 N. E. 387.

⁴ *Schimberg v. Waite*, 93 Ill. App. 130; *Reagan v. Bank*, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; *Wing v. McDowell*, Walk. Ch. (Mich.) 175; *Westervelt v. Voorhis*, 42 N. J. Eq. 179, 6 Atl. 665.

⁵ *Boyd v. Boyd*, 128 Iowa, 699, 104 N. W. 798, 111 Am. St. Rep. 215; *Arnold v. Whitcomb*, 83 Mich. 19, 46 N. W. 1029; *Olyphant v. Phyfe*, 166 N. Y. 630, 60 N. E. 1117; *Gall v. Gall*, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. (N. S.) 603. And see *Wallace v. McKenzie*, 104 Cal. 130, 37 Pac. 859.

⁶ *Craft v. Russell*, 67 Ala. 9; *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723,

may be affected by concealment, fraud, or deceit on the part of the prior grantee or mortgagee, as where a prior mortgagee conceals the existence of his mortgage from one about to take a mortgage on the same premises,⁷ or, upon inquiry, states that nothing is due on his mortgage.⁸ A mortgagor, however, is not bound to disclose his mortgage if it is on record.⁹ In dealing with conveyances of realty, the question usually is whether the equities are equal, and they are not if the subsequent purchaser has notice of the prior conveyance. However, a purchaser with notice may acquire a good title from one who purchased without notice, because otherwise the latter's free right of disposal would be abridged.¹⁰ On the other hand, a purchaser without notice can take a good title from one who had notice.¹¹ Many questions of priority between equal equities, and between equal equities and the legal title, that arose in former times, and which may still arise in England,¹² in absence of any general act of registration in that country,¹³ are no longer of importance in this country, since they are now brought within our recording laws. For example, creditors and subsequent bona fide purchasers are subject to notice given by record, and, at the present time, most priorities are

20 S. W. 492; *First Nat. Bank of Towanda v. Robinson*, 105 App. Div. 193, 94 N. Y. Supp. 767; *Wheeler v. Kirtland*, 24 N. J. Eq. 552.

⁷ *L'Amoureux v. Van Denburgh*, 7 Paige (N. Y.) 316, 32 Am. Dec. 635.

⁸ *Platt v. Squire*, 12 Metc. (Mass.) 494; *Miller v. Bingham*, 29 Vt. 82. And see *Fay v. Valentine*, 12 Pick. (Mass.) 40, 22 Am. Dec. 397; *Chester v. Greer*, 5 Humph. (Tenn.) 26.

⁹ *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; *Paine v. French*, 4 Ohio, 318; *Palmer v. Palmer*, 48 Vt. 69.

¹⁰ *Alexander v. Pendleton*, 8 Cranch (U. S.) 462, 3 L. Ed. 624; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388; *Morse v. Curtis*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456; *Boynton v. Rees*, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; *Webster v. Van Steenbergh*, 46 Barb. (N. Y.) 211; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Day v. Clark*, 25 Vt. 397; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772. Contra, *Sims v. Hammond*, 33 Iowa, 368. But see, contra, where the deed is recorded in the meantime. *Van Rensselaer v. Clark*, 17 Wend. (N. Y.) 25, 31 Am. Rep. 280; *Bayles v. Young*, 51 Ill. 127. And see *Clark v. McNeal*, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638. One who has taken a title, with notice, and transferred it, cannot acquire a good title by subsequently repurchasing from one who had no notice. *Schutt v. Large*, 6 Barb. (N. Y.) 373.

¹¹ *Wood v. Mann*, 1 Sumn. 506, Fed. Cas. No. 17,951; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144; *Somes v. Brewer*, 2 Pick. (Mass.) 184, 13 Am. Dec. 406; *Glidden v. Hunt*, 24 Pick. (Mass.) 221; *Fallass v. Pierce*, 30 Wis. 443; *MORSE v. CURTIS*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, *Burdick Cas. Real Property*.

¹² See *Pilcher v. Rawlins*, 7 Ch. App. 259, 268; *Bailey v. Barnes* [1894] 1 Ch. 25, 36, C. A.

¹³ See *infra*.

determined by the statutes governing registration, rather than by equitable doctrines. There are some cases, however, not within such laws, and to which the principles of equity must be applied, as, for example, equities arising under resulting and constructive trusts, and estoppel to claim an after-acquired title.¹⁴

Actual Notice

Notice is either actual or constructive. As a rule, the classification is unimportant, since the consequence is the same in either case. Where, however, a statute uses the term "actual notice," the distinction may become material.¹⁵ Actual notice is said¹⁶ to consist of information of a fact directly communicated to a person, or of such information as would lead to knowledge of such fact.¹⁷

Actual notice may be express or implied; the former consisting of information of a fact directly communicated to a person, and the latter consisting of information presumed to have been received from a knowledge of circumstances proved to have been possessed by such person.¹⁸ There is considerable lack of agreement, however, in the books and cases, as to the classification of notice; some making implied and constructive notice identical,¹⁹ and others defining implied notice as notice that one is presumed to have from his legal relations with another who has actual notice, as, for example, in the relationship of principal and agent. Some courts, also, limit actual notice to actual knowledge;²⁰ but as a rule, it does not necessitate actual knowledge.²¹ Actual notice may be shown by circumstantial evidence, and whether there was such notice depends in each instance upon the facts of the case.²² The test is generally, whether the circumstances were such as to cause a reasonably

¹⁴ See *Minor & Wurts*, Real Prop. § 575. And see, in general, *Equitable Estates*, and *Estoppel*, elsewhere in this volume.

¹⁵ "The decided preponderance of authority," says Chief Justice Peters in *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295, "supports the position that the statutory 'Actual notice' is a conclusion of fact capable of being established by all grades of legitimate evidence." And see *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054; *Clafin v. Lenheim*, 66 N. Y. 301, 306.

¹⁶ *Eaton*, Equity, p. 125.

¹⁷ *Brinkman v. Jones*, 44 Wis. 498. See, also, *Maupin v. Emmons*, 47 Mo. 304; *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281.

¹⁸ *Eaton*, Equity, p. 127.

¹⁹ See *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261.

²⁰ See *Eaton*, Equity, p. 127.

²¹ *Fetter*, Eq. 81. See, however, *Lamb v. Pierce*, 113 Mass. 72.

²² *Lamb v. Pierce*, 113 Mass. 72; *White v. Foster*, 102 Mass. 375; *Sibley v. Leffingwell*, 8 Allen (Mass.) 584; *Michigan Mut. Life Ins. Co. v. Conant*, 40 Mich. 530; *Vest v. Michie*, 31 Grat. (Va.) 149, 31 Am. Rep. 722; *Vaughn v. Tracy*, 22 Mo. 415; *Speck v. Riffin*, 40 Mo. 405.

prudent man to make inquiry.²³ The notice, however, must afford sufficient information to make a reasonable inquiry on, and not merely to put him on inquiry.²⁴ For instance, a mere rumor is not notice.²⁵ A purchaser, however, who is put on inquiry, must make a reasonable investigation of the title,²⁶ and he cannot rely on statements of his grantor, or one who is interested in concealing the prior incumbrance.²⁷ He is presumed to have notice of facts which due inquiry would have shown him.²⁸ The burden of proof, however, is on the one who seeks to establish the existence of notice.²⁹

Notice, to affect a subsequent purchaser, must be received before the transaction is completed and the price paid.³⁰ If notice is received after part of the money has been paid over, the protection extends to that part, but not to money subsequently paid.³¹

Notice to Agent

Notice may arise from the relation of principal and agent,³² which includes attorney and client.³³ One who deals with real

²³ *Fassett v. Smith*, 23 N. Y. 252; *Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 39 N. Y. 70; *Maupin v. Emmons*, 47 Mo. 304; *Willcox v. Hill*, 11 Mich. 256; *Helms v. Chadbourne*, 45 Wis. 60; *Brinkman v. Jones*, 44 Wis. 498; *Heaton v. Prather*, 84 Ill. 330; *Curtis v. Mundy*, 3 Metc. (Mass.) 405; *Wilson v. Hunter*, 30 Ind. 466.

²⁴ *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182; *Jackson ex dem. Hyer v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *City of Chicago v. Witt*, 75 Ill. 211; *Maul v. Rider*, 59 Pa. 167.

²⁵ *Parkhurst v. Hosford* (C. C.) 21 Fed. 827; *Pittman v. Sofley*, 64 Ill. 155; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Buttrick v. Holden*, 13 Metc. (Mass.) 355; *Shepard v. Shepard*, 36 Mich. 173; *Appeal of Bugbee*, 110 Pa. 331, 1 Atl. 273; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Lamont v. Stimson*, 5 Wis. 443.

²⁶ *Schweiss v. Woodruff*, 73 Mich. 473, 41 N. W. 511; *Oliver v. Sanborn*, 60 Mich. 346, 27 N. W. 527; *Cambridge Val. Bank v. Delano*, 48 N. Y. 326; *Maul v. Rider*, 59 Pa. 167; *Wilson v. Miller*, 16 Iowa, 111. But, if inquiry fails to disclose the prior conveyance, he is protected. *Williamson v. Brown*, 15 N. Y. 354.

²⁷ *Blatchley v. Osborn*, 33 Conn. 226; *Russell v. Petree*, 10 B. Mon. (Ky.) 184; *Littleton v. Giddings*, 47 Tex. 109.

²⁸ *Passumpsic Sav. Bank v. Bank*, 53 Vt. 82; *Austin v. Pulschen* (Cal.) 39 Pac. 799. Notice of an unrecorded deed is notice of all its contents. *Martin v. Cauble*, 72 Ind. 67; *Hill v. Murray*, 56 Vt. 177.

²⁹ *Ryder v. Rush*, 102 Ill. 338; *McCormick v. Leonard*, 38 Iowa, 272.

³⁰ *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Schultze v. Houfes*, 96 Ill. 335; *Palmer v. Williams*, 24 Mich. 328; *Dixon v. Hill*, 5 Mich. 404; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

³¹ *Baldwin v. Sager*, 70 Ill. 503; *Redden v. Miller*, 95 Ill. 336.

³² *Jackson ex dem. Hyer v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *Bigley v.*

³³ See note 33 on following page.

property through an agent is bound by any notice which may come to the agent in the scope of his employment.³⁴ In the same way, a *cestui-que* trust is bound by notice to his trustee.³⁵ Notice, however, to a husband, is not notice to his wife.³⁶ Notice to a corporation can be given only by notice to an officer who has the matter in charge, and notice to the agent of a corporation is not notice to the corporation, unless it touches matters in the line of the agent's business.³⁷ The presumption of notice may, however, be rebutted by showing facts which raise a presumption that the agent did not communicate his knowledge to his principal, as where the agent has been guilty of fraud, or where the knowledge came to the agent in another transaction, or under such circumstances that he will not be presumed to have remembered it.³⁸

Constructive Notice

Constructive notice is such information of a fact as a person will be legally presumed to possess from the existence of other established facts.³⁹ Constructive as well as actual notice of prior equities, liens, or other incumbrances will postpone the rights of one having such notice to the rights of the prior holders.⁴⁰ Some authorities, as previously stated, regard constructive notice the same as implied notice.⁴¹ It has been also said that constructive notice is a conclusion of law that cannot be controverted by extraneous evidence.⁴² The legal presumption, however, of notice arising from the existence of established facts may be rebuttable, or it may be conclusive.⁴³ Notice presumed from recitals in title deeds, from *lis pendens*, and from registration, is conclusive.⁴⁴ A presumption of notice arising, however, from the fact that a

Jones, 114 Pa. 510, 7 Atl. 54; Sowler v. Day, 58 Iowa, 252, 12 N. W. 297. But see Reynolds v. Black, 91 Iowa, 1, 58 N. W. 922.

³³ May v. Le Claire, 11 Wall. (U. S.) 217, 20 L. Ed. 50; Josephthal v. Heyman, 2 Abb. N. C. (N. Y.) 22; Walker v. Schreiber, 47 Iowa, 529.

³⁴ Hoppock v. Johnson, 14 Wis. 303; Tucker v. Tilton, 55 N. H. 223.

³⁵ Pope v. Pope, 40 Miss. 516.

³⁶ Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Satterfield v. Malone (C. C.) 35 Fed. 445, 1 L. R. A. 35.

³⁷ Wilson v. McCullough, 23 Pa. 440, 62 Am. Dec. 347.

³⁸ Armstrong v. Abbott, 11 Colo. 220, 17 Pac. 517; 1 Jones, Mortg. (5th Ed.) § 560.

³⁹ Eaton, Equity, p. 125; Williamson v. Brown, 15 N. Y. 354, 359. See, also, Pomeroy, Eq. Jur. § 606.

⁴⁰ Glidden v. Hunt, 24 Pick. (Mass.) 221.

⁴¹ See supra.

⁴² Drey v. Doyle, 99 Mo. 459, 12 S. W. 287; Rogers v. Jones, 8 N. H. 264.

⁴³ Eaton, Equity, p. 136.

⁴⁴ Eaton, Equity, p. 137.

person other than the grantor is in possession of lands which are the subject-matter of a conveyance,⁴⁵ may be rebutted.⁴⁶

Registration

The most important form of constructive notice is notice by registration. The doctrine of notice by the recording of instruments is purely of statutory origin. It is unknown to the common law, and in England, even at the present time, there is no general system of registration. In that country, however, various special acts have provided for the registration of deeds within the Bedford Level,⁴⁷ in Yorkshire,⁴⁸ and in Middlesex,⁴⁹ and the practice of registration has been confined to these districts.⁵⁰

In all the states of this country, on the other hand, the recording of an instrument affecting real property in an office designated by statute, in the manner and form directed by the statute, operates as constructive notice of its contents, and of the estates and rights created by it, to subsequent incumbrancers or purchasers under the same grantor.⁵¹ The object of these recording statutes is to give publicity to dealings with land, and thus prevent frauds upon mortgagees and purchasers. A person who takes a deed or a mortgage of land, although ignorant of a previous conveyance or mortgage, will nevertheless be bound by constructive notice of such prior conveyance or incumbrance, if the instrument creating it has been duly recorded.⁵² On the other hand, if one does not record his deed or mortgage, he is negligent, and should suffer, rather than an innocent subsequent purchaser or incumbrancer.⁵³ Consequently, a conveyance or a mortgage not recorded in accordance with the law will not affect the rights of third persons

⁴⁵ See *infra*.

⁴⁶ Eaton, Equity, p. 137; *Williamson v. Brown*, 15 N. Y. 362; *Reynolds v. Carlisle*, 99 Ga. 730, 27 S. E. 169.

⁴⁷ St. 15 Car. II, c. 17, § 8 (1664).

⁴⁸ St. 47 & 48 Vict. c. 54, § 31, repealing and amending the earlier Yorkshire statutes of 1703, 1706, 1707, and 1734.

⁴⁹ St. 7 Anne, c. 20, § 1 (1708). The act does not apply, however, to the city of London. Sugden, Vendors & Purchasers (14th Ed.) 732.

⁵⁰ Laws of England, vol. 24, § 547, note. England has, however, a general Land Transfer Act (1875 and 1897, 38 & 39 Vict. c. 87, §§ 118-122; 60 & 61 Vict. c. 65, § 22) providing for the transfer of land by registration of title. See post. It is compulsory in London, but voluntary elsewhere, and is, in practice, confined to London. Laws of England, vol. 24, § 558, note.

⁵¹ 1 Stim. Am. St. Law, art. 161.

⁵² *Continental Investment & Loan Soc. v. Wood*, 168 Ill. 421, 48 N. E. 221; *Leppo v. Gilbert*, 26 Kan. 138; *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Webber v. Ramsey*, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429; *Tarbell v. West*, 86 N. Y. 280; *Jeanes v. Hizer*, 186 Pa. 523, 40 Atl. 785.

⁵³ *Bird v. Dennison*, 7 Cal. 297.

not having actual notice of the previous transaction.⁵⁴ The statutes do not, as a rule, make the recording of a deed,⁵⁵ or of a mortgage, a requisite to the validity of the conveyance or of the lien between the original parties,⁵⁶ since between them an unrecorded instrument is good, if otherwise valid.⁵⁷ It is subsequent bona fide purchasers and incumbrancers whom the statutes seek to protect.⁵⁸

Instruments Entitled to Record

Just what instruments are entitled to record will depend upon the statute of the particular state.⁵⁹ Speaking generally, however, the statutes of most states provide for the registration of all instruments affecting the title to real property.⁶⁰ They cover all mortgages, including, usually, trust deeds operating as mortgages.⁶¹ Equitable mortgages also usually come within the provisions of the recording acts,⁶² as do likewise mortgages affecting leasehold estates.⁶³ Assignments of mortgages may also be recorded the same as mortgages.⁶⁴ The laws in most of the states

⁵⁴ *Newhall v. Burt*, 7 Pick. (Mass.) 157; *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; *Johnson v. Stogg*, 2 Johns. (N. Y.) 510; *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. 566; *Corpman v. Baccastow*, 84 Pa. 363.

⁵⁵ See *Deeds*, post.

⁵⁶ See, however, *Nickel v. Brown*, 75 Md. 172, 23 Atl. 736.

⁵⁷ *Alvis v. Morrison*, 63 Ill. 181, 14 Am. Rep. 117; *Northwestern Forwarding Co. v. Mahaffey*, 36 Kan. 152, 12 Pac. 705; *Howard Mut. Loan & Fund Ass'n v. McIntyre*, 3 Allen (Mass.) 571; *Forrester v. Parker*, 14 Daly, 208, 6 N. Y. St. Rep. 274; *Girard Trust Co. v. Baird*, 212 Pa. 41, 61 Atl. 507, 1 L. R. A. (N. S.) 405, 4 Ann. Cas. 314.

⁵⁸ See *infra*, To Whom Record is Notice.

⁵⁹ *Blight's Heirs v. Banks' Ex'rs*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; *Hughes v. Wilkinson's Lessee*, 37 Miss. 482; *Sheehan v. Davis*, 17 Ohio St. 571; *Brotherton v. Livingston*, 3 Watts & S. (Pa.) 334.

⁶⁰ 1 Stim. Am. St. Law, § 1624; 2 Dembitz, Land Tit. 948, 955.

⁶¹ *Branch v. Railroad Co.*, Fed. Cas. No. 1,807. See, *contra*, *Stanhope v. Dodge*, 52 Md. 483.

⁶² *Hunt v. Johnson*, 19 N. Y. 279; *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Smith v. Neilson*, 13 Lea (Tenn.) 461; *Appeal of Russell*, 15 Pa. 319.

⁶³ Although leasehold estates are treated as chattel interests, mortgages affecting them are recorded with mortgages of real property. *Berry v. Insurance Co.*, 2 Johns. Ch. (N. Y.) 603; *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474; *Paine v. Mason*, 7 Ohio St. 198. Mortgages of growing crops and of trees, as long as they are realty, are to be recorded with mortgages of real property. *Jones v. Chamberlin*, 5 Heisk. (Tenn.) 210. Powers of attorney are sometimes required to be recorded. 1 Stim. Am. St. Law, § 1624 (10).

⁶⁴ See 1 Stim. Am. St. Law, § 1624; *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746; *Larned v. Donovan*, 84 Hun, 533, 32 N. Y. Supp. 731; *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340; *Bowling v. Cook*, 39 Iowa, 200; *Merrill v. Luce*, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844;

provide, also, for the recording of plats, or maps, or charts of land, for the purpose of enabling the grantor and others in subsequent deeds to refer in their deeds to the blocks and lots of such plats as matters of public record, and also for the purpose of dedicating to the public the streets, wharves, alleys, and open places laid down on such plats.⁶⁵ The record, however, of an instrument which is not authorized by the statute to be recorded, does not give notice of its existence,⁶⁶ nor are purchasers affected by the registry of a forged deed.⁶⁷ To entitle a mortgage or other conveyance to be admitted to record, the requirements of the statutes as to execution⁶⁸ and delivery must be complied with.⁶⁹ Moreover, in most of the states, before a conveyance can be recorded, it must be acknowledged by the maker before an officer designated by statute.⁷⁰ In some jurisdictions, also, the payment of all taxes due upon the land may be prerequisite to the registration of a deed.⁷¹ If an instrument defectively executed is in fact recorded, no constructive notice is raised by such a registration,⁷² although

Stein v. Sullivan, 31 N. J. Eq. 409; *Turpin v. Ogle*, 4 Ill. App. 611. But see *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. Question of priority of assignments of the same mortgage seldom arises, because the mortgage note and mortgage are usually delivered to the first assignee. 1 Jones, *Mortg.* (5th Ed.) § 483.

⁶⁵ *Satchell v. Doram*, 4 Ohio St. 542; *Williams v. Smith*, 22 Wis. 598; *Maywood Co. v. Village of Maywood*, 118 Ill. 65, 6 N. E. 866.

⁶⁶ *Moore v. Hunter*, 6 Ill. (1 Gilm.) 317; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Parret v. Shaubhut*, 5 Minn. 323 (Gil. 258), 80 Am. Dec. 424.

⁶⁷ *Pry v. Pry*, 109 Ill. 466.

⁶⁸ *Thompson v. Morgan*, 6 Minn. 292 (Gil. 199); *Harper v. Barsh*, 10 Rich. Eq. (S. C.) 149; *Racouillat v. Sansevain*, 32 Cal. 376. As to description of the property, and the requirements for signing, sealing, witnessing, etc., see *Deeds*, post.

⁶⁹ *Sigourney v. Larned*, 10 Pick. (Mass.) 72; *Galpin v. Abbott*, 6 Mich. 17; *Fryer v. Rockefeller*, 63 N. Y. 268; *Green v. Drinker*, 7 Watts & S. (Pa.) 440; *McKean & E. Land Imp. Co. v. Mitchell*, 35 Pa. 269, 78 Am. Dec. 335; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *White v. Denman*, 1 Ohio St. 110.

⁷⁰ 1 *Stim. Am. St. Law*, § 1570; *Edwards v. Thom*, 25 Fla. 222, 5 South. 707; *New England Mortgage Security Co. v. Ober*, 84 Ga. 294, 10 S. E. 625; *Reed v. Coale*, 4 Ind. 283.

⁷¹ *Martin v. Bates*, 50 S. W. 38, 20 Ky. Law Rep. 1798.

⁷² *Blockman v. Henderson*, 116 Iowa, 578, 87 N. W. 655, 56 L. R. A. 902; *Heister's Lessee v. Fortner*, 2 Bin. (Pa.) 40, 4 Am. Dec. 417; *Graves v. Graves*, 6 Gray (Mass.) 391; *Blood v. Blood*, 23 Pick. (Mass.) 80; *St. Louis Iron & Mach. Works v. Kimball*, 53 Ill. App. 636; *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695; *Farmers' & Mechanics' Bank v. Bronson*, 14 Mich. 361; *Cumberland Building & Loan Ass'n v. Sparks*, 111 Fed. 647, 49 C. C. A. 510. Compare *Morrison v. Brown*, 83 Ill. 562.

actual notice might arise by proof of the actual knowledge of the record.⁷³

Time and Place

The statutes may provide that a deed shall be recorded within a certain time,⁷⁴ or at least filed for record;⁷⁵ but otherwise it may generally be recorded at any time, unless the delay be so long as to raise a question of its proper registration.⁷⁶ In some states, an instrument takes effect as notice only from the time of its actual entry upon the records;⁷⁷ but, as a general rule, notice dates from the time the mortgage or other instrument is filed in the proper office for record.⁷⁸ A conveyance may be recorded even after the death of the grantor, if delivery to the grantee is made during the lifetime of the grantor.⁷⁹

A mortgage or conveyance must be recorded in the county in which the land is located.⁸⁰ If, however, the land is located in two or more counties, it must be recorded in each county.⁸¹ A power of attorney to convey land may be recorded in any county in which the grantor may at the time or thereafter have land to convey (unless it is restricted to particular tracts); that is, in any coun-

⁷³ *Bass v. Estill*, 50 Miss. 300; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

⁷⁴ *Schmidt v. Zahrndt*, 148 Ind. 447, 47 N. E. 335; *Moore v. Davey*, 1 N. M. 303; *Ridgway v. Stewart*, 4 Watts & S. (Pa.) 383; *Bloom v. Simms*, 27 S. C. 90, 3 S. E. 45.

⁷⁵ *Dubose v. Young*, 10 Ala. 365; *Gill v. Fauntleroy's Heirs*, 8 B. Mon. (Ky.) 177; *Hughes v. Powers*, 99 Tenn. 480, 42 S. W. 1.

⁷⁶ See *Longworth v. Close*, 15 Fed. Cas. No. 8,489, where a period of twenty-six years elapsed.

⁷⁷ *Benson v. Green*, 80 Ga. 230, 4 S. E. 851; *State ex rel. Slocumb v. Rogillo*, 30 La. Ann. 833. Compare *Way v. Levy*, 41 La. Ann. 447, 6 South. 661.

⁷⁸ *Kessler v. State*, 24 Ind. 313; *Haworth v. Taylor*, 108 Ill. 275; *Sinclair v. Slawson*, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235; *Mutual Life Ins. Co. of New York v. Dake*, 87 N. Y. 257; *Appeal of Brooke*, 64 Pa. 127; *Woodward v. Boro*, 16 Lea (Tenn.) 678. The certificate of the recording officer is conclusive as to the time of filing. *Tracy v. Jenks*, 15 Pick. (Mass.) 465; *Hatch v. Haskins*, 17 Me. 391.

⁷⁹ *Gill v. Pinney's Adm'r*, 12 Ohio St. 38; *Haskell v. Bissell*, 11 Conn. 174.

⁸⁰ *Jencks v. Smith*, 1 N. Y. 90; *KENNEDY v. HARDEN*, 92 Ga. 230, 18 S. E. 542, *Burdick Cas. Real Property*; *Lewis v. Baird*, 3 McLean, 56, Fed. Cas. No. 8,316; *St. John v. Conger*, 40 Ill. 535; *Stewart v. McSweeney*, 14 Wis. 468. In New Hampshire, Rhode Island, and Connecticut, the town is the unit instead of the county. 2 *Dembitz, Land Tit.* 941.

⁸¹ *KENNEDY v. HARDEN*, 92 Ga. 230, 18 S. E. 542, *Burdick Cas. Real Property*; *Woodbury v. Manlove*, 14 Ill. 213; *Van Meter v. Knight*, 32 Minn. 205, 20 N. W. 142; *Wells v. Wells*, 47 Barb. (N. Y.) 416; *Appeal of Oberholtzer*, 124 Pa. 583, 17 Atl. 143, 144. See, however, as to change of boundaries, *Koerper v. Railway Co.*, 40 Minn. 132, 41 N. W. 656; *Melton v. Turner*, 38 Tex. 81.

ty of the state. It does not follow, however, that, when recorded in one county, it will make a deed as to land in another county recordable; nor will it, in some states, where the statute does not expressly authorize the recording of such instruments in every county, even prove itself by record.⁸²

Errors in Record

Where notice takes effect only from the time of the actual recording, material errors in the registration will vitiate the record,⁸³ except where the mistake is clearly evident, and can be corrected from the instrument itself.⁸⁴ In states, however, where notice dates from the time of filing, it is held that the instrument will be constructive notice as filed, and not as erroneously recorded.⁸⁵ The recording officer is generally liable for damages suffered by the parties through his negligence in recording.⁸⁶ He may, however, correct errors in the record at any time;⁸⁷ but it is held that notice of the instrument as corrected begins only from the time such corrections are made.⁸⁸

Index

In most states, an index of grantors and grantees (or mortgagors and mortgagees), and also, in some states, of the land itself (under the public surveys), is required to be kept by statute. In some of these states, the index may also, by statute, be made a part of the record, so that an instrument recorded, but not indexed, is not notice.⁸⁹ As a rule, however, the index is no part of the record, and consequently has no effect as notice.⁹⁰

⁸² Muldrow v. Robison, 58 Mo. 331.

⁸³ Taylor v. Hotchkiss, 2 La. Ann. 917; Hill v. McNichol, 76 Me. 314; Thompson v. Morgan, 6 Minn. 292 (Gil. 199); Peck v. Mallams, 10 N. Y. 509.

⁸⁴ Dargin v. Beeker, 10 Iowa, 571; Thorwarth v. Armstrong, 20 Minn. 464 (Gil. 419); Muehlberger v. Schilling (Sup.) 3 N. Y. Supp. 705; Kennedy v. Boykin, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838.

⁸⁵ Zear v. Trust Co., 2 Kan. App. 505, 43 Pac. 977; Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235; Brown v. Kirkman, 1 Ohio St. 116; Shove v. Larsen, 22 Wis. 142.

⁸⁶ 1 Jones, Mortg. (5th Ed.) § 579.

⁸⁷ Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917.

⁸⁸ Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260.

⁸⁹ Howe v. Thayer, 49 Iowa, 154; Congregational Church Bldg. Soc. v. Church, 24 Wash. 433, 64 Pac. 750. See Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 427; Lombard v. Culbertson, 59 Wis. 433, 18 N. W. 399. But see Lane v. Duchac, 73 Wis. 646, 41 N. W. 962. And see MORSE v. CURTIS, 140 Mass. 112, 2 N. E. 929, 54 Am. St. Rep. 456, Burdick Cas. Real Property.

⁹⁰ Ryan v. Carr, 46 Mo. 483; Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18; Mutual Life Ins. Co. of New York v. Dake, 87 N. Y. 257; Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Stockwell v. McHenry, 107 Pa. 237, 52 Am. Rep. 475; Green v. Garrington, 16 Ohio St. 548, 91 Am. Dec. 103.

Destruction of Record

When an instrument has been properly recorded, its priority is nowise affected by a destruction of the records.⁹¹

Of What Facts Record is Notice

When an instrument is properly recorded, it is constructive notice of everything that may be learned by an actual examination of the record. Therefore purchasers are bound by specific recitals in the recorded deed,⁹² and a reference to a prior unrecorded instrument gives notice of that instrument.⁹³ There is notice, also, as held in some cases, of anything of which the record is sufficient to put one on inquiry.⁹⁴ In case of a mortgage, if the record states the specific amount of the debt secured, it is notice only as to such an amount.⁹⁵ Where, however, the amount is left uncertain, but reference is made to other instruments whereby the real amount can be ascertained, subsequent purchasers and incumbrancers will be put on inquiry.⁹⁶ Mortgages to secure future advances by the mortgagee are valid,⁹⁷ and, if properly recorded, have priority over subsequent conveyances and incumbrances, up to the amount expressed in the mortgage.⁹⁸ The mortgagee is a purchaser from the time the advances are made, if without actual notice of the conveyance.⁹⁹ If one who has a mortgage for future

⁹¹ Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Heaton v. Prather, 84 Ill. 330; Addis v. Graham, 88 Mo. 197. See 1 Stim. Am. St. Law, § 1620. But some statutes require a re-recording within a given time. Tolle v. Alley (Ky.) 24 S. W. 113. And see Hyatt v. Cochran, 69 Ind. 436.

⁹² Osborn v. Carr, 12 Conn. 195; Clark v. Holland, 72 Iowa, 34, 33 N. W. 350, 2 Am. St. Rep. 230; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. Rep. 826; Dexter v. Harris, 2 Mason, 531, Fed. Cas. No. 3,862.

⁹³ White v. Foster, 102 Mass. 375.

⁹⁴ Murphy v. Coates, 33 N. J. Eq. 424; Johnson v. Stagg, 2 Johns. (N. Y.) 510; Heaton v. Prather, 84 Ill. 330. But see Interstate Bldg. & Loan Ass'n v. McCartha, 43 S. C. 72, 20 S. E. 807. Record of an incumbrance on land given prior to the acquisition of the title, is not notice. Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163; Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980.

⁹⁵ Bacon v. Brown, 19 Conn. 29; Hinchman v. Town, 10 Mich. 508; Mills v. Kellogg, 7 Minn. 469 (Gil. 377); Ketcham v. Wood, 22 Hun (N. Y.) 64.

⁹⁶ Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Babcock v. Lisk, 57 Ill. 327; Gardner v. Cohn, 95 Ill. App. 26.

⁹⁷ Schimberg v. Waite, 93 Ill. App. 130; Hyman v. Hauff, 138 N. Y. 48, 33 N. E. 735; Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Merchants' & Farmers' Bank v. Plow Co., 45 La. Ann. 1214, 14 South. 139. Cf. Bowen v. Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. Rep. 203.

⁹⁸ Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155; Wagner v. Breed, 29 Neb. 720, 46 N. W. 286; Reynolds v. Webster, 71 Hun, 378, 24 N. Y. Supp. 1133; Bank of Oroville v. Lawrence (Cal.) 37 Pac. 936.

⁹⁹ Simons v. Bank, 93 N. Y. 269.

advances acquires, however, actual notice of a subsequent mortgage, he is not protected as to advances made after that time,¹ unless, by the terms of his contract with the mortgagor, he is bound to make such advances.² The recording of the subsequent mortgage is not, however, notice to the first mortgagee.³

To Whom Record is Notice

The recording of instruments pertaining to realty is notice to such persons as are designated by the statutes, or such as, by construction of the courts, come within the provisions of such statutes. Most of the recording laws provide that unrecorded instruments shall be void only as against subsequent purchasers and incumbrancers without notice and for value, whose deeds or mortgages are recorded first.⁴ The effect of these statutes is that priority of record gives priority of title,⁵ and, when the instruments of both are unrecorded, priority is according to the time of execution.⁶ One who has taken a recorded mortgage upon realty is not bound to take notice, however, of the record of a subsequent conveyance or mortgage, and a subsequent mortgagee who desires to protect his rights must give actual notice to the prior mortgagee.⁷

The record, moreover, is notice only to subsequent purchasers and incumbrancers deriving title from the same grantor, since the record of an instrument is notice only to those who are bound to search the records.⁸ Consequently no one is affected with notice who does not claim through the same chain of title.⁹ Nor is the

¹ *Frye v. Bank*, 11 Ill. 367; *Hall v. Crouse*, 13 Hun (N. Y.) 557; *Todd v. Outlaw*, 79 N. C. 235; *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922.

² *Brinkmeyer v. Helbling*, 57 Ind. 435; *Appeal of Moroney*, 24 Pa. 372.

³ *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411; *Bedford v. Backhouse*, 2 Eq. Cas. Abr. 615, pl. 12; *Morecock v. Dickins*, 1 Amb. 678.

⁴ See 1 Stim. Am. St. Law, § 1611; 2 Pom. Eq. Jur. § 646.

⁵ *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Lacustrine Fertilizer Co. v. Fertilizer Co.*, 82 N. Y. 476; *Burrows v. Hovland*, 40 Neb. 464, 58 N. W. 947.

⁶ 1 Stim. Am. St. Law, § 1611 A (1).

⁷ *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Powers v. Lafler*, 73 Iowa, 283, 34 N. W. 859; *MORSE v. CURTIS*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, *Burdick Cas. Real Property*; *Truscott v. King*, 6 Barb. (N. Y.) 346.

⁸ *Pomeroy*, Eq. Jur. § 658.

⁹ *Webber v. Ramsey*, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429; *Long v. Dollarhide*, 24 Cal. 218; *Tilton v. Hunter*, 24 Me. 29; *Crockett v. Maguire*, 10 Mo. 34; *Losey v. Simpson*, 11 N. J. Eq. 246; *Rodgers v. Burchard*, 34 Tex. 441, 7 Am. Rep. 283; *Rankin v. Miller*, 43 Iowa, 11. And see *MORSE v. CURTIS*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, *Burdick Cas. Real Property*.

record of a deed of any effect against a prior grantee whose deed is already recorded.¹⁰ A subsequent conveyance, moreover, does not become effectual by record against a prior unrecorded instrument, unless the subsequent conveyance was for value and without notice in any way.¹¹ In some states a purchaser by a quitclaim deed is held to take subject to prior unrecorded instruments,¹² although in many states the cases hold the contrary.¹³ A purchaser from an heir takes land free from the unrecorded conveyances of the ancestor, of which he has no notice.¹⁴ Unrecorded deeds and mortgages are, as previously stated, valid against the grantor or mortgagor, and they are also valid against his administrator,¹⁵ and also his heirs and devisees.¹⁶ They are valid, also, against his assignee in bankruptcy,¹⁷ but not against a bona fide purchaser from such assignee.¹⁸ A mortgagee and a trustee

¹⁰ *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Bell v. Fleming's Ex'rs*, 12 N. J. Eq. 13.

¹¹ *Adams v. Cuddy*, 13 Pick. (Mass.) 460, 25 Am. Dec. 330; *Jackson ex dem. Hunter v. Page*, 4 Wend. (N. Y.) 585; *Jackson ex dem. Bristol v. Elston*, 12 Johns. (N. Y.) 452; *Mills v. Smith*, 8 Wall. (U. S.) 27, 19 L. Ed. 346; *Good-enough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534.

¹² *Wickham v. Henthorn*, 91 Iowa, 242, 59 N. W. 276; *Reed v. Knights*, 87 Me. 181, 32 Atl. 870; *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209; *American Mortg. Co. v. Hutchinson*, 19 Or. 334, 24 Pac. 515. See *JOHNSON v. WILLIAMS*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243, *Burdick Cas. Real Property*.

¹³ The question is controlled by the registry laws in some states. See *Bradbury v. Davis*, 5 Colo. 265; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill. 214, 37 Am. Rep. 105; *Tucker v. Gibson*, 80 Kan. 90, 101 Pac. 633; *Stark v. Boynton*, 167 Mass. 443, 45 N. E. 764; *Strong v. Lynn*, 38 Minn. 315, 37 N. W. 448; *Starr v. Kisner*, 219 Mo. 64, 117 S. W. 1129; *Wilhelm v. Wilken*, 149 N. Y. 447, 44 N. E. 82, 52 Am. St. Rep. 743, 32 L. R. A. 370; *Cutler v. James*, 64 Wis. 173, 24 N. W. 874, 54 Am. Rep. 603; *Willingham v. Hardin*, 75 Mo. 429; *Graff v. Middleton*, 43 Cal. 341. And see *DOW v. WHITNEY*, 147 Mass. 1, 16 N. E. 722, *Burdick Cas. Real Property*.

¹⁴ *Earle v. Fiske*, 103 Mass. 491; *Powers v. McFerran*, 2 Serg. & R. (Pa.) 44; *Kennedy v. Northup*, 15 Ill. 148; *Vaughan v. Greer*, 38 Tex. 530; *Youngblood v. Vastine*, 46 Mo. 239, 2 Am. Rep. 509; *McCulloch's Lessee v. Eudaly*, 3 Yerg. (Tenn.) 346; *Hill v. Meeker*, 24 Conn. 211. Contra, *Harlan's Heirs v. Seaton's Heirs*, 18 B. Mon. (Ky.) 312; *Hancock v. Beverly's Heirs*, 6 B. Mon. (Ky.) 531; *Rodgers v. Burchard*, 34 Tex. 441, 7 Am. Rep. 283.

¹⁵ *Andrews v. Burns*, 11 Ala. 691; *Sanders v. Barlow* (C. C.) 21 Fed. 836.

¹⁶ 1 Stim. Am. St. Law, § 1611 B; *Sicard v. Davis*, 6 Pet. (U. S.) 124, 8 L. Ed. 342; *Burns v. Berry*, 42 Mich. 176, 3 N. W. 924; *Gill v. Pinney's Adm'r*, 12 Ohio St. 38; *McLaughlin v. Ihmsen*, 85 Pa. 364; *MORSE v. CURTIS*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, *Burdick Cas. Real Property*.

¹⁷ *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Appeal of Mellon*, 32 Pa. 121.

¹⁸ *Holbrook v. Dickenson*, 56 Ill. 497. As to who are bona fide purchasers, see *Fetter*, Eq. 95.

under a deed of trust are also held purchasers within the meaning of the recording laws.¹⁹ In some states, however, one who takes a mortgage to secure a pre-existing debt is not a purchaser, and takes only the mortgagor's equitable interest.²⁰ The assignee of a mortgage is, however, protected as a subsequent purchaser,²¹ and judgment and execution creditors, with specific liens upon the property, are usually protected against an unrecorded conveyance or mortgage,²² although in some states the judgment is merely a lien upon the mortgagor's equity in the premises.²³ At an execution sale, a purchaser without notice of a prior mortgage also usually takes the land free from such an incumbrance.²⁴ A mortgage given for the purchase money, or the balance thereof, of the sale of land, takes priority over all prior judgment liens and all other claims upon the land,²⁵ provided such a mortgage is a

¹⁹ *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; *Hulett v. Insurance Co.*, 114 Pa. 142, 6 Atl. 554; *Porter v. Green*, 4 Iowa, 571; *Kesner v. Trigg*, 98 U. S. 50, 25 L. Ed. 83; *Sheffey v. Bank (D. C.)* 33 Fed. 315.

²⁰ *Boxheimer v. Gunn*, 24 Mich. 372. But he is a purchaser if he releases some valuable right, such as a vendor's lien. *Lane v. Logue*, 12 Lea (Tenn.) 681; or gives an extension of time, *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243; *Cary v. White*, 52 N. Y. 138; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

²¹ *Bank of Ukiah v. Bank*, 100 Cal. 590, 35 Pac. 170.

²² *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233; *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268; *Building Ass'n v. Clark*, 43 Ohio St. 427, 2 N. E. 846; *Appeal of Lahr*, 90 Pa. 507.

²³ *Gill v. Pinney's Adm'r*, 12 Ohio St. 38; *Herman v. Clark* (Tenn. Ch. App.) 39 S. W. 873; *Jackson ex dem. Tuthill v. Dubois*, 4 Johns. (N. Y.) 216; *Cover v. Black*, 1 Pa. 493; *Pixley v. Huggins*, 15 Cal. 128; *Bell v. Evans*, 10 Iowa, 353; *Righter v. Forrester*, 1 Bush (Ky.) 278. Contra, *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468. And see *Van Thorniley v. Peters*, 26 Ohio St. 471. Where a mistake in omitting property from a mortgage is reformed, the lien of a mortgage on the omitted property is superior to that of a judgment obtained after the execution of the mortgage, and before its reformation. *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855. And the rule is the same when the judgment is against an heir to whom the land has descended. *Voorhis v. Westervelt*, 43 N. J. Eq. 642, 12 Atl. 533, 3 Am. St. Rep. 315.

²⁴ *Woodward v. Sartwell*, 129 Mass. 210; *DOW v. WHITNEY*, 147 Mass. 1, 16 N. E. 722, *Burdick Cas. Real Property*; *McFadden v. Worthington*, 45 Ill. 362; *Jackson ex dem. Lansing v. Chamberlain*, 8 Wend. (N. Y.) 620; *Morrison v. Funk*, 23 Pa. 421; *Ehle v. Brown*, 31 Wis. 405. But see, for some limitations on this rule, a full discussion of creditors' rights under the registry laws in 2 *Dembitz, Land Tit.* 992.

²⁵ *Boies v. Benham*, 127 N. Y. 620, 28 N. E. 657, 14 L. R. A. 55; *Coleman v. Reynolds*, 181 Pa. 317, 37 Atl. 543. By statute in some states, 1 *Stim. Am. St. Law*, § 1864; and without statute in others, *Roane v. Baker*, 120 Ill. 308, 11 N. E. 246; *Curtis v. Root*, 20 Ill. 54; *Phelps v. Fockler*, 61 Iowa, 340, 14 N. W. 729, 16 N. W. 210; *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. 414. Such mortgage may be to a third person who advances the purchase money. Jack-

part of the same transaction as the deed of conveyance.²⁶ Such a mortgage must be recorded, however, the same as any other, in order to have priority over subsequent conveyances.²⁷ A mortgagee under an absolute deed, with a separate defeasance, is, as a rule, protected by the record of the deed, without a record of the defeasance,²⁸ although, in some jurisdictions, the defeasance must also be recorded in order to give notice.²⁹

The effect of notice in connection with the recording of an assignment of a mortgage has been previously considered.³⁰

Purchasers with Actual Notice

Since the recording acts are intended to protect, by constructive notice, bona fide subsequent purchasers or incumbrancers, it should follow that subsequent purchasers, incumbrancers, or other lienors, with actual notice, are not within the purview of such statutes, and so the cases generally hold.³¹ The object of registration being to give notice, if one has actual notice, it is a substitute for the record, and the fact that a prior deed or a mortgage is not recorded cannot affect such a person.³² Most of the statutes expressly provide, moreover, as previously pointed out, that unrecorded instruments relating to realty shall be void only as against subsequent purchasers and incumbrancers "without notice" or "without actual notice."³³

son ex dem. *Beebe v. Austin*, 15 Johns. (N. Y.) 477; *Laidley v. Alkin*, 80 Iowa, 112, 45 N. W. 384, 20 Am. St. Rep. 408; *Jones v. Tainter*, 15 Minn. 512 (Gil. 423). But see *Stansell v. Roberts*, 13 Ohio, 149, 42 Am. Dec. 193; *Heuissler v. Nickum*, 38 Md. 270.

²⁶ *Appeal of Foster*, 3 Pa. 79; *Appeal of Cake*, 23 Pa. 186, 62 Am. Dec. 328; *Banning v. Edes*, 6 Minn. 402 (Gil. 270).

²⁷ *Jackson v. Reid*, 30 Kan. 10, 1 Pac. 308.

²⁸ *Harrison v. Morton*, 87 Md. 671, 40 Atl. 897; *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124; *Jackson v. Ford*, 40 Me. 381. But in some states, by statute, the defeasance must be recorded, or the mortgagee takes no interest under the mortgage. 1 Stim. Am. St. Law, § 1860 A.

²⁹ *Clark v. Condit*, 18 N. J. Eq. 358; *Macaulay v. Porter*, 71 N. Y. 173; *Safe Deposit & Title Guaranty Co. v. Linton*, 213 Pa. 105, 62 Atl. 566.

³⁰ See *Assignment of Mortgage*, in preceding chapter.

³¹ *King v. Huni*, 118 Ky. 450, 81 S. W. 254, 85 S. W. 723. And see *MORSE v. CURTIS*, 140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456, *Burdick Cas. Real Property*. In Louisiana and North Carolina it is otherwise. See *Adams v. Daunis*, 29 La. Ann. 315; *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. 890.

³² *Ætna Life Ins. Co. v. Ford*, 89 Ill. 252; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Butler v. Viele*, 44 Barb. (N. Y.) 166; *Appeal of Britton*, 45 Pa. 172.

³³ See 1 Stim. Am. St. Law, § 1611; 2 *Pomeroy, Eq. Jur.* § 646.

CONSTRUCTIVE NOTICE BY RECITALS IN TITLE DEEDS

200. A purchaser of real property has constructive notice of all matters affecting his estate or interest which are set forth or suggested by way of recital in any of the instruments in his chain of title.

A mortgagee, in order to protect himself, must investigate all matters which might affect his interest that are recited in the mortgage deed given to him.⁸⁴ The same rule applies to recitals in the deeds through which his mortgagor derived his title.⁸⁵ In other words, one who takes a mortgage or a conveyance of land is bound by the recitals in any instrument in his chain of title,⁸⁶ and is likewise chargeable with notice where, by reason of any such recital, a reasonably careful man would be put upon inquiry, when careful investigation, in the prosecution of such inquiry, would show the existence of prior rights.⁸⁷ For example, a recital in a deed that the premises are conveyed subject to a mortgage is binding on a subsequent purchaser, even though the mortgage is not recorded.⁸⁸ Also, when one has actual notice of an unrecorded conveyance, he is bound by all the facts of which such conveyance is notice.⁸⁹ When, however, a reference, in one of the deeds making up the chain of title, to other deeds or writings is only incidental (for instance, if it is in a part of the deed in which other lands are granted), the purchaser is not bound

⁸⁴ *Bell v. Twilight*, 22 N. H. 500; *Dailey v. Kastell*, 56 Wis. 444, 14 N. W. 635.

⁸⁵ *Babcock v. Wells*, 25 R. I. 30, 54 Atl. 599.

⁸⁶ *George v. Kent*, 7 Allen (Mass.) 16; *United States Mortg. Co. v. Gross*, 93 Ill. 483; *Dean v. Long*, 122 Ill. 447, 14 N. E. 34; *Baker v. Mather*, 25 Mich. 51; *Cambridge Val. Bank v. Delano*, 48 N. Y. 326; *Parke v. Neeley*, 90 Pa. 52; *Kerr v. Kitchen*, 17 Pa. 433; *Dailey v. Kastell*, 56 Wis. 444, 14 N. W. 635; *Clark v. Holland*, 72 Iowa, 34, 33 N. W. 350, 2 Am. St. Rep. 230.

⁸⁷ *Garrett v. Simpson*, 115 Ill. App. 62; *Gordon v. Hydraulic Co.*, 117 Mich. 620, 76 N. W. 142; *Hoyt v. Hoyt*, 17 Hun (N. Y.) 192; *Flitcraft v. Trust Co.*, 211 Pa. 114, 60 Atl. 557; *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. Ed. 587; *Lytle v. Turner*, 12 Lea (Tenn.) 641.

⁸⁸ *Kitchell v. Mudgett*, 37 Mich. 81; *Baker v. Mather*, 25 Mich. 51; *Garrett v. Puckett*, 15 Ind. 485.

⁸⁹ *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Green v. Slayter*, 4 Johns. Ch. (N. Y.) 38; *Bent v. Coleman*, 89 Ill. 364.

to pursue the inquiry; and he has no actual, and, it seems, not even constructive, notice of the matter which may be found in those deeds.⁴⁰

CONSTRUCTIVE NOTICE BY POSSESSION

201. Actual, notorious, exclusive, and hostile possession of land by a person other than the grantor or mortgagor is constructive notice to a purchaser or mortgagee of such rights in the land as the person in possession may have.

One about to purchase or to take a mortgage of land, which is in the possession of a third person at the time of the conveyance or the mortgage, is ordinarily put upon inquiry, by the doctrine of constructive notice, as to the rights of such third persons in the land.⁴¹ In other words, a purchaser is bound to inquire of the occupant what his rights may be.⁴² This doctrine applies, for example, in case of a mortgagee, when a purchaser is in possession by an unrecorded deed, or in possession even under an executory contract to purchase.⁴³ It also applies to lessees in possession.⁴⁴ The constructive notice extends also to any contract or equity of the tenant in possession affecting the title, which the tenant would be presumed to communicate to an intending purchaser in answer to inquiries, as a covenant or agreement to renew the

⁴⁰ See *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797, 5 L. R. A. 45.

⁴¹ *Phillips v. Costley*, 40 Ala. 486; *Byers v. Engles*, 16 Ark. 543; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Massey v. Hubbard*, 18 Fla. 688; *Sewell v. Holland*, 61 Ga. 608; *Brainard v. Hudson*, 103 Ill. 218; *Sutton v. Jervis*, 31 Ind. 265, 99 Am. Dec. 631; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Lyons v. Bodenhamer*, 7 Kan. 455; *Hackwith v. Damron*, 1 T. B. Mon. (Ky.) 235; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692; *New v. Wheaton*, 24 Minn. 406; *Vaughn v. Tracy*, 22 Mo. 415; *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109, 8 L. R. A. 211; *Appeal of Bugbee*, 110 Pa. 331, 1 Atl. 273. But other courts hold the contrary. *Harral v. Leverty*, 50 Conn. 46, 47 Am. Rep. 608; *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Brinkman v. Jones*, 44 Wis. 498.

⁴² *Leake*, Digest of Law of Property in Land, p. 359.

⁴³ *Tillotson v. Mitchell*, 111 Ill. 518; *School Dist. No. 82 v. Taylor*, 19 Kan. 287; *Weisberger v. Wisner*, 55 Mich. 246, 21 N. W. 331; *Bank of Orleans v. Flagg*, 3 Barb. Ch. (N. Y.) 316.

⁴⁴ *Wrede v. Cloud*, 52 Iowa, 371, 3 N. W. 400; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Welsh v. Schoen*, 59 Hun, 356, 13 N. Y. Supp. 71; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *WOOD v. PRICE*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210, *Burdick Cas. Real Property*.

lease, or a contract to sell to the tenant.⁴⁵ Many cases, moreover, hold that possession by a tenant is notice, not only of his own rights, but also of the rights of his landlord as well.⁴⁶ It is held, also, in many states, that possession is notice, although the possession is not actually known to the subsequent purchaser.⁴⁷

Possession, however, is notice only during its continuance,⁴⁸ and it must be open, visible, notorious, and exclusive.⁴⁹ It must be also hostile to the grantor or mortgagor.⁵⁰ As a rule, possession on the part of members of the grantor's family, occupying the premises with him, does not amount to any notice of any liens or claims which they may have.⁵¹ Possession of part of the premises by a third person may operate, however, as notice of a title to the whole of the premises.⁵² In order that possession may constitute notice, it must be inconsistent with the title on which the purchaser relies.⁵³ Therefore possession by a grantor is not notice to a subsequent purchaser of any right reserved,⁵⁴ although it may be notice of rights subsequently acquired.⁵⁵

⁴⁵ Leake, Digest of Law of Property in Land; Daniels v. Davidson, 16 Ves. 249, 17 Ves. 433; Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Allen v. Gates, 73 Vt. 222, 50 Atl. 1092.

⁴⁶ WOOD v. PRICE, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210; Burdick Cas. Real Property; U. S. v. Sliney (C. C.) 21 Fed. 894; Haworth v. Taylor, 108 Ill. 275; Whitaker v. Miller, 83 Ill. 381; Hood v. Fahnestock, 1 Pa. 470, 44 Am. Dec. 147; Dickey v. Lyon, 19 Iowa, 544. But see Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847. The English rule, however, is that no notice of the landlord's rights is given. Hunt v. Luck, [1902] 1 Ch. 428; Jones v. Smith, 1 Hare, 43, 63; Barnhart v. Greenshields, 9 Mooré, P. C. 18, 36.

⁴⁷ Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Edwards v. Thompson, 71 N. C. 177.

⁴⁸ Ehle v. Brown, 31 Wis. 405; Meehan v. Williams, 48 Pa. 238.

⁴⁹ Norton v. Insurance Co., 74 Minn. 484, 77 N. W. 298, 539; Williams v. Sprigg, 6 Ohio St. 585; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Bogue v. Williams, 48 Ill. 371; Kendall v. Lawrence, 22 Pick. (Mass.) 540; McMechan v. Griffing, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; Webster v. Van Steenberg, 46 Barb. (N. Y.) 211; Page v. Waring, 76 N. Y. 463; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Meehan v. Williams, 48 Pa. 238.

⁵⁰ Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; Phillips v. Owen, 99 App. Div. 18, 90 N. Y. Supp. 947.

⁵¹ Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473; Elliot v. Lane, 82 Iowa, 484, 48 N. W. 720, 31 Am. St. Rep. 504; Rankin v. Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661; Cary v. White, 7 Lans. (N. Y.) 1.

⁵² Nolan v. Grant, 51 Iowa, 519, 1 N. W. 709; Watkins v. Edwards, 23 Tex. 443.

⁵³ Staples v. Fenton, 5 Hun (N. Y.) 172; Plumer v. Robertson, 6 Serg. & R. (Pa.) 179; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167.

⁵⁴ Newhall v. Pierce, 5 Pick. (Mass.) 450; Dawson v. Bank, 15 Mich. 489; Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243.

⁵⁵ 1 Jones, Mortg. (5th Ed.) § 597.

On the other hand, long-continued possession by the grantor is held to be notice of any right claimed by him,⁵⁶ as where he holds as mortgagor after giving a deed absolute in form.⁵⁷ Possession by the mortgagor or his grantee is not notice, however, of an unrecorded release.⁵⁸

CONSTRUCTIVE NOTICE BY LIS PENDENS

202. A pending suit (*lis pendens*) relating to land affects purchasers and mortgagees, *pendente lite*; their rights being subject to the result of the litigation.⁵⁹

By the doctrine of *lis pendens*,⁶⁰ one who purchases, during the litigation, realty from a party to a suit which involves the title thereto, takes it subject to the rights of the litigants as they may be determined by the action; that is, the pendency of the suit affecting the title to realty is constructive notice to purchasers who acquire interests in the property after the commencement of the action.⁶¹ In order, however, to affect a purchaser or a mortgagee, the grantor or mortgagor must be a party to the suit,⁶² and the land in question must be so clearly described in the pleadings that it may be identified.⁶³ Such suits as ejectment,⁶⁴ mortgage foreclosures, and specific performance of con-

⁵⁶ *White v. White*, 89 Ill. 460; *Ford v. Marcall*, 107 Ill. 136; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Hopkins v. Garrard*, 7 B. Mon. (Ky.) 312.

⁵⁷ *New v. Wheaton*, 24 Minn. 406.

⁵⁸ *Briggs v. Thompson*, 86 Hun, 607, 33 N. Y. Supp. 765.

⁵⁹ *Leake*, *Law of Prop. in Land*, 361.

⁶⁰ See *Eaton*, *Eq.* p. 151; *Story*, *Eq. Jur.* § 405.

⁶¹ *WOOD v. PRICE*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, *Ann. Cas.* 1913A, 1210, *Burdick Cas. Real Property* (stating the doctrine); *Haven v. Adams*, 8 Allen (Mass.) 363; *Jackson ex dem. Hendricks v. Andrews*, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574; *Bolling v. Carter*, 9 Ala. 921; *Blanchard v. Ware*, 37 Iowa, 305; *Hersey v. Turbett*, 27 Pa. 418; *Youngman v. Railroad Co.*, 65 Pa. 278; *Edwards v. Banksmith*, 35 Ga. 213; *Grant v. Bennett*, 96 Ill. 513; *Smith v. Hodsdon*, 78 Me. 180, 3 Atl. 276. But see *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766; *Douglass v. McCrackin*, 52 Ga. 596; *McCutchen v. Miller*, 31 Miss. 65; *Wyatt v. Barwell*, 19 Ves. 435.

⁶² *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Brundage v. Biggs*, 25 Ohio St. 652, 656; *Green v. Rick*, 121 Pa. 130, 15 Atl. 497, 2 L. R. A. 48, 6 Am. St. Rep. 760; *Miller v. Sherry*, 2 Wall. (U. S.) 237, 17 L. Ed. 827.

⁶³ *Low v. Pratt*, 53 Ill. 438; *Allen v. Poole*, 54 Miss. 323, 333; *Griffith v. Griffith*, 9 Paige (N. Y.) 315, 317; *Houston v. Timmerman*, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848.

⁶⁴ *Howard v. Kennedy's Ex'rs*, 4 Ala. 592, 39 Am. Dec. 307; *Jones v. Chiles*, 2 Dana (Ky.) 25; *Jackson ex dem. Hills v. Tuttle*, 9 Cow. (N. Y.) 233; *Bolin v. Connelly*, 73 Pa. 336.

tracts for the sale of land,⁶⁵ most frequently illustrate the application of the rule.

In many states, at the present time, there are statutes providing that notice shall not be charged by a pending suit relating to the title of land, unless the notice is filed in some designated public office.⁶⁶

⁶⁵ *Blanchard v. Ware*, 43 Iowa, 530.

⁶⁶ *Eaton*, *Equity*, p. 155; *Pomeroy*, *Eq. Jur.* § 640. And see the statutes of the several states. See, also, *WOOD v. PRICE*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, *Ann. Cas.* 1913A, 1210, *Burdick Cas. Real Property*.

CHAPTER XX

MORTGAGES (Continued)

(C) DISCHARGE AND FORECLOSURE

- 203. Discharge of Mortgages.
- 204. By Performance.
- 205. Effect of Tender.
- 206. Payment by Third Person—Subrogation.
- 207. By Merger.
- 208. By Redemption.
- 209. Form of Release of Mortgages.
- 210. Foreclosure.
- 211. Form of Remedy.
- 212. Statutory Right of Redemption.

DISCHARGE OF MORTGAGES

203. A mortgage may be discharged:

- (a) By performance.
- (b) By merger.
- (c) By redemption.

DISCHARGE BY PERFORMANCE

204. The performance of the condition named in the mortgage, which includes either the payment of the debt secured or the performance of some other particular condition, discharges the mortgage.

Discharge of Mortgages

The usual ways in which mortgages are discharged are outlined in the preceding headnote. It is often said that a mortgage can be discharged only by payment of the debt secured, or by release of the security;¹ but such statements are to be understood as being employed in a general sense, or as containing within themselves various methods by which payment, or satisfaction, or a release of the security, may be made. For example, a mortgage may be ex-

¹ *McCrery v. Nivin* (Del. Ch.) 67 Atl. 452; *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473; *Knight v. McKinney*, 84 Me. 107, 24 Atl. 744; *Miner v. Graham*, 24 Pa. 491.

tinguished by a gift of the note to the mortgagor, *inter vivos*, or by will.² It may also be extinguished by an acceptance on the part of the mortgagee of other security for the debt, by way of substitution for the original security.³ There is no discharge, however, by taking merely additional security for the mortgage debt,⁴ or by changing the form of the debt, such as taking a new note for the old one, the security remaining the same.⁵ Performance usually requires the payment of the mortgage debt, but the condition may require other acts, as, for example, the support of the mortgagee. In such latter cases, the performance of the particular condition will discharge the mortgage by operation of law.⁶ Payment of the debt secured, on or before the day appointed, discharges the mortgage,⁷ and at common law the title to the mortgaged premises revests in the mortgagor without a reconveyance.⁸ Payment before the day on which the debt falls due cannot be enforced by either party;⁹

² *Thomas v. Fuller*, 68 Hun, 361, 22 N. Y. Supp. 862; *Finch v. Houghton*, 19 Wis. 149.

³ *Robinson v. Leavitt*, 7 N. H. 73; *Duntz v. Horton*, 83 Hun, 332, 31 N. Y. Supp. 742; *Id.*, 146 N. Y. 368, 41 N. E. 88; *Interstate Bldg. & Loan Ass'n v. Tabor*, 21 Tex. Civ. App. 112, 51 S. W. 300.

⁴ *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Flower v. Elwood*, 66 Ill. 438; *Cissna v. Haines*, 18 Ind. 496; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205.

⁵ *Flower v. Elwood*, 66 Ill. 438; *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Williams v. Starr*, 5 Wis. 534; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Swan v. Yapple*, 35 Iowa, 248; *Walters v. Walters*, 73 Ind. 425.

⁶ *Tucker v. Taylor*, 191 Pa. 402, 43 Atl. 318; *Gutwillig v. Wiederman*, 26 App. Div. 26, 49 N. Y. Supp. 984; *Stoel v. Flanders*, 68 Wis. 256, 32 N. W. 114.

⁷ *Lydon v. Campbell*, 204 Mass. 580, 91 N. E. 151, 134 Am. St. Rep. 702; *Denman v. Payne*, 152 Ala. 342, 44 South. 635; *Thurber v. Stimmel*, 119 N. Y. 641, 24 N. E. 4; *McNair v. Picotte*, 33 Mo. 57; *Meigs v. Bunting*, 141 Pa. 233, 21 Atl. 588, 23 Am. St. Rep. 273; *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*; *Gage v. McDermid*, 150 Ill. 598, 37 N. E. 1026; *Kingsley v. Purdom*, 53 Kan. 56, 35 Pac. 811. Cf. *Greensburg Fuel Co. v. Gas Co.*, 162 Pa. 78, 29 Atl. 274; *Bartlett v. Wade*, 66 Vt. 629, 30 Atl. 4. But see *Sturges v. Hart*, 84 Hun, 409, 32 N. Y. Supp. 422; *Herber v. Thompson*, 47 La. Ann. 800, 17 South. 318.

⁸ *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Merrill v. Chase*, 3 Allen (Mass.) 339; *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612; *BARRETT v. HINCKLEY*, *supra*, *Burdick Cas. Real Property*; *Holman v. Bailey*, 3 Mete. (Mass.) 55; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37. So, in a mortgage for support, if the condition is performed up to the death of the mortgagee the title revests in the mortgagor. *Munson v. Munson*, 30 Conn. 425.

⁹ *Gordon v. Bank*, 115 Mass. 588; *Armstrong v. Wilson* (Tex. Civ. App.) 109 S. W. 955; *Greenville Bldg. & Loan Ass'n v. Wholey*, 68 N. J. Eq. 92, 59 Atl. 341; *Weldon v. Tollman*, 15 C. C. A. 138, 67 Fed. 986; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700; *Moore v. Kime*, 43 Neb. 517, 61 N. W. 736.

but, if the mortgagee accepts such payment, it will operate as a discharge of the mortgage.¹⁰

Payment, however, after the day mentioned in the condition, that is, after the breach of condition and forfeiture, at common law, does not divest the title of the mortgagee,¹¹ and, if the mortgagee will not reconvey voluntarily, the mortgagor must resort to equity to secure a reconveyance.¹² Under the modern lien theory, however, payment at any time before foreclosure will discharge the mortgage, and the title reverts in the mortgagor without a reconveyance.¹³ A discharge of the mortgage debt usually discharges the mortgage,¹⁴ but a discharge in bankruptcy, although it may release the personal liability of the mortgagor, does not affect the mortgage lien.¹⁵ Moreover, in general, a discharge, by agreement of the parties, of the personal liability of the mortgagor, does not discharge the mortgage, in absence of any intention to discharge the mortgage debt.¹⁶

It is held that a mortgagor cannot discharge a mortgage by set-

¹⁰ 1 Jones, *Mortg.* (5th Ed.) § 888. A mortgage debt payable at or before a certain day can be paid immediately. *In re John and Cherry Sts.*, 19 Wend. (N. Y.) 659.

¹¹ *Munson v. Munson*, 30 Conn. 425; *Currier v. Gale*, 9 Allen (Mass.) 522; *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444.

¹² *Plomley v. Felton*, 14 App. Cas. 61, 58 L. J. P. C. 50, 60 L. T. Rep. N. S. 193; *Walker v. Jones*, L. R. 1 P. C. 50, 12 Jur. N. S. 381, 35 L. J. P. C. 30; *Currier v. Gale*, 9 Allen (Mass.) 522; *Doton v. Russell*, 17 Conn. 146. A court of common law has no jurisdiction in such a case. *Gorely v. Gorely*, 1 H. & N. 144.

¹³ *Willemin v. Dunn*, 93 Ill. 511; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Swett v. Horn*, 1 N. H. 332; *Van Husan v. Kanouse*, 13 Mich. 303. See *Robinson v. Cross*, 22 Conn. 171; *Decker v. Decker*, 64 Neb. 239, 89 N. W. 795; *Caruthers v. Humphrey*, 12 Mich. 270; *McNair v. Picotte*, 33 Mo. 57; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Shields v. Lozeur*, 34 N. J. Law, 496, 3 Am. St. Rep. 256.

¹⁴ *Hastings v. Hastings*, 110 Mass. 280; *Atwater v. Underhill*, 22 N. J. Eq. 599; *Martin v. Goldsborough* (Md.) 25 Atl. 420; *Sherman v. Sherman*, 3 Ind. 337; *Shields v. Lozeur*, 34 N. J. Law, 496, 3 Am. St. Rep. 256; *BOGERT v. BLISS*, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684, *Burdick Cas. Real Property*.

¹⁵ *Burtis v. Wait*, 33 Kan. 478, 6 Pac. 783; *Cary v. Prentiss*, 7 Mass. 63; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 496. Foreclosure is not payment, and does not discharge the mortgage debt. See post. The parties may agree, however, that it shall constitute a discharge. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456; *Renwick v. Wheeler*, 48 Fed. 431; *Vansant v. Allmon*, 23 Ill. 30; *Germania Bldg. Ass'n v. Neill*, 93 Pa. 322.

¹⁶ *Hayden v. Smith*, 12 Metc. (Mass.) 511; *Donnelly v. Simonton*, 13 Minn. 301 (Gil. 278); *Walls v. Baird*, 91 Ind. 429; *Bentley v. Vanderheyden*, 35 N. Y. 677.

ting up debts due him from the mortgagee,¹⁷ in absence of an agreement to that effect.¹⁸ It is also held, however, that when the mortgagor is holder of the mortgage as administrator of the mortgagee, he may discharge the mortgage at any time by charging the amount thereof to himself on his probate account,¹⁹ and that a subsequent assignment would transfer no title to the assignee.²⁰ Extending the time of payment does not discharge the mortgage as to subsequent mortgagees,²¹ although it is otherwise where the mortgage is to secure the debt of another, unless the mortgagor consents to the extension.²² Payment of a part of the debt will release the mortgage pro tanto,²³ although a release of part of the mortgaged premises does not discharge the mortgage as to the other parts,²⁴ unless it would injuriously affect subsequent mortgages, of which the first mortgagee had notice.²⁵ After a mortgage has been discharged, it cannot be revived, so as to take precedence over intervening incumbrances;²⁶ that is, the mortgage cannot be continued by the parties as security for another debt, to the detriment of subsequent creditors or purchasers.²⁷ When, however, the discharge of a mortgage has been obtained by fraud or mistake, it may be set aside, unless third persons, without notice, whose rights have intervened since the discharge, would be injuriously affected.²⁸

¹⁷ *Brown v. Coriell*, 50 N. J. Eq. 753, 26 Atl. 915, 21 L. R. A. 321, 35 Am. St. Rep. 789. In a suit to foreclose a mortgage brought by parties in interest after the death of the mortgagee, the mortgagor cannot set up as payments toward the mortgage debt in the mortgagee's lifetime certain debts due to him from the mortgagee. *Green v. Storm*, 3 Sandf. Ch. (N. Y.) 305.

¹⁸ *Hartshorn v. Davis*, 174 Mass. 34, 54 N. E. 244; *Gallup v. Jackson*, 47 Mich. 475, 11 N. W. 277; *Holcomb v. Campbell*, 118 N. Y. 46, 22 N. E. 1107.

¹⁹ *Martin v. Smith*, 124 Mass. 111. But see *Soverhill v. Suydam*, 59 N. Y. 140; *Kinney v. Ensign*, 18 Pick. (Mass.) 232; *Crow v. Conant*, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

²⁰ *Ipswich Mfg. Co. v. Story*, 5 Metc. (Mass.) 310.

²¹ *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; *Whitacre v. Fuller*, 5 Minn. 508 (Gil. 401); *Cleveland v. Martin*, 2 Head (Tenn.) 128; *Naltner v. Tappey*, 55 Ind. 107.

²² *Smith v. Townsend*, 25 N. Y. 479; *Metz v. Todd*, 36 Mich. 473; *Christner v. Brown*, 16 Iowa, 130.

²³ *Howard v. Gresham*, 27 Ga. 347; *Babbitt v. McDermott* (N. J. Ch.) 26 Atl. 889; *In re Thuresson*, 3 Ont. L. R. 271, 1 Ont. W. R. 4.

²⁴ *Patty v. Pease*, 8 Paige (N. Y.) 277, 35 Am. Dec. 683.

²⁵ *Stewart v. McMahan*, 94 Ind. 389.

²⁶ *BOGERT v. BLISS*, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684, *Burdick Cas. Real Property*; *Mitchell v. Coombs*, 96 Pa. 430; *Lindsay v. Garvin*, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219.

²⁷ *Marvin v. Vedder*, 5 Cow. (N. Y.) 671; *BOGERT v. BLISS*, *supra*; *Carlton v. Jackson*, 121 Mass. 592; *Blake v. Broughton*, 107 N. C. 220, 12 S. E. 127.

²⁸ *Errett v. Wheeler*, 109 Minn. 157, 163, 123 N. W. 414, 26 L. R. A. (N. S.) 816; *Southern Kansas Farm, Loan & Trust Co. v. Garrity*, 57 Kan. 805, 48

Who may Pay

The mortgage debt may be paid by the mortgagor,²⁹ or by any person lawfully representing him, as, for example, the guardian of a minor owner of incumbered property.³⁰ Upon the death of a mortgagor, the debt may be paid by any one succeeding to his rights, as his widow,³¹ or personal representative.³² A surety on the note may also pay the debt,³³ as well as a junior mortgagee, in order to protect himself.³⁴ A mere volunteer, however, cannot discharge the mortgage by paying the debt;³⁵ but where third persons not primarily liable pay off the mortgage in order to preserve their rights and interests, they will be subrogated to the rights of the mortgagee.³⁶

The personal estate of a decedent is the primary fund for the payment of his debts, and therefore a deceased owner's personal property is to be applied to the payment of mortgages on his realty,³⁷ unless he has expressed a contrary intention.³⁸ This right can, however, be claimed only by the widow, heirs, or devisees.³⁹ It cannot be enforced against any others than the personal representative, next of kin, or residuary legatee.⁴⁰ It is not available

Pac. 33; *Saint v. Cornwall*, 207 Pa. 270, 56 Atl. 440; *Stimis v. Stimis*, 60 N. J. Eq. 313, 47 Atl. 20; *Beal v. Congdon*, 75 Mich. 77, 42 N. W. 685.

Persons without notice: *Burton v. Reagan*, 75 Ind. 77; *Raymond v. Whitehouse*, 119 Iowa, 132, 93 N. W. 292; *Lowry v. Bennett*, 119 Mich. 301, 77 N. W. 935.

²⁹ *Wheeler v. Brooke*, 26 Ont. 96; *Blim v. Wilson*, 5 Phila. (Pa.) 78. And see *Everett v. Gately*, 183 Mass. 503, 67 N. E. 598.

³⁰ *Cheney v. Roodhouse*, 135 Ill. 257, 25 N. E. 1019.

³¹ *Stinson v. Anderson*, 96 Ill. 373.

³² *Bishop v. Chase*, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

³³ *Richeson v. Crawford*, 94 Ill. 165.

³⁴ *Tyrrell v. Ward*, 102 Ill. 29; *Ball v. Callahan*, 95 Ill. App. 615, affirmed in 197 Ill. 318, 64 N. E. 295.

³⁵ *Bennett v. Chandler*, 199 Ill. 97, 64 N. E. 1052; *Young v. Morgan*, 89 Ill. 199; *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11.

³⁶ See *Payment by Third Persons—Subrogation*, *infra*.

³⁷ *Hoff's Appeal*, 24 Pa. 200; *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614; *Parsons v. Freeman*, Amb. 115; *Woods v. Huntingford*, 3 Ves. 128. But see *Tweddell v. Tweddell*, 2 Brown, Ch. 101; *Scott v. Beecher*, 5 Madd. 96; *Loosemore v. Knapman, Kay*, 123.

³⁸ As by specific bequests of his personal property. *Hoff's Appeal*, 24 Pa. 200. See *Serle v. St. Elvy*, 2 P. Wms. 386.

³⁹ *Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Lockhart v. Hardy*, 9 Beav. 379. And see *Duke of Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

⁴⁰ *Hocker's Appeal*, 4 Pa. 497; *Gibson v. McCormick*, 10 Gill & J. (Md.) 65; *Cope v. Cope*, 2 Salk. 449.

against creditors, or when the personal estate is insolvent,⁴¹ nor against a specific legatee.⁴²

Payment to Whom

Payment of the mortgage debt may be made to the mortgagee, or to his duly authorized agent.⁴³ In case of the death of the mortgagee, payment should be made to his personal representative.⁴⁴ Payment must be made in lawful money,⁴⁵ unless otherwise agreed,⁴⁶ and a check does not operate as payment until it is paid.⁴⁷

205. EFFECT OF TENDER—As a rule, good and sufficient tender of payment, refused by the mortgagee, will discharge the mortgage.

Where, at maturity, a sufficient tender of the amount due is made to one authorized to receive payment of the mortgage debt, the tender, although refused, will, according to the general rule, have the effect of discharging the mortgage.⁴⁸ A tender, however, after default, does not discharge the mortgage,⁴⁹ although tender made

⁴¹ *Hocker's Appeal*, 4 Pa. 497; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

⁴² *Oneal v. Mead*, 1 P. Wms. 693; *Lutkins v. Leigh*, Cas. t. Talb. 53. See also, *Evelyn v. Evelyn*, 2 P. Wms. 659; *Middleton v. Middleton*, 15 Beav. 450.

⁴³ *Cutler v. Haven*, 8 Pick. (Mass.) 490; *Cary v. Cary*, 189 Pa. 65, 42 Atl. 19; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; *Ambrose v. Barrett*, 121 Cal. 297, 53 Pac. 805, 54 Pac. 264; *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Converse v. Dillaye*, 62 N. Y. 621; *Donaldson v. Wilson*, 79 Mich. 181, 44 N. W. 429; *U. S. Bank v. Burson*, 90 Iowa, 191, 57 N. W. 705.

⁴⁴ *Briggs v. Briggs*, 134 Pa. 514, 19 Atl. 677; *Trotter v. Shippen*, 2 Pa. 358; *Reynolds v. Smith*, 57 Mich. 194, 23 N. W. 727; *Fesmire v. Shannon*, 143 Pa. 201, 22 Atl. 898.

⁴⁵ A stipulation that the debt shall be paid in gold may be enforced. *Dorr v. Hunter*, 183 Ill. 432, 56 N. E. 159; *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

⁴⁶ *Burke v. Grant*, 116 Ill. 124, 4 N. E. 655; *Webber v. Ryan*, 54 Mich. 70, 19 N. W. 751; *Gallup v. Jackson*, 47 Mich. 475, 11 N. W. 277.

⁴⁷ *Harbach v. Colvin*, 73 Iowa, 638, 35 N. W. 663.

⁴⁸ *Security State Bank v. Lodge*, 85 Neb. 255, 122 N. W. 992; *McDaniels v. Reed*, 17 Vt. 674; *Breunich v. Weselman*, 100 N. Y. 609, 2 N. E. 385; *Willard v. Harvey*, 5 N. H. 252; *Lockridge v. Lacey*, 30 U. C. Q. B. 494; *Potts v. Plaisted*, 30 Mich. 149. Contra *Matthews v. Lindsay*, 20 Fla. 962; *Knollenberg v. Nixon*, 171 Mo. 445, 72 S. W. 41, 94 Am. St. Rep. 790; *Maynard v. Hunt*, 5 Pick. (Mass.) 240; *Schearff v. Dodge*, 33 Ark. 340. And see *PARKER v. BEASLEY*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, *Burdick Cas. Real Property*.

⁴⁹ *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; *Shields v. Lozeau*, 34 N. J. Law, 496, 3 Am. St. Rep. 256.

pending a suit for foreclosure is ground for the dismissal of the suit.⁵⁰

A tender, to be sufficient, cannot be made before maturity,⁵¹ and it must be fair and reasonable,⁵² absolute and unconditional.⁵³ It must be, also, for the whole amount of the mortgage debt,⁵⁴ or of the balance due.⁵⁵ Tender will be effectual only when made by one entitled to make payment, as, for example, the mortgagor,⁵⁶ a grantee who has assumed the mortgage,⁵⁷ or a junior mortgagee.⁵⁸ Moreover, to operate as a discharge, it must be made to one authorized to receive payment, and having a right to enter satisfaction.⁵⁹ If the mortgage has been assigned, payment or tender is to be made to the assignee, if the mortgagor has notice of the assignment.⁶⁰ Although a good tender may discharge the mortgage, yet it does not, if refused, discharge the debt itself,⁶¹ although it will prevent the further running of interest.⁶²

⁵⁰ *Potter v. Schaffer*, 209 Mo. 586, 108 S. W. 60; *Babcock v. Perry*, 8 Wis. 277.

⁵¹ *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700; *Moore v. Kime*, 43 Neb. 517, 61 N. W. 736.

⁵² *Darling v. Chapman*, 14 Mass. 101; *Post v. Springsted*, 49 Mich. 90, 13 N. W. 370; *Haney v. Clark*, 65 Tex. 93.

⁵³ *Sager v. Tupper*, 35 Mich. 134; *Mott v. Rutter* (N. J. Ch.) 54 Atl. 159, affirmed 66 N. J. Eq. 435, 57 Atl. 1132; *Potts v. Plaisted*, 30 Mich. 149; *Engle v. Hall*, 45 Mich. 57, 7 N. W. 239; *Roosevelt v. Bank*, 45 Barb. (N. Y.) 579.

⁵⁴ *Roberts v. Building Ass'n*, 74 Md. 1, 21 Atl. 684; *Thorton v. Bank*, 71 Mo. 221; *Tidwell v. Wittmeier*, 150 Ala. 253, 43 South. 782; *Graham v. Linden*, 50 N. Y. 547; *Sager v. Tupper*, 35 Mich. 134; *Cupples v. Galligan*, 6 Mo. App. 62.

⁵⁵ *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17; *McDaniels v. Lapham*, 21 Vt. 222; *Hartley v. Tatham*, 1 Rob. (N. Y.) 246.

⁵⁶ *Graffin v. State*, 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061; *Johnston v. Gray*, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; *Blim v. Wilson*, 5 Phila. (Pa.) 78.

⁵⁷ *Harris v. Jex*, 66 Barb. (N. Y.) 232.

⁵⁸ *Frost v. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Sayer v. Tupper*, 35 Mich. 134.

⁵⁹ *Post v. Springsted*, 49 Mich. 90, 13 N. W. 370; *Grussey v. Schneider*, 50 How. Prac. (N. Y.) 134; *Dorkray v. Noble*, 8 Greenl. (Me.) 278; *U. S. Bank v. Burson*, 90 Iowa, 191, 57 N. W. 705.

⁶⁰ *Kennedy v. Moore*, 91 Iowa, 39, 58 N. W. 1066; *Dorkray v. Noble*, 8 Greenl. (Me.) 278. And see *Hetzell v. Barber*, 6 Hun (N. Y.) 534.

⁶¹ *Cowles v. Marble*, 37 Mich. 158; *Cobbey v. Knapp*, 23 Neb. 579, 37 N. W. 485.

⁶² *Cowles v. Marble*, 37 Mich. 158; *Knollenberg v. Nixon*, 171 Mo. 445, 72 S. W. 41, 94 Am. St. Rep. 790. See *PARKER v. BEASLEY*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, *Burdick Cas. Real Property*.

206. PAYMENT BY THIRD PERSON—SUBROGATION—

Whenever one not primarily liable for the mortgage debt pays it to protect his own rights, he is substituted, or subrogated, in equity in place of the mortgagee, so as to enable him to enforce the mortgage against the person primarily liable, the same as the original mortgagee could have done, if unpaid. This he may do without any formal assignment of the mortgage to him.

Under some circumstances the payment of a mortgage debt does not satisfy the mortgage or destroy its lien, because equity regards the person making the payment as the owner of the mortgage for certain definite purposes, and keeps it alive and preserves its lien for his benefit and security.⁶³ In effect, it is an equitable assignment of the mortgage to the one paying the debt.⁶⁴ This equitable doctrine of subrogation, as applied to mortgages, provides a means, therefore, by which one not primarily liable for the mortgage debt, but having paid it as a necessary measure for the protection of his rights, may enforce the mortgage against the debtor.⁶⁵ Subrogation does not arise, however, when only a part of the mortgage debt is paid, since the mortgage debt must be paid in full.⁶⁶ Moreover, it can be claimed only in favor of one who has paid a mortgage debt not his duty to pay.⁶⁷ A mere volunteer cannot invoke the aid of subrogation,⁶⁸ since one must have paid under some compulsion made necessary for the protection of his rights.⁶⁹ The doctrine is fre-

⁶³ 3 Pom. Eq. Jur. § 1211, quoted in *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1. See, also, *Sheldon on Subrogation*, §§ 1, 3, 14, 16.

⁶⁴ *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Muir v. Berkshire*, 52 Ind. 149; *Sessions v. Kent*, 75 Iowa, 601, 39 N. W. 914.

⁶⁵ *Errett v. Wheeler*, 109 Minn. 157, 163, 123 N. W. 414, 26 L. R. A. (N. S.) 816; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Richards v. Griffith*, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156; *Ahern v. Freeman*, 46 Minn. 156, 48 N. W. 677, 24 Am. St. Rep. 206; *Hover v. Hover*, 21 App. Div. 565, 48 N. Y. Supp. 395; *Matthews v. Trust Co.*, 52 Fed. 687; *McCormick's Adm'r v. Irwin*, 35 Pa. 111.

⁶⁶ *Loeb v. Fleming*, 15 Ill. App. 503; *Forest Oil Co.'s Appeals*, 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584; *In re Graff's Estate*, 139 Pa. 69, 21 Atl. 233.

⁶⁷ *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102; *Young v. Morgan*, 89 Ill. 199.

⁶⁸ *McCleary v. Savage*, 9 Sadler (Pa.) 271, 12 Atl. 158; *White v. Cannon*, 125 Ill. 412, 17 N. E. 753; *Brethauer v. Schorer*, 77 Conn. 575, 60 Atl. 125.

⁶⁹ *Goodbody v. Goodbody*, 95 Ill. 456; *Conwell v. McCowan*, 81 Ill. 285; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 496; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102; *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. 1003.

quently applied in favor of a vendee of incumbered real property, who has not become responsible for the mortgage debt, yet has paid it in order to prevent a sale, or to preserve his interest.⁷⁰ Likewise, a junior mortgagee who pays a senior incumbrance for his own protection is entitled to be subrogated to the rights of the senior mortgagee.⁷¹ An indorser of a note, or a surety of the mortgage debt, may also be subrogated to the rights of the mortgagee, when compelled to discharge the indebtedness.⁷² One, however, who loans money to a mortgagor to pay the mortgage debt, without any agreement that he shall have the benefit of the security, is not subrogated,⁷³ although he generally will be where there is an agreement to that effect.⁷⁴

Marshaling of Securities

Connected with the equitable doctrine of subrogation is another equitable doctrine, that of marshaling of securities.⁷⁵ This doctrine rests upon the principle, laid down by courts of equity, that a person having resort to two funds or securities shall not, by his choice, disappoint another having resort to but one.⁷⁶ As applied to mortgages, if a first mortgagee has a security on two properties of the same mortgagor, and a second mortgagee has a security on only one of these properties, the two properties will be marshaled, so as to throw the first incumbrance as far as possible on the property not included in the second security.⁷⁷ The former practice was to

⁷⁰ *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Howard v. Agry*, 9 Mass. 179; *Platt v. Brick*, 35 Hun (N. Y.) 121; *Wadsworth v. Blake*, 43 Minn. 509, 45 N. W. 1131.

⁷¹ *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Spaulding v. Harvey*, 129 Ind. 106, 28 N. E. 323, 13 L. R. A. 619, 28 Am. St. Rep. 176; *Everston v. Bank*, 33 Kan. 352, 6 Pac. 605; *Washburn v. Hammond*, 151 Mass. 132, 24 N. E. 33; *Quinlan v. Stratton*, 128 N. Y. 659, 28 N. E. 529.

⁷² *Havens v. Willis*, 100 N. Y. 482, 3 N. E. 313; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 496; *Conner v. Howe*, 35 Minn. 518, 29 N. W. 314; *Gossin v. Brown*, 11 Pa. 527; *Richeson v. Crawford*, 94 Ill. 165; *Dick v. Moon*, 26 Minn. 309, 4 N. W. 39; *Motley v. Harris*, 1 Lea (Tenn.) 577.

⁷³ *Bartlett v. Wade*, 66 Vt. 629, 30 Atl. 4; *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273; *Bockes v. Hathorn*, 20 Hun (N. Y.) 503.

⁷⁴ *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312, affirmed in 13 Barb. (N. Y.) 561.

⁷⁵ See, in general, *Eaton*, Eq. 513.

⁷⁶ 3 Pom. Eq. Jur. § 1414; *Webb v. Smith*, 30 Ch. Div. 192; *Trimmer v. Bayne*, 9 Ves. 209, 211.

⁷⁷ *Andreas v. Hubbard*, 50 Conn. 351; *Turner v. Flinn*, 67 Ala. 529; *Hudson v. Dismukes*, 77 Va. 242; *Sibley v. Baker*, 23 Mich. 312; *Lanoy v. Athol*, 2 Atk. 444; *Gibson v. Seagrim*, 20 Beav. 614; *Ball v. Setzer*, 33 W. Va. 444,

enjoin the mortgagee having the two securities from resorting to that which alone was security for the other mortgagee.⁷⁸ The later practice, however, is to permit the double creditor to enforce his claim as he pleases,⁷⁹ allowing, however, the mortgagee having but one security to be subrogated to the rights of the double creditor, should the latter resort to the only security on which the former has a lien.⁸⁰ The doctrine of marshaling does not, as a rule, apply to the prejudice of the rights of third persons,⁸¹ but it does apply to persons claiming the property under the mortgagor otherwise than by actual assignment or charge; that is, it applies against his judgment creditors,⁸² and against his heirs and personal representatives.⁸³

DISCHARGE OF MORTGAGE BY MERGER

207. At law, when the complete legal title in fee and the mortgage become united in the same person in the same right, the mortgage is merged in the ownership, and is discharged. Equity, however, will prevent a merger when it would be contrary to the intention of the parties, or when the rights of third persons would be prejudiced.

The doctrine of merger, either by analogy to the merger of a less estate in a greater, or because a man cannot be his own debtor,⁸⁴ may also be applied to the discharge of mortgages.⁸⁵ At law, merger takes place when the mortgage and the ownership of the

10 S. E. 798; *Abbott v. Powell*, 6 Sawy. 91, Fed. Cas. No. 13. And see, for other applications, *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037; *Cullen v. Trust Co.*, 60 Minn. 6, 61 N. W. 818; *Witt v. Rice*, 90 Iowa, 451, 57 N. W. 951; *Henkel v. Bohnke*, 7 Tex. Civ. App. 16, 26 S. W. 645; *Black v. Reno*, 59 Fed. 917.

⁷⁸ *Eaton*, Eq. 314; *Kerley*, Hist. Eq. 215; *Evertson v. Booth*, 19 Johns. (N. Y.) 495.

⁷⁹ This is also the modern English practice, and the single creditor cannot interfere with the rights of the double creditor. *Manks v. Whiteley*, [1911] 2 Ch. 448, 466.

⁸⁰ *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Alexander v. Welch*, 10 Ill. App. 181; *Washington Bldg. & Loan Ass'n v. Beaghen*, 27 N. J. Eq. 98; *Herbert v. Loan Ass'n*, 17 N. J. Eq. 497, 90 Am. Dec. 601; *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22; *Milmine v. Bass*, 29 Fed. 632.

⁸¹ *Webb v. Smith*, 30 Ch. Div. 192, 202; 3 Pom. Eq. Jur. § 1414.

⁸² *Laws of Eng.* vol. 21, p. 305; *Gray v. Stone*, [1893] 69 L. T. 282.

⁸³ *Lanoy v. Athol*, 2 Atk. 444; *Flint v. Howard*, [1893] 2 Ch. 54, 73.

⁸⁴ *Laws of Eng.* vol. 21, p. 318, note.

⁸⁵ *Cock v. Bailey*, 146 Pa. 328, 23 Atl. 370; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 721; *Milnor v. Loan Ass'n*, 64 Minn. 500, 67 N. W. 346; *Fouche v. Delk*, 83 Iowa, 297, 48 N. W. 1078.

land vest in the same person.⁸⁶ In order, however, that merger may take place, the complete legal title in fee⁸⁷ and the mortgage must be held by the same person and in the same right.⁸⁸ Thus, for example, there is no merger where the land is leased for life to the mortgagee,⁸⁹ or where the equity of redemption is assigned to a beneficiary under a trust; the legal title being in a trustee.⁹⁰ Moreover, no merger is effected when the mortgagee has assigned the mortgage before he acquires the equity of redemption.⁹¹ In equity, however, merger, with its resultant discharge of the mortgage, does not necessarily take place when the ownership of the land and ownership of the mortgage become united in the same person. In equity, if the intention of the parties, either actual or presumed, is that there should be no merger,⁹² or if it would not accord with justice, or with the rights of third persons, that a merger should take place,⁹³ the doctrine will not be applied. Con-

⁸⁶ *Lynch v. Pfeiffer*, 110 N. Y. 33, 17 N. E. 402; *Dull's Estate*, 137 Pa. 116, 20 Atl. 419; *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265; *Jenning's Lessee v. Wood*, 20 Ohio, 261; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; *Gibson v. Crehore*, 3 Pick. (Mass.) 475; *Ann. Arbor Sav. Bank v. Webb*, 56 Mich. 377, 23 N. W. 51; *Judd v. Seekins*, 62 N. Y. 266; *McGale v. McGale*, 18 R. I. 675, 29 Atl. 967. But see *Burt v. Gamble*, 98 Mich. 402, 57 N. W. 261; *Cook v. Foster*, 96 Mich. 610, 55 N. W. 1019.

⁸⁷ *Walbridge v. Day*, 31 Ill. 379, 83 Am. Dec. 227; *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455.

⁸⁸ *Bush v. Herring*, 113 Iowa, 158, 84 N. W. 1036; *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654; *Mann v. Mann*, 49 Ill. App. 472; *Sprague v. Beamer*, 45 Ill. App. 17; *Souther v. Pearson* (N. J. Ch.) 28 Atl. 450. At common law an assignment of the mortgage to the wife of the mortgagor discharged it by merger. 1 Jones, *Mortg.* (5th Ed.) § 850. But such is not now the rule. *Model Lodging House Ass'n v. Boston*, 114 Mass. 133; *Newton v. Manwarring*, 56 Hun, 645, 10 N. Y. Supp. 347; *McCrary v. Little*, 136 Ind. 86, 35 N. E. 836; *Bean v. Boothby*, 57 Me. 295. And see *Bemis v. Call*, 10 Allen (Mass.) 512.

⁸⁹ *Powers v. Patten*, 71 Me. 583.

⁹⁰ *Brown v. Doe*, 10 Smedes & M. (Miss.) 268; *Hatz's Appeal*, 40 Pa. 209; *Collins v. Stocking*, 98 Mo. 290, 11 S. W. 750.

⁹¹ *Chase Nat. Bank v. Bank*, 28 Wash. 150, 68 Pac. 454; *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; *Lime Rock Nat. Bank v. Mowry*, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294; *International Bank of Chicago v. Wilkshire*, 108 Ill. 143.

⁹² *Continental Title & Trust Co. v. Devlin*, 209 Pa. 380, 58 Atl. 843; *Flanigan v. Sable*, 44 Minn. 417, 46 N. W. 854; *Security Title & Trust Co. v. Schlender*, 190 Ill. 609, 60 N. E. 854; *Shattuck v. Bank*, 63 Kan. 443, 65 Pac. 643; *Lynch v. Pfeiffer*, 110 N. Y. 33, 17 N. E. 402; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170; *Jarvis v. Frink*, 14 Ill. 396; *Loverin v. Trust Co.*, 113 Pa. 6, 4 Atl. 191; *Aiken v. Railway Co.*, 37 Wis. 469; *Walker v. Goodsill*, 54 Mo. App. 631.

⁹³ *New Jersey Ins. Co. v. Meeker*, 40 N. J. Law, 18; *Silliman v. Gammage*, 55 Tex. 365; *Farrand v. Long*, 184 Ill. 100, 56 N. E. 313; *Gray v. Nelson*, 77

sequently, merger does not occur when the owner has an interest in keeping the mortgage alive,⁹⁴ as where the owner of the equity of redemption is not the original mortgagor, and has not assumed the mortgage debt.⁹⁵ Nor is there any merger when there is an intervening right between the mortgage and equity of redemption.⁹⁶ Thus, where a first mortgagee purchases the equity of redemption, there will be no merger if there are subsequent mortgages, or other intervening liens; it being presumed to be his intention to keep his mortgage alive as a first lien upon the property.⁹⁷ In determining the intention of the parties, their relation to each other and to the mortgage debt is material, when they have not shown their intention by express words.⁹⁸ However, a merger will never be prevented by the intention of the parties, where it will work wrong or injury to others.⁹⁹ If there is no evidence of intention whether a merger shall take place or not, and if no opposing equitable principles are involved, equity will follow the law, and a merger will result.¹ However, whether or not a merger has taken place cannot be determined by a mere inspection of the record, because, although there may be recorded a union of the estate in one person,

Iowa, 63, 41 N. W. 566; *Keith v. Wheeler*, 159 Mass. 161, 34 N. E. 174; *Ft. Scott Bldg. & Loan Ass'n v. Insurance Co.* (1906) 74 Kan. 272, 86 Pac. 142.

⁹⁴ *Edgerton v. Young*, 43 Ill. 464; *Richardson v. Hockenhull*, 85 Ill. 124; *Tuttle v. Brown*, 14 Pick. (Mass.) 514; *Snyder v. Snyder*, 6 Mich. 470; *Spencer v. Ayrault*, 10 N. Y. 202; *Duncan v. Drury*, 9 Pa. 332, 49 Am. Dec. 565; *Davis v. Pierce*, 10 Minn. 376 (Gil. 302); *McCroly v. Little*, 136 Ind. 86, 35 N. E. 836; *White v. Hampton*, 13 Iowa, 259; *Lyon v. McIlvaine*, 24 Iowa, 9.

⁹⁵ *Grover v. Thatcher*, 4 Gray (Mass.) 526; *Evans v. Kimball*, 1 Allen (Mass.) 240. But see *Byington v. Fountain*, 61 Iowa, 512, 14 N. W. 220, 16 N. W. 534.

⁹⁶ *Gray v. Nelson*, 77 Iowa, 63, 41 N. W. 566; *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245; *Dickerson v. Uhl*, 71 Mich. 398, 39 N. W. 472; *Hines v. Ward*, 121 Cal. 115, 53 Pac. 427; *Grover v. Thatcher*, 4 Gray (Mass.) 526; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390; *Coburn v. Stephens*, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218; *Jewett v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106; *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196.

⁹⁷ *Gibbs v. Johnson*, 104 Mich. 120, 62 N. W. 145; *Dutton v. Ives*, 5 Mich. 515; *Hooper v. Henry*, 31 Minn. 264, 17 N. W. 476; *Bell v. Woodward*, 34 N. H. 90; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Smith v. Swan*, 69 Iowa, 412, 29 N. W. 402; *Pike v. Gleason*, 60 Iowa, 150, 14 N. W. 210; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782. But see *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642.

⁹⁸ *Smith v. Roberts*, 91 N. Y. 470; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455.

⁹⁹ *McGiven v. Wheelock*, 7 Barb. (N. Y.) 22; *First Nat. Bank of Lebanon v. Essex*, 84 Ind. 144.

¹ *Jarvis v. Frink*, 14 Ill. 396; *Campbell v. Carter*, 14 Ill. 286; *Freeman v. Paul*, 3 Greenl. (Me.) 260, 14 Am. Dec. 237.

a merger may have been prevented by the intention of the parties.² Intention may be shown, however, by express recitals in the deed, if present, or by the fact that there has been no release of the mortgage.³

DISCHARGE OF MORTGAGE BY REDEMPTION

208. A mortgage may also be discharged by being redeemed, after condition broken, by any one who has an interest in the equity of redemption paying the whole amount due, before the right to redeem is barred by foreclosure, laches, or the statute of limitations.

In some states there is also a statutory right of redemption, even after sale on foreclosure.

Nature of Redemption

The term "redemption" may be used in several ways in connection with mortgages. In one sense a mortgage may be said to be "redeemed" when the debt is paid, or other condition performed, at the time fixed by the contract. In such a sense, however, the word is very rarely employed, since fulfillment of the condition is technically known as performance, and has already been considered under that term.⁴ In some states, moreover, the "redemption" of a mortgage conveys the meaning of a statutory right to recover the property after it has been sold on foreclosure.⁵ The usual and general meaning of the term, however, is associated with a mortgagor's right to an "equity of redemption," and signifies a redemption of the land after the maturity of the debt, or after condition broken, and before foreclosure. After sale of the land under a valid decree of foreclosure, the equitable right of redemption is extinguished.⁶ It has previously been pointed out that, at common law, after breach of condition, the estate of the mortgagor was absolutely determined, but that courts of equity subsequently granted relief from the harshness of this

² Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Morgan v. Hammett, 34 Wis. 512; Worcester Nat. Bank v. Cheney, 87 Ill. 602; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

³ Weston v. Livezey, 45 Colo. 142, 100 Pac. 404; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455.

⁴ Supra.

⁵ Infra.

⁶ Goodman v. White, 26 Conn. 317; White v. Smith, 174 Mo. 186, 73 S. W. 610; Butler v. Seward, 10 Allen (Mass.) 466. And see infra as to laches and statute of limitations.

rule, by giving the mortgagor, or those succeeding to his interests, a right of redemption.⁷ This constitutes, as also shown, the chief difference between mortgages at common law and in equity.⁸ A mortgage may be discharged by performance, even after breach of the condition, if the mortgagee accepts the performance;⁹ but, if the mortgagee refuses to accept, the mortgagor must usually resort to a court of equity, or to a court exercising equitable jurisdiction, in order to enforce his right of redemption, and secure a discharge of the mortgage.¹⁰

Restrictions on the Right to Redeem

So essential to a mortgage is the right of redemption that any provision inserted in a mortgage which restricts or takes away the right, or which confines the equity of redemption to a particular time, or to a particular description of persons, is termed a "clog" or "fetter" on the equity of redemption, and is void.¹¹ The principle, "once a mortgage always a mortgage,"¹² applies in such a case, and no agreement of the parties, entered into at the time of the mortgage, that the mortgage shall not be redeemable, has any effect in equity.¹³ The equity of redemption may, however, be released by a subsequent contract between the parties, founded upon adequate consideration, and free from fraud and oppression.¹⁴

Persons Who may Redeem

The mortgagor, or persons claiming under the mortgage, and deriving title mediately or immediately from the mortgagor, may redeem.¹⁵ An interest in part of the mortgaged premises is suffi-

⁷ Chapter XVIII.

⁸ *Id.*

⁹ *Supra.*

¹⁰ Ejectment is not generally maintainable for this purpose. *McKeighan v. Hopkins*, 14 Neb. 361, 15 N. W. 711; *Chase v. Peck*, 21 N. Y. 581. In Pennsylvania, however, an action of ejectment may be brought as a substitute for a bill to redeem. *Mellon v. Lemmon*, 111 Pa. 56, 2 Atl. 56; *Chase v. Peck*, 21 N. Y. 581; *Hill v. Payson*, 3 Mass. 559; *Parsons v. Welles*, 17 Mass. 419; *Woods v. Woods*, 66 Me. 206. And see *infra*.

¹¹ *Co. Litt.* 205, note; *Williams, Real Prop.* (17th Ed.) 605; *Newcomb v. Bonham* (1681) 1 Vern. 7.

¹² *Lord Chancellor Nottingham in Newcomb v. Bonham*, 1 Vern. 7, 8. And see *MOONEY v. BYRNE*, 163 N. Y. 86, 57 N. E. 163, *Burdick Cas. Real Property*.

¹³ *Courtenay v. Wright*, 2 Giff. 337; *Lender v. Caldwell*, 4 Kan. 339; *Stover's Heirs v. Bound's Heirs*, 1 Ohio St. 107; *Baxter v. Child*, 39 Me. 110; *Wilson v. Fisher*, 148 N. C. 535, 62 S. E. 622; *MOONEY v. BYRNE*, *supra*, *Burdick Cas. Real Property*.

¹⁴ *Carpenter v. Carpenter*, 70 Ill. 457; *Haggerty v. Brower*, 105 Iowa, 395, 75 N. W. 321.

¹⁵ *Loomis v. Knox*, 60 Conn. 343, 22 Atl. 771; *Mills v. Mills*, 115 N. Y. 80, 21 N. E. 714; *Mercer v. McPherson*, 70 Kan. 617, 79 Pac. 118; *Frisbee v.*

cient to give the right,¹⁶ and the interest need not be one in fee, since a tenant for life or years may exercise the right.¹⁷ A junior mortgagor may redeem, if the debt on the first mortgage is overdue;¹⁸ and if a first mortgage is foreclosed, a junior mortgagee may redeem, if made a party to the foreclosure of the first mortgage.¹⁹ An assignee of the equity of redemption may also redeem, whether he is an assignee by act of parties,²⁰ or by operation of law,²¹ and purchasers of the mortgaged property may also redeem.²² Likewise, the heirs of the mortgagor or of the owner of the equity of redemption may redeem, unless the equity has been devised to another.²³ So the guardian of an infant heir may exercise the right.²⁴ A joint owner may redeem by paying the whole debt,²⁵ and can hold the land to secure contribution from his co-owners.²⁶ A widow of the mortgagor, who has released her dower,

Frisbee, 86 Me. 444, 29 Atl. 1115; *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889.

¹⁶ *In re Willard*, 5 Wend. (N. Y.) 94; *Boquet v. Coburn*, 27 Barb. (N. Y.) 230.

¹⁷ *Lamson v. Drake*, 105 Mass. 564; *Loud v. Lane*, 8 Metc. (Mass.) 517; *Wunderle v. Ellis*, 212 Pa. 618, 62 Atl. 106, 4 Ann. Cas. 806; *Averill v. Taylor*, 8 N. Y. 44.

¹⁸ *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889; *Frost v. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Sager v. Tupper*, 35 Mich. 134; *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204; *Morse v. Smith*, 83 Ill. 396; *Atwood v. Carmer*, 75 N. J. Eq. 319, 73 Atl. 114; *Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; *Wheeler v. Menold*, 81 Iowa, 647, 47 N. W. 871; *Rogers v. Herron*, 92 Ill. 583.

¹⁹ *Horr v. Herrington*, 22 Okl. 590, 98 Pac. 443, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648; *Smith v. Shay*, 62 Iowa, 119, 17 N. W. 444; *J. I. Case Threshing-Mach. Co. v. Mitchell*, 74 Mich. 679, 42 N. W. 151; *Jackson v. Weaver*, 138 Ind. 539, 38 N. E. 166; *Thompson v. Chandler*, 7 Greenl. (Me.) 377; *Loomis v. Knox*, 60 Conn. 343, 22 Atl. 771.

²⁰ *Scott v. Henry*, 13 Ark. 112; *Gordon v. Smith*, 10 C. C. A. 516, 62 Fed. 503; *EVERSON v. McMULLEN*, 113 N. Y. 293, 21 N. E. 52, 4 L. R. A. 118, 10 Am. St. Rep. 445, *Burdick Cas. Real Property*. And on seeking redemption he need not prove a valuable consideration. *Barnard v. Cushman*, 35 Ill. 451.

²¹ *White v. Bond*, 16 Mass. 400.

²² *Kelgour v. Wood*, 64 Ill. 345; *Drinan v. Nichols*, 115 Mass. 353; *Howard v. Robbins*, 170 N. Y. 498, 63 N. E. 530.

²³ *Peterson v. Webber*, 46 Minn. 372, 49 N. W. 125; *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486; *Zaegel v. Kuster*, 51 Wis. 31, 7 N. W. 781; *Chew v. Hyman*, 10 Biss. 240, 7 Fed. 7; *Lewis v. Nangle*, 2 Ves. Sr. 431.

²⁴ *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534; *Norbury v. Norbury*, 4 Madd. 191.

²⁵ *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Norton v. Tharp*, 53 Mich. 146, 18 N. W. 601; *In re Willard*, 5 Wend. (N. Y.) 94; *Emerson v. Atkinson*, 159 Mass. 356, 34 N. E. 516; *Taylor v. Porter*, 7 Mass. 355; *Calkins v. Munsel*, 2 Root (Conn.) 333; *Lyon v. Robbins*, 45 Conn. 513.

²⁶ *Taylor v. Porter*, 7 Mass. 355.

er, may redeem from the mortgage;²⁷ but, to do so, she is required to pay the whole amount, and not merely one-third.²⁸ A tenant by the curtesy has also a right of redemption.²⁹ Even during the husband's lifetime, a wife has such an interest in her husband's property that she may redeem, whether she has signed the mortgage³⁰ or not.³¹ Purchasers of mortgaged lands at a valid judicial sale,³² judgment creditors of the mortgagor,³³ and a mortgagor's assignee in bankruptcy³⁴ may also redeem.

On the other hand, one claiming an interest in the land not derived from the mortgagor is not entitled to redeem.³⁵ For this reason, the holder of a tax title has no right to redeem.³⁶ General and unsecured creditors having no specific lien upon the mortgaged land, likewise, cannot exercise the right of redemption.³⁷

²⁷ *Barr v. Vanalstine*, 120 Ind. 590, 22 N. E. 965; *Hays v. Cretin*, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. (N. S.) 1039; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614; *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *McCabe v. Bellows*, 1 Allen (Mass.) 269; *Id.*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *McArthur v. Franklin*, 16 Ohio St. 193. And see *Campbell v. Ellwanger*, 81 Hun, 259, 30 N. Y. Supp. 792. See, also, *Burson v. Dow*, 65 Ill. 146.

²⁸ *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Van Duyne v. Thayer*, 14 Wend. (N. Y.) 233. And see *EVERSON v. McMULLEN*, 113 N. Y. 293, 21 N. E. 52, 4 L. R. A. 118, 10 Am. St. Rep. 445, *Burdick Cas. Real Property* (where redemption is made by another, the widow's claim of dower subject to contribution).

²⁹ *Casborne v. Scarfe*, 1 Atk. 603.

³⁰ *Lamb v. Montague*, 112 Mass. 352; *Mackenna v. Trust Co.*, 184 N. Y. 411, 77 N. E. 721, 3 L. R. A. (N. S.) 1068, 112 Am. St. Rep. 620, 6 Ann. Cas. 471; *Smith v. Hall*, 67 N. H. 200, 30 Atl. 409.

³¹ *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; *Moore v. Smith*, 95 Mich. 71, 54 N. W. 701.

³² *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648; *Hayward v. Cain*, 110 Mass. 273; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355; *Riggs v. Owen*, 120 Mo. 176, 25 S. W. 356.

³³ *Groff v. Morehouse*, 51 N. Y. 503; *Ætna Life Ins. Co. v. Beckman*, 210 Ill. 394, 71 N. E. 452; *People ex rel. Bethmann v. Bowman*, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265; *Boynton v. Pierce*, 151 Ill. 197, 37 N. E. 1024; *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871; *Todd v. Johnson*, 56 Minn. 60, 57 N. W. 320. But he cannot redeem a mortgage on a homestead when he has no lien thereon. *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293.

³⁴ *Lloyd v. Hoo Sue*, 5 Sawy. 74, Fed. Cas. No. 8,432.

³⁵ *Ayres v. Adair County*, 61 Iowa, 728, 17 N. W. 161; *Smith v. Austin*, 9 Mich. 465.

³⁶ *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; *Witt v. Mewhirter*, 57 Iowa, 545, 10 N. W. 890; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672.

³⁷ *McNiece v. Eliason*, 78 Md. 168, 27 Atl. 940; *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139; *Long v. Mellett*, 94 Iowa, 548, 63 N. W. 190.

Amount Required to Redeem

Under redemption, the party redeeming is required to pay all that in equity and good faith is due.³⁸ Usually, in an ordinary case, this will be the amount of the mortgage debt and interest,³⁹ including all interest due from the date of the mortgage to the time of redemption.⁴⁰ Sums, however, paid by the mortgagee in discharging prior liens and incumbrances, together with the costs thereby incurred, may be added to the amount of the mortgage,⁴¹ as may be also attorney's fees provided for in the mortgage,⁴² and insurance premiums.⁴³ The mortgagee cannot be compelled to release a portion of the premises by payment of part of the sum due.⁴⁴ However small may be the interest in the mortgaged property of the person redeeming, he must pay the whole debt.⁴⁵ By agreement, however, of the parties, there may be a redemption of part of the premises only.⁴⁶ Where, under a statutory right to redeem after foreclosure sale, a person seeks to recover the property, it is usually provided by the statute that the amount payable is the price paid at such a sale, with interest.⁴⁷ In equitable proceedings, however, if redemption is sought, after such sale, the amount to be paid is the entire debt, although the land

³⁸ *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51.

³⁹ *Cowles v. Marble*, 37 Mich. 158; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512. And see *Shearer v. Field*, 6 Misc. Rep. 189, 27 N. Y. Supp. 29; *Gleason v. Kinney*, 65 Vt. 560, 27 Atl. 208.

⁴⁰ *Martin v. Martin*, 146 Mass. 517, 16 N. E. 413; *Dingle v. Coppen*, [1899] 1 Ch. 726, 68 L. J. Ch. 337, 79 L. T. Rep. N. S. 693.

⁴¹ *Jack v. Cold*, 114 Iowa, 349, 86 N. W. 374; *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215; *Mosier v. Norton*, 83 Ill. 519; *Long v. Long*, 111 Mo. 12, 19 S. W. 537.

⁴² *Hosford v. Johnson*, 74 Ind. 479.

⁴³ *Id.*

⁴⁴ *Clarke v. Cowan*, 206 Mass. 252, 92 N. E. 474, 138 Am. St. Rep. 388; *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N. E. 91; *Andreas v. Hubbard*, 50 Conn. 351; *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86; *Boqut v. Coburn*, 27 Barb. (N. Y.) 230; *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Meacham v. Steele*, 93 Ill. 135; *Knowles v. Rablin*, 20 Iowa, 101. And see *Norton v. Henry*, 67 Vt. 308, 31 Atl. 787. So as to redemption by joint owners. *Ward v. Green* (Tex. Civ. App.) 28 S. W. 574.

⁴⁵ *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 134.

⁴⁶ *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N. E. 91. The English doctrine of tacking, by which the holder of a first and subsequent mortgage may cut out the rights of intervening mortgagees, is inconsistent with our registry system, and does not prevail in this country. 2 Jones, *Mortg.* (5th Ed.) § 1082.

⁴⁷ *Dows v. Blanchard* (1887 Iowa) 27 N. W. 492; *Weyant v. Murphy*, 78 Cal. 278, 20 Pac. 568, 12 Am. St. Rep. 50; *Evans v. Trust Co.*, 67 Minn. 160, 69 N. W. 715, 1069.

was sold for a less sum.⁴⁸ In general, moreover, the cost of the foreclosure proceedings must be paid by one redeeming after the foreclosure.⁴⁹

Contribution

Where the interests are equal, as in case of a joint tenant, or a tenant in common, one who redeems by paying the whole debt is entitled to a pro rata contribution from his cotenants.⁵⁰ Likewise, where a mortgage is placed upon land containing different parcels owned in severalty by different owners, all being equally liable for the debt, a redemption by one person, in order to protect his interest, will enable him to enforce contribution proportionally from the others.⁵¹ Contribution, however, is never enforced, except between those whose equities are equal.⁵² Consequently, purchasers subsequent to a second mortgage cannot compel contribution against the second mortgagee, when the first mortgage is enforced against them.⁵³ Moreover, a mortgagor who has conveyed with covenants of warranty, after he has paid the mortgage, cannot enforce contribution against his grantee.⁵⁴ In case, however, the mortgaged premises have been conveyed by the mortgagor at different times in separate parcels, the parcels are liable in the inverse order of their alienation; the parcel last sold being liable to its full value before the parcel next previously conveyed can be charged.⁵⁵ Between those, however, who hold

⁴⁸ *Evans v. Kahr*, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467; *Spurgin v. Ad- amson*, 62 Iowa, 661, 18 N. W. 293; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Martin v. Fridley*, 23 Minn. 13; *Hosford v. Johnson*, 74 Ind. 479; *Johnson v. Harmon*, 19 Iowa, 56.

⁴⁹ *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443; *Parks v. Allen*, 42 Mich. 482, 4 N. W. 227; *Gage v. Brewster*, 30 Barb. (N. Y.) 387.

⁵⁰ *Buettel v. Harmount*, 46 Minn. 481, 49 N. W. 250; *Brown v. Bank*, 8 Metc. (Mass.) 47; *Baird v. Jackson*, 98 Ill. 78; *Goodrich v. Leland*, 18 Mich. 110.

⁵¹ *Coffin v. Parker*, 127 N. Y. 117, 27 N. E. 814; *Huber v. Hess*, 191 Ill. 305, 61 N. E. 61; *Moore v. Shurtleff*, 128 Ill. 370, 21 N. E. 775.

⁵² *Sanford v. Hill*, 46 Conn. 42; *Henderson v. Truitt*, 95 Ind. 309.

⁵³ *Henderson v. Truitt*, 95 Ind. 309.

⁵⁴ *Sargeant v. Rowsey*, 89 Mo. 617, 1 S. W. 823.

⁵⁵ *Vogle v. Brown*, 120 Ill. 338, 11 N. E. 327, 12 N. E. 252; *Gray v. Lumber Co.*, 128 Mich. 427, 87 N. W. 376, 54 L. R. A. 731; *Mount v. Potts*, 23 N. J. Eq. 188; *Miles v. Fralich*, 11 Hun (N. Y.) 561; *Bates v. Ruddick*, 2 Iowa, 423, 65 Am. Dec. 774; *Deavitt v. Judevine*, 60 Vt. 695, 17 Atl. 410; *Solicitors' Loan & Trust Co. v. Railroad Co.*, 11 Wash. 684, 40 Pac. 344. But that the parcels are proportionately liable, see *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. 252; *Dickey v. Thompson*, 8 B. Mon. (Ky.) 312. And cf. *Turner v. Flenniken*, 164 Pa. 469, 30 Atl. 486, 44 Am. St. Rep. 624; *Dates v. Winstanley*, 53 Ill. App. 623. See, however, *Vogel v. Shurtleff*, 28 Ill. App. 516; *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544, 949; *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037.

separate parts of mortgaged land by simultaneous conveyances, contribution is to be enforced according to the present value of the parcels, exclusive of the improvements placed thereon by the purchasers.⁵⁶

When Right is Barred

The right of redemption may be barred by foreclosure,⁵⁷ by laches,⁵⁸ or by the running of the statute of limitations.⁵⁹ The right to redeem is reciprocal with the right to sue for the mortgage debt, and, if there is no foreclosure, the right to redeem will continue as long as the right to maintain an action for the debt.⁶⁰ A mortgagor may also be barred from his right to redeem by estoppel, as where, for example, he has conveyed the land to the mortgagee,⁶¹ or where by his prior conduct an attempt on his part to redeem would materially prejudice the rights of persons entitled to rely upon such conduct.⁶² Foreclosure, however, will not have the effect of barring the right, if the mortgagee subsequently recognizes the mortgage as still existing.⁶³ Nor does foreclosure bar a right to redeem against one not made a party to the foreclosure suit.⁶⁴ By analogy to the statute of limitations, the courts of most states hold that the right of redemption is barred when the mortgagee is in adverse possession for a period of time sufficient to give title to realty by prescription.⁶⁵ In order that

The United States government is not affected by the rule stated in text. *U. S. v. Duncan*, Fed. Cas. No. 15,003, 4 McLean, 607, 12 Ill. 523.

⁵⁶ *Bates v. Ruddick*, 2 Iowa, 423, 65 Am. Dec. 774.

⁵⁷ *Preschbaker v. Feaman's Heirs*, 32 Ill. 475; *Parker v. Child*, 25 N. J. Eq. 41; *Heimberger v. Boyd*, 18 Ind. 420. See *BARRETT v. HINCKLEY*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331, *Burdick Cas. Real Property*.

⁵⁸ *Walker v. Warner*, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; *Learned v. Foster*, 117 Mass. 365; *Denn v. Wynkoop*, 8 Johns. (N. Y.) 168; *Baker v. Bailey*, 204 Pa. 524, 54 Atl. 326; *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968.

⁵⁹ *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. 520; *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298.

⁶⁰ *Cassem v. Heustis*, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357; *Borst v. Boyd*, 3 Sandf. Ch. (N. Y.) 501; *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

⁶¹ *Noxon v. Glen*, 2 N. Y. St. Rep. 661; *King v. King*, 215 Ill. 100, 74 N. E. 89; *Ross v. Leavitt*, 70 N. H. 602, 50 Atl. 110.

⁶² *Schlawig v. Fleckenstein*, 80 Iowa, 668, 45 N. W. 770; *Hardy v. Keene*, 67 N. H. 166, 32 Atl. 759; *Bayley v. Bailey*, 5 Gray (Mass.) 505; *Watts v. Julian*, 122 Ind. 124, 23 N. E. 698.

⁶³ *Lounsbury v. Norton*, 59 Conn. 170, 22 Atl. 153.

⁶⁴ *Farwell v. Murphy*, 2 Wis. 533; *Murphy v. Farwell*, 9 Wis. 102; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 428; *American Buttonhole, etc., Co. v. Mut. Life Ass'n*, 61 Iowa, 464, 16 N. W. 527.

⁶⁵ *Barnes v. Boardman*, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; *Clark*

possession by the mortgagee may bar the right of redemption, it is necessary, however, that the possession be adverse during the whole period of limitation.⁶⁶ The bar, moreover, of the right of redemption by lapse of time, is removed by anything which shows the mortgage as still continuing, such as by the rendering of an account,⁶⁷ the assignment of the mortgage,⁶⁸ recitals by the mortgagee in a deed or will,⁶⁹ or by proceedings to foreclose.⁷⁰ Where redemption is allowed by statute after a foreclosure sale, the right to redeem under such circumstances will be barred by the running of the time fixed by the statutes.⁷¹ Generally, however, the parties may, upon a consideration, extend by agreement the time beyond a period fixed by law.⁷² When the right of redemption is barred, the rights of the mortgagee, or of the purchaser under the foreclosure, become absolute.⁷³

Actions to Redeem

The right to redeem being an equitable one, the proper procedure to enforce the right, when the mortgagee refuses to accept payment, at or after maturity, is a suit in equity, or an action in the nature of such a suit.⁷⁴ An action at law for the recovery does not lie,⁷⁵ although it is held, in Pennsylvania, that an action

v. Clough, 65 N. H. 43, 23 Atl. 526; Miller v. Smith, 44 Minn. 127, 46 N. W. 324; Harter v. Twhig, 158 U. S. 448, 15 Sup. Ct. 883, 39 L. Ed. 1049; Robinson v. Fife, 3 Ohio St. 551; Jarvis v. Woodruff, 22 Conn. 548; Fox v. Blossom, 17 Blatchf. 352, Fed. Cas. No. 5,008.

⁶⁶ Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495; McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; Frisbee v. Frisbee, 86 Me. 444, 29 Atl. 1115.

⁶⁷ Munro v. Barton, 98 Me. 250, 56 Atl. 844; Chapin v. Wright, 41 N. J. Eq. 438, 5 Atl. 574; Edsell v. Buchanan, 2 Ves. Jr. 83.

⁶⁸ Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501.

⁶⁹ Hansard v. Hardy, 18 Ves. 455.

⁷⁰ Calkins v. Calkins, 3 Barb. (N. Y.) 305; Robinson v. Fife, 3 Ohio St. 551.

⁷¹ Lancy v. Bank, 177 Mass. 431, 59 N. E. 115; Law v. Bank, 85 Minn. 411, 89 N. W. 320, 89 Am. St. Rep. 566; Turpie v. Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310.

⁷² Cox v. Ratcliffe, 105 Ind. 374, 5 N. E. 5; Steele v. Bond, 28 Minn. 267, 9 N. W. 772; Taggart v. Blair, 215 Ill. 339, 74 N. E. 372; Brown v. Lawton, 87 Me. 83, 32 Atl. 733; Clark v. Crosby, 101 Mass. 184; Chytraus v. Smith, 141 Ill. 231, 30 N. E. 450; Turpie v. Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310.

⁷³ Moody v. Funk, 82 Iowa, 1, 47 N. W. 1008, 31 Am. St. Rep. 455; Finnegan v. Effertz, 90 Minn. 114, 95 N. W. 762; Gallagher v. Giddings, 33 Neb. 222, 49 N. W. 1126.

⁷⁴ Shobe v. Luff, 66 Ill. App. 414; Boles v. Calkins, 1 Root (Conn.) 553; Gillett v. Eaton, 6 Wis. 30.

⁷⁵ Schwarz v. Sears, Walk. Ch. (Mich.) 170; Fogal v. Pirro, 10 Bosw. (N. Y.) 100; Mellon v. Lemmon, 111 Pa. 56, 2 Atl. 56; McKeighan v. Hopkins, 14 Neb. 361, 15 N. W. 711; Chase v. Peck, 21 N. Y. 581.

in ejectment may be brought in lieu of a bill in equity.⁷⁶ If there is more than one owner of the equity of redemption, all must be made parties plaintiff in the proceedings,⁷⁷ and all persons having an interest in the property who would be affected by the redemption should be made parties defendant.⁷⁸ The original mortgagee need not be made a party, if he has assigned the mortgage;⁷⁹ the assignee being the proper defendant.⁸⁰ Likewise, where a mortgagor has sold the land, he is no longer a necessary party to the suit.⁸¹ The decree, if in favor of the plaintiff, usually provides that upon payment of the amount due, within a time specified, the mortgage shall be discharged; otherwise, the suit will be dismissed.⁸²

FORM OF RELEASE OF MORTGAGES

209. The formal release or discharge of a mortgage may be made by—

- (a) A deed.
- (b) An indorsement upon the mortgage.
- (c) An entry of satisfaction on the record.

Upon full payment of the mortgage debt, or upon the performance of any other condition required, the mortgagee is generally bound to deliver to the mortgagor some formal release or discharge of the mortgage.⁸³

A release may be made in various ways. It may take, for ex-

⁷⁶ *Mellon v. Lemmon*, 111 Pa. 56, 2 Atl. 56.

⁷⁷ *Lanies' Appeal*, 112 Pa. 456, 4 Atl. 375; *Taggart v. Rogers*, 52 Hun, 614, 5 N. Y. Supp. 255; *Zane v. Fink*, 18 W. Va. 693; *Gerson v. Davis*, 143 Ala. 381, 39 South. 198.

⁷⁸ *Hunt v. Rooney*, 77 Wis. 258, 45 N. W. 1084; *Wolcott v. Sullivan*, 6 Paige (N. Y.) 117; *Conant v. Warren*, 6 Gray (Mass.) 562; *Sanborn v. Sanborn*, 104 Mich. 180, 62 N. W. 371; *Burns v. Thayer*, 115 Mass. 89; *Johnson v. Golder*, 132 N. Y. 116, 30 N. E. 376.

⁷⁹ *Beals v. Cobb*, 51 Me. 348; *Raisin Fertilizer Co. v. Bell*, 107 Ala. 261, 18 South. 168.

⁸⁰ *Brown v. Johnson*, 53 Me. 246; *Stone v. Locke*, 46 Me. 445.

⁸¹ *Thomas v. Jones*, 84 Ala. 302, 4 South. 270; *Parker v. Small*, 58 Ind. 349; *Hilton v. Lothrop*, 46 Me. 297.

⁸² *Chicago & C. Rolling-Mill Co. v. Scully*, 141 Ill. 408, 30 N. E. 1062; *Bremmer v. Dock Co.*, 127 Ill. 464, 18 N. E. 321; *Dennett v. Codman*, 158 Mass. 371, 33 N. E. 574; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *Boquet v. Coburn*, 27 Barb. (N. Y.) 230; *Hanley v. Mason*, 42 Ind. App. 312, 85 N. E. 381, 732.

⁸³ *Whitesides v. Cook*, 20 Ill. App. 574; *Lankton v. Stewart*, 27 Minn. 346, 7 N. W. 360; *Headley v. Goundry*, 41 Barb. (N. Y.) 279.

ample, the form of a deed,⁸⁴ and where the legal title of the mortgaged property is in the mortgagee, a formal release can be executed only by a deed of reconveyance to the mortgagor.⁸⁵ When release is made by deed, no particular form is required,⁸⁶ and a quitclaim deed will be sufficient.⁸⁷ A mortgage may also be released by an indorsement upon the mortgage deed itself.⁸⁸ It is provided by statute, in many states, that a mortgage may be discharged by putting on record a satisfaction, that is, a certificate by the mortgagee that the mortgage has been satisfied, and, generally, an entry of satisfaction on the margin of the record of the mortgage is sufficient.⁸⁹ In some states a penalty is provided by statute, which the mortgagor may collect of the owner of the mortgage, for failure to enter satisfaction of record.⁹⁰

FORECLOSURE

210. In theory, foreclosure is a procedure in equity by which the mortgagee, upon default on the part of the mortgagor, extinguishes, or bars, or forecloses the mortgagor's equity of redemption. In the prevailing modern practice, however, it is a suit or action whereby the mortgagee, upon the failure of the mortgagor to pay the debt, seeks satisfaction of the debt out of the mortgaged property itself.

⁸⁴ *Bryan v. Stump*, 8 Grat. (Va.) 241, 56 Am. Dec. 139; *Miller v. Hicken*, 92 Cal. 229, 28 Pac. 339; *Allen v. Bank*, 134 Mass. 580; 1 Jones, *Mortg.* (5th Ed.) § 972; *Mutual Bldg. & Loan Ass'n v. Wyeth*, 105 Ala. 639, 17 South. 45.

⁸⁵ This is the law in England. See *Laws of Eng.* vol. 21, p. 331, tit. *Mortgages*.

⁸⁶ *Allen v. Bank*, 134 Mass. 580; *Agnew v. Renwick*, 27 S. C. 562, 4 S. E. 223.

⁸⁷ *Bridgman v. Johnson*, 44 Mich. 491, 7 N. W. 83; *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884; *Donlin v. Bradley*, 119 Ill. 412, 10 N. E. 11; *Woodbury v. Aikin*, 13 Ill. 639; *Barnstable Sav. Bank v. Barrett*, 122 Mass. 172. But see *Weldon v. Tollman*, 15 C. C. A. 138, 67 Fed. 986.

⁸⁸ *Turner v. Flinn*, 72 Ala. 532; *Allard v. Lane*, 18 Me. 9. Consult, also, the local statutes.

⁸⁹ *Murray v. Brokaw*, 67 Ill. App. 402; *People v. Keyser*, 28 N. Y. 226, 84 Am. Dec. 338; *Valle's Adm'x v. Iron Mountain Co.*, 27 Mo. 455; *Bausman v. Eads*, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201; *Summers v. Kilgus*, 14 Bush (Ky.) 449; *Hutchings v. Clark*, 64 Cal. 228, 30 Pac. 805; *Storch v. McCain*, 85 Cal. 304, 24 Pac. 639; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; 1 *Stim. Am. St. Law*, § 1905.

⁹⁰ *Judy v. Thompson*, 156 Ind. 533, 60 N. E. 270; *Shields v. Klopff*, 70 Wis. 69, 35 N. W. 284; *Collar v. Harrison*, 28 Mich. 518; *Lane v. Frake*, 70 Ill. App. 303; *Murphy v. Fleming*, 69 Mich. 185, 36 N. W. 787; *Crawford v. Simon*, 159 Pa. 585, 28 Atl. 491; *Spaulding v. Sones*, 11 Ind. App. 562, 700, 39 N. E. 526; *Jones v. Trust Co.*, 7 S. D. 122, 63 N. W. 553.

Nature of Foreclosure

Under the legal, or title, theory of mortgage,⁹¹ the title to the mortgaged property became, at common law, absolute in the mortgagee as soon as the day fixed for the performance of the condition had passed. We have seen, however, that courts of equity allowed the mortgagor to redeem even after the expiration of the "law day," modifying thereby the rigor and harshness of the common-law rule.⁹² The mortgagee, however, as soon as the estate in law became forfeited by failure of the mortgagor to perform the stipulated condition, could commence a suit in equity for the purpose of barring, or foreclosing, the mortgagor's equitable right to redeem.⁹³ The court thereupon fixed a further time, usually six months,⁹⁴ for the payment of the debt. If the mortgage was not paid within this allotted period, the law took its course, and the property passed absolutely to the mortgagee; the mortgagor's right to redeem being foreclosed.⁹⁵

In modern practice, however, the term "foreclosure" is used in a broader sense. It is either a suit in equity,⁹⁶ or, in many states, an action at law,⁹⁷ whereby the mortgagee, upon the mortgagor's failure to perform his obligation, resorts to the security itself in order that his claim may be satisfied by the sale of the property.⁹⁸

When the Right Accrues

In absence of an agreement to extend the time of payment,⁹⁹ or of such an express provision in the mortgage deed,¹ the mortgagee has the right to foreclose as soon as there is a breach by non-payment at the time fixed, or by failure of performance of the condition of the mortgage, whatever it may be.² However, a surety or an indorser of the mortgage note cannot foreclose a mortgage

⁹¹ See chapter XVIII.

⁹² *Id.*

⁹³ See *Bonham v. Newcomb* (1684) 1 Vern. 232.

⁹⁴ In England at the present time six months after the master's certificate of the accounting is the period usually allowed for redemption. *Laws of England*, XXI, p. 288.

⁹⁵ This is known as strict foreclosure and prevails in some jurisdictions at the present time. See *infra*.

⁹⁶ See *infra*.

⁹⁷ See *infra*.

⁹⁸ *Anderson v. Baxter*, 4 Or. 105.

⁹⁹ *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Dodge v. Crandall*, 30 N. Y. 294; *Wallace v. Hussey*, 63 Pa. 24. A promise to extend the time may be shown by parol. *VAN SYCKEL v. O'HEARN*, 50 N. J. Eq. 173, 24 Atl. 1024, *Burdick, Cas. Real Property*.

¹ *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2; *Central Trust Co. v. Manufacturing Co.*, 93 Fed. 712, 35 C. C. A. 547.

² *Barroilhet v. Battelle*, 7 Cal. 450; *King v. King*, 215 Ill. 100, 74 N. E. 89; *Metropolitan Life Ins. Co. v. Hall*, 56 Hun, 647, 10 N. Y. Supp. 196; *Harding*

given to indemnify him, until he has actually paid the note.³ When, however, the condition of the mortgage is to save harmless, foreclosure proceedings may be begun on the failure of the mortgagor to pay the note when due.⁴

When the Right is Barred

In most states there are special statutory provisions limiting the time in which foreclosure proceedings may be brought.⁵ Courts of equity, however, independently of such statutes, have at times applied, by analogy, statutes of limitations governing the recovery of land to proceedings for the foreclosure of mortgages.⁶ Moreover, in general, where the mortgagor has been in continuous possession without the payment of principal or interest, for the period limiting actions under the doctrine of adverse possession, the right to foreclose will be barred by such lapse of time.⁷ Such a bar to foreclosure may be waived, however, by a recognition of the mortgage as still existing.⁸

In many jurisdictions, the barring of the recovery of the debt by the statute of limitations will also bar the right to foreclose,⁹ although other states hold that in such cases the right to proceed against the security is not affected.¹⁰ It is held, however, that a decree for deficiency¹¹ cannot be obtained in a foreclosure suit

v. Manufacturing Co., 34 Conn. 458; Trayser v. Trustees of Asbury University, 39 Ind. 556; Gladwyn v. Hitchman, 2 Vern. 135.

³ Burt v. Gamble, 98 Mich. 402, 57 N. W. 261; Lewis v. Richey, 5 Ind. 152; Francis v. Porter, 7 Ind. 213; Dye v. Mann, 10 Mich. 291. Cf. Kramer v. Bank, 15 Ohio, 253.

⁴ Thurston v. Prentiss, 1 Mich. 193.

⁵ Burnett v. Wright, 63 Hun, 624, 17 N. Y. Supp. 309; Boone v. Colehour, 165 Ill. 305, 46 N. E. 253; Leonard v. Binford, 122 Ind. 200, 23 N. E. 704; Slingerland v. Sherer, 46 Minn. 422, 49 N. W. 237. And see *In re Tarbell*, 160 Mass. 407, 36 N. E. 55.

⁶ Baent v. Kennicutt, 57 Mich. 268, 23 N. W. 808; Hough v. Bailey, 32 Conn. 288; Ray v. Pearce, 84 N. C. 485; Cleveland Ins. Co. v. Reed, 1 Biss. 180, Fed. Cas. No. 2,889.

⁷ Cook v. Rounds, 60 Mich. 310; 27 N. W. 517; Colton v. Depew, 59 N. J. Eq. 126, 44 Atl. 662; Turnbull v. Mann, 99 Va. 41, 37 S. E. 288; Locke v. Caldwell, 91 Ill. 417; Chouteau's Ex'r v. Burlando, 20 Mo. 482.

⁸ Schifferstein v. Allison, 123 Ill. 662, 15 N. E. 275; Blair v. Carpenter, 75 Mich. 167, 42 N. W. 790; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

⁹ McLane v. Allison, 7 Kan. App. 263, 53 Pac. 781; Jenks v. Shaw, 99 Iowa, 604, 68 N. W. 900, 61 Am. St. Rep. 256; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; Pollock v. Maison, 41 Ill. 516; Duty v. Graham, 12 Tex. 427, 62 Am. Dec. 534; City of Ft. Scott v. Schulenberg, 22 Kan. 648; Lord v. Morris, 18 Cal. 482.

¹⁰ Ellis v. Fairbanks, 38 Fla. 257, 21 South. 107; Camden v. Alkire, 24 W. Va. 674; Thayer v. Mann, 19 Pick. (Mass.) 535; Michigan Ins. Co. v. Brown, 11 Mich. 265; Mott v. Maris (Tex. Civ. App.) 29 S. W. 825.

¹¹ See *infra*.

after the recovery of the debt is barred,¹² and also that an equitable mortgage for purchase money cannot be enforced after the barring of the debt.¹³

The statute of limitations begins ordinarily to run from the time the debt matures or any other condition is broken.¹⁴

Personal Judgment

A mortgage consists of two things: A debt or other obligation, and property pledged as security for the debt.¹⁵ In the early equity practice, a foreclosure suit was directed against the security alone, or, in other words, it was a proceeding strictly in rem, no personal judgment being rendered against the mortgagor; a resort to the courts of law being necessary to obtain a judgment for any deficiency over and above the value of the property.¹⁶ Under modern practice, however, in most states, a decree for a deficiency of the mortgage debt may be rendered in the foreclosure suit.¹⁷ Moreover, in some jurisdictions, a personal judgment for the whole amount of the debt may be obtained in an action at law, when the foreclosure proceedings fail, or in case the mortgage is defective;¹⁸ and, generally, where the court foreclosing a mortgage rendered no judgment for a deficiency, the creditor may, after foreclosure sale, sue at law for any deficiency which may remain unsatisfied.¹⁹

¹² Hulbert v. Clark, 57 Hun, 558, 11 N. Y. Supp. 417; Slingerland v. Sherer, 46 Minn. 422, 49 N. W. 237.

¹³ Borst v. Corey, 15 N. Y. 505; Littlejohn v. Gordon, 32 Miss. 235.

¹⁴ Clough v. Rowe, 63 N. H. 526, 3 Atl. 314; Martin v. Stoddard, 127 N. Y. 61, 27 N. E. 285; Rees v. Logsdon, 68 Md. 93, 11 Atl. 708; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609. See Coyle v. Wilkins, 57 Ala. 108.

¹⁵ Quarrell v. Beckford, 1 Madd. 269, 278.

¹⁶ Johnson v. Shepard, 35 Mich. 115; Webber v. Blanc, 39 Fla. 224, 22 South. 655; Wisconsin Nat. Loan & Bldg. Ass'n v. Pride, 136 Wis. 102, 116 N. W. 637.

¹⁷ Rutherford Realty Co. v. Cook, 198 N. Y. 29, 90 N. E. 1112; Thomson v. Black, 208 Ill. 229, 70 N. E. 318; Pike v. Gleason, 60 Iowa, 150, 14 N. W. 210; Grand Island Savings & Loan Ass'n v. Moore, 40 Neb. 686, 59 N. W. 115; Flentham v. Steward, 45 Neb. 640, 63 N. W. 924; Shumway v. Orchard, 12 Wash. 104, 40 Pac. 634. To authorize such a judgment against a grantee, he must have assumed the mortgage. Blass v. Terry, 87 Hun, 563, 34 N. Y. Supp. 475; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Green v. Hall, 45 Neb. 89, 63 N. W. 119. Cf. Farmers' Loan & Trust Co. v. Grape Creek Coal Co., 13 C. C. A. 87, 65 Fed. 717.

¹⁸ See the statutes of different states. And see Dudley v. Congregation Third Order St. Francis, 138 N. Y. 451, 34 N. E. 281; Louisville Banking Co. v. Blake, 70 Minn. 252, 73 N. W. 155.

¹⁹ Webster v. Fleming, 178 Ill. 140, 52 N. E. 975; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Shields v. Riopelle, 63 Mich. 458, 30 N. W. 90; Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; Lansing v. Goelet, 9 Cow. (N. Y.) 346; Hunt v. Stiles, 10 N. H. 466. But see Bassett v. Mason, 18 Conn. 131.

The amount of the judgment recoverable is usually the difference between the proceeds realized from the sale of the property and the amount due on the debt;²⁰ but, in some states, a personal judgment, in connection with foreclosure proceedings, may be rendered for the entire debt, the proceeds of the sale being applied towards the satisfaction of the judgment.²¹ In some jurisdictions, the proceedings for enforcing a mortgage and the personal remedies against the debtor are concurrent.²² In most states, however, where judgment for the deficiency may be given on foreclosure, a separate personal action for the debt cannot be maintained against the debtor while foreclosure proceedings are pending,²³ and in some states such a proceeding cannot be maintained while foreclosure is pending without consent of the court.²⁴ As an auxiliary remedy, the mortgagee may obtain the appointment of a receiver to take charge of the mortgaged premises whenever the mortgage is insufficient and the mortgagor is insolvent,²⁵ and in some cases when the mortgagor is impairing the security by committing waste.²⁶ The mortgagor may likewise secure the appointment of a receiver when the mortgagee in possession is insolvent and is committing waste.²⁷ In most states, third persons liable for the debt may be joined as defendants,²⁸ and a judgment cannot be rendered against one who has not been made a party.²⁹ When the mortgagor or principal debtor is dead, no judgment for the deficiency can, as a rule, be rendered against his personal representative. The deficiency must be prov-

²⁰ *Frank v. Davis*, 135 N. Y. 275, 31 N. E. 1100, 17 L. R. A. 306; *Shaffner v. Appleman*, 170 Ill. 281, 48 N. E. 978; *Gunning v. Sorg*, 113 Ill. App. 332.

²¹ *Englund v. Lewis*, 25 Cal. 337; *Rowland v. Leiby*, 14 Cal. 156.

²² *Rothschild v. Railway Co.*, 84 Hun. 103, 32 N. Y. Supp. 37; *Jackson v. Hull*, 10 Johns. (N. Y.) 481; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; *Torrey v. Cook*, 116 Mass. 163. But see *Felton v. West*, 102 Cal. 266, 36 Pac. 676.

²³ *Holmes v. Railway Co.*, 57 N. J. Law, 16, 29 Atl. 419; *Hargreaves v. Menken*, 45 Neb. 668, 63 N. W. 951; *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677; *Winters v. Mining Co.*, 57 Fed. 287.

²⁴ *In re Moore*, 81 Hun. 389, 31 N. Y. Supp. 110; *Meehan v. Bank*, 44 Neb. 213, 62 N. W. 490.

²⁵ *Rider v. Bagley*, 84 N. Y. 461; *Douglass v. Cline*, 12 Bush (Ky.) 608; *Ogden v. Chalfant*, 32 W. Va. 559, 9 S. E. 879.

²⁶ *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Stockman v. Wallis*, 30 N. J. Eq. 449.

²⁷ 2 Jones, *Mortg.* (5th Ed.) § 1517. And see *Boston & P. R. Corp. v. Railroad Co.*, 12 R. I. 220.

²⁸ *Palmer v. Carey*, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586; 2 Jones, *Mortg.* (5th Ed.) § 1710. But not in the absence of a statute permitting it. *Id.* But see *Hilton v. Bank*, 26 Fed. 202.

²⁹ *Williams v. Follett*, 17 Colo. 51, 28 Pac. 330. Such as a nonresident who

ed against his estate.³⁰ In all cases, moreover, it is essential that the court should have jurisdiction over the person of the defendant in order to render a valid personal judgment.³¹

SAME—FORM OF REMEDY

211. The principal forms of foreclosure employed in the several states are:

- (a) Entry and possession.
- (b) Writ of entry.
- (c) A power of sale in the mortgage or deed of trust.
- (d) A suit in equity, under which there may be:
 - (1) A strict foreclosure; or
 - (2) A decree of sale.
- (e) A statutory action at law.

There are various modes of foreclosure in use in the several states, and great diversity in detail in the states where the same method is used. In any particular case, the local statutes and practice must be considered. Jurisdiction to foreclose mortgages was originally, as already pointed out, in courts of equity, and this jurisdiction is very generally retained.³² In a number of states, however, the subject is fully covered by statutory provisions.³³ Equitable mortgages are foreclosed the same way as mortgages in the usual form.³⁴

Foreclosure by Entry and Possession

In a few states, foreclosure may be effected by an entry by the mortgagee on the mortgaged premises and the retention of the possession for a limited time, after which all right of redemption is barred.³⁵ It is a statutory procedure, and the provisions of the

has not appeared. *Schwinger v. Hickok*, 53 N. Y. 280 (a mortgagor); *Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102.

³⁰ *Leonard v. Morris*, 9 Paige (N. Y.) 90; *Pechaud v. Riquet*, 21 Cal. 76. And see *Mutual Ben. Life Ins. Co. v. Howell*, 32 N. J. Eq. 146; *Null v. Jones*, 5 Neb. 500.

³¹ *Beecher v. Ireland*, 46 Kan. 97, 26 Pac. 448; *Jehle v. Brooks*, 112 Mich. 131, 70 N. W. 440; *Southward v. Jamison*, 66 Ohio St. 290, 64 N. E. 135; *Scovil v. Fisher*, 77 Iowa, 97, 41 N. W. 583.

³² *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Hallowell v. Ames*, 165 Mass. 123, 42 N. E. 558; *Price v. State Bank*, 14 Ark. 50; *Old Colony Trust Co. v. Great White Spirit Co.*, 178 Mass. 92, 59 N. E. 673.

³³ 1 Stim. Am. St. Law, art. 192; 2 Jones, *Mortg.* (5th Ed.) c. 30.

³⁴ *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000.

³⁵ See statutes of different states; *Stebbins v. Robbins*, 67 N. H. 232, 38

statute must be strictly observed.³⁶ After the expiration of this time the mortgagee takes an absolute estate,³⁷ and becomes entitled to all the rents and profits.³⁸ The entry must be peaceable, and in the presence of witnesses,³⁹ who are to make a certificate of the fact, and the certificate is to be recorded.⁴⁰ A certificate, however, of the mortgagor, who consents to the entry, if duly recorded, may have the same effect.⁴¹ An entry on part of the land is good,⁴² and, when several parcels are covered by the same mortgage, an entry on one is sufficient.⁴³ There must be an actual entry,⁴⁴ but the possession may be passed to an assignee, or to a tenant.⁴⁵ Although the estate of the mortgagee becomes absolute by the failure of the mortgagor to redeem within the time allowed, this effect may be waived by the acceptance of payment after the time for redemption has passed.⁴⁶ The rights acquired by the entry may be assigned before the time for redemption has expired.⁴⁷ Foreclosure by this method, when complete, operates as a discharge of the mortgage debt, to the amount of

Atl. 15; *Jarvis v. Albro*, 67 Me. 310; *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458; *Van Vronker v. Eastman*, 7 Metc. (Mass.) 157; *Daniels v. Mowry*, 1 R. I. 151. This is usually three years. In New Hampshire, only one year is allowed for redemption. 2 *Jones, Mortg.* (5th Ed.) § 1239; 1 *Stim. Am. St. Law*, § 1921.

³⁶ *Pease v. Benson*, 28 Me. 336; *Freeman v. Atwood*, 50 Me. 473; *Roberts v. Littlefield*, 48 Me. 61.

³⁷ *Randall v. Bradley*, 65 Me. 43; *Nagle v. Macy*, 9 Cal. 426.

³⁸ *Welch v. Adams*, 1 Metc. (Mass.) 494; *Stone v. Patterson*, 19 Pick. (Mass.) 476, 31 Am. Dec. 156; *Cook v. Johnson*, 121 Mass. 326.

³⁹ Usually two. See *Whitney v. Guild*, 11 Gray (Mass.) 496.

⁴⁰ *Whitney v. Guild*, 11 Gray (Mass.) 496; *Hayden v. Peirce*, 165 Mass. 359, 43 N. E. 119; *Sisson v. Tate*, 109 Mass. 230; *Snow v. Pressey*, 82 Me. 552, 20 Atl. 78; *Chase v. Marston*, 66 Me. 271.

⁴¹ 1 *Stim. Am. St. Law*, § 1921; 2 *Jones, Mortg.* (5th Ed.) §§ 1259, 1261.

⁴² *Lennon v. Porter*, 5 Gray (Mass.) 318; *Colby v. Poor*, 15 N. H. 198. But see *Spring v. Haines*, 21 Me. 126.

⁴³ *Green v. Cross*, 45 N. H. 574; *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Green v. Pettingill*, 47 N. H. 375, 93 Am. Dec. 444; *Hurd v. Coleman*, 42 Me. 182; *Lucier v. Marsales*, 133 Mass. 454; *Kittredge v. Bellows*, 4 N. H. 424; *Ellis v. Drake*, 8 Allen (Mass.) 161; *Fletcher v. Cary*, 103 Mass. 475; *Deming v. Comings*, 11 N. H. 474.

⁴⁴ *Boyd v. Shaw*, 14 Me. 58; *Thayer v. Smith*, 17 Mass. 429; *Whitney v. Guild*, 11 Gray (Mass.) 496.

⁴⁵ *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Green v. Pettingill*, 47 N. H. 375, 93 Am. Dec. 444; *Hurd v. Coleman*, 42 Me. 182; *Lucier v. Marsales*, 133 Mass. 454; *Kittredge v. Bellows*, 4 N. H. 424; *Ellis v. Drake*, 8 Allen (Mass.) 161; *Fletcher v. Cary*, 103 Mass. 475; *Deming v. Comings*, 11 N. H. 474.

⁴⁶ *Fisher v. Shaw*, 42 Me. 32; *Trow v. Berry*, 113 Mass. 139; *Gould v. White*, 26 N. H. 178; *Dow v. Moor*, 59 Me. 118; *Ross v. Leavitt*, 70 N. H. 602, 50 Atl. 110; *Tompson v. Tappan*, 139 Mass. 506, 1 N. E. 924; *Joslin v. Wyman*, 9 Gray (Mass.) 63; *McNeil v. Call*, 19 N. H. 403, 51 Am. Dec. 188; *Chase v. McLellan*, 49 Me. 375.

⁴⁷ *Deming v. Comings*, 11 N. H. 474.

the value of the land.⁴⁸ The right of entry upon the death of the mortgagee descends to his heirs,⁴⁹ or it may be exercised by a duly authorized agent of the mortgagee.⁵⁰

Foreclosure by Writ of Entry

Another possible method of foreclosure, in use in some states, is by means of a writ of entry. It is an action at law in which the mortgagee declares, usually, upon the mortgage,⁵¹ and asks that it may be foreclosed, and that the possession of the premises may be awarded to him.⁵² The judgment is in conditional form, and is to the effect that, unless the debt be paid by a certain time, the mortgagee shall have the possession of the property.⁵³ If the mortgagor thereupon fails to pay within the allotted time, a writ of possession is granted to the mortgagee. Upon entry, by virtue of his writ, the mortgagee must retain possession during the time fixed by law, usually three years; the mortgagor having a right to redeem during this period.⁵⁴ In case the mortgagor does not redeem, the mortgagee has the absolute title.⁵⁵ It is obvious, therefore, that this method of foreclosure is essentially the same as that by entry and possession, except that a writ of entry is brought to secure the possession.⁵⁶ A legal interest in the land is necessary to sustain the action, and the writ should be brought against the owner of the equity of redemption, either the original mortgagor,⁵⁷ or his grantee,⁵⁸ although the mortgagor may be joined as a defendant, even if he has assigned his

⁴⁸ *Morse v. Merritt*, 110 Mass. 458; *Stevens v. Fellows*, 70 N. H. 148, 47 Atl. 135; *Smith v. Packard*, 19 N. H. 575.

⁴⁹ *Kibbe v. Thompson*, Fed. Cas. No. 7,754, 5 Bliss, 226.

⁵⁰ *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

⁵¹ *Warner v. Brooks*, 14 Gray (Mass.) 109; *Blanchard v. Kimball*, 13 Metc. (Mass.) 300; *Sherman v. Hanno*, 66 N. H. 160, 28 Atl. 18; *Noyes v. Richardson*, 59 N. H. 490.

⁵² *Fiedler v. Carpenter*, Fed. Cas. No. 4,759, 2 Woodb. & M. 211.

⁵³ *Raynham v. Wilmarth*, 13 Metc. (Mass.) 414; *Fales v. Gibbs*, Fed. Cas. No. 4,621, 5 Mason, 462. See *Howard v. Houghton*, 64 Me. 445; *Treat v. Pierce*, 53 Me. 71.

⁵⁴ 2 Jones, *Mortg.* (5th Ed.) § 1306. The period may be shorter in some states. The local statute should be consulted, of course.

⁵⁵ *Hurd v. Coleman*, 42 Me. 182; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Deming v. Comings*, 11 N. H. 474.

⁵⁶ *Dooley v. Potter*, 140 Mass. 49, 2 N. E. 935; *Ingalls v. Richardson*, 3 Metc. (Mass.) 340.

⁵⁷ *Whittier v. Dow*, 14 Me. 298.

⁵⁸ *Campbell v. Bemis*, 16 Gray (Mass.) 485; *Johnson v. Phillips*, 13 Gray (Mass.) 198.

interest.⁵⁹ The action may be brought by the mortgagee,⁶⁰ or by his assignee.⁶¹

Foreclosure under Power of Sale

In many states, an express power of sale is inserted in a mortgage or a deed of trust, authorizing the mortgagee, or trustee, upon default of the mortgagor, to foreclose the mortgage by sale without resort to the courts.⁶² Such provisions are valid,⁶³ unless the statutes, as is the fact in some states, prohibit the exercise of such powers, and require a judicial proceeding in order to foreclose a mortgage.⁶⁴ A mortgagee, however, who has a valid power of sale, is not compelled to exercise it, since he may resort to any other concurrent remedy in order to foreclose;⁶⁵ and the existence of other remedies does not, on the other hand, preclude him from exercising his power.⁶⁶

When mortgaged property is sold under a valid power of sale, the mortgage debt is thereby extinguished,⁶⁷ as is also any conveyance of title made by the mortgagor subsequent to the mortgage.⁶⁸ The mortgagor's equity of redemption is likewise barred.⁶⁹ The effect, in fact, is the same as strict foreclosure in a suit in equity.⁷⁰

⁵⁹ *Straw v. Greene*, 14 Allen (Mass.) 206; *Hunt v. Hunt*, 17 Pick. (Mass.) 118.

⁶⁰ *Walcutt v. Spencer*, 14 Mass. 409; *Phillips v. Crippen* (Me. 1886) 5 Atl. 69.

⁶¹ *Day v. Philbrook*, 85 Me. 90, 26 Atl. 999; *Page v. Pierce*, 26 N. H. 317; *Gould v. Newman*, 6 Mass. 239; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613.

⁶² *Judge v. Pfaff*, 171 Mass. 195, 50 N. E. 524; *Tappan v. Huntington*, 97 Minn. 31, 106 N. W. 98. In England, prior to the Conveyancing Act of 1881 (44 & 45 Vict. c. 41), it was customary to insert an express power of sale in a mortgage. That act, however, gave a mortgagee a statutory power to sell either at public auction or at private sale.

⁶³ *Elliott v. Wood*, 45 N. Y. 71; *Lariverre v. Rains*, 112 Mich. 276, 70 N. W. 583; *Strother v. Law*, 54 Ill. 413; *Weld v. Rees*, 48 Ill. 428.

⁶⁴ See the statutes of the different states. And see *Brown v. Bryan*, 5 Idaho, 145, 51 Pac. 995; *Brewer v. Harrison*, 27 Colo. 349, 62 Pac. 224; *Wheeler v. Sexton*, 34 Fed. 154; *FISKE v. MAYHEW*, 90 Neb. 196, 133 N. W. 195, Ann. Cas. 1913A, 1043, *Burdick Cas. Real Property*.

⁶⁵ *Dutton v. Cotton*, 10 Iowa, 408; *Morrison v. Bean*, 15 Tex. 267; *Utermehle v. McGreal*, 1 App. D. C. 359.

⁶⁶ *Drayton v. Chandler*, 93 Mich. 383, 53 N. W. 558; *Dohm v. Haskin*, 88 Mich. 144, 50 N. W. 108; *Sawyer v. Campbell*, 130 Ill. 186, 22 N. E. 458; *Montague v. Dawes*, 12 Allen (Mass.) 397.

⁶⁷ *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687; *Cox v. Wheeler*, 7 Paige (N. Y.) 248; *Loomis v. Clambey*, 69 Minn. 469, 72 N. W. 707, 65 Am. St. Rep. 576.

⁶⁸ *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223.

⁶⁹ Unless there is a statutory right of redemption after the sale. *Gassenheimer v. Molton*, 80 Ala. 521, 2 South. 652; *Kinsley v. Ames*, 2 Metc. (Mass.) 29; *Ryan v. Sanford*, 133 Ill. 291, 24 N. E. 428; *Woodruff v. Adair*, 131 Ala. 530, 32 South. 515.

⁷⁰ *Aiken v. Bridgeford*, 84 Ala. 295, 4 South. 266. See *supra*.

The purchaser at such a sale, if the proceedings are regular and fully comply with the law, obtains the same title the mortgagor had when he executed the mortgage.⁷¹ The mortgagee, however, retains the right to sue the mortgagor for a deficiency if the sale does not realize enough to satisfy his lawful claims.⁷²

A mortgagor cannot revoke a power of sale,⁷³ nor does his death have that effect.⁷⁴ A power of sale may be suspended, however, by a bill to redeem filed by the mortgagor,⁷⁵ although not when filed by a subsequent mortgagee.⁷⁶ As a rule, a court of equity will not restrain a sale under a power,⁷⁷ although in a proper case it may do so.⁷⁸

Who may Exercise the Power

The power of sale must generally be exercised by the mortgagee,⁷⁹ or, in case of a deed of trust, by a duly authorized trustee.⁸⁰ As a rule, the power cannot be delegated unless express authority to that effect is given in the mortgage.⁸¹ Where, however, the power of sale is given to the mortgagee "and his assigns," a sale may be lawfully made by the assignee of the mortgage.⁸² Where,

⁷¹ *Beach v. Shaw*, 57 Ill. 17; *Martin v. Castle*, 193 Mo. 183, 91 S. W. 930; *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

⁷² *Draper v. Mann*, 117 Mass. 439; *Blake v. McKusick*, 10 Minn. 251 (Gil. 195); *Aultman & Taylor Co. v. Meade*, 121 Ky. 241, 89 S. W. 137, 28 Ky. Law Rep. 208, 123 Am. St. Rep. 193.

⁷³ *Ray v. Hemphill*, 97 Ga. 563, 25 S. E. 485; *Hyde v. Warren*, 46 Miss. 13; *Sulphur Mines Co. of Virginia v. Thompson*, 93 Va. 293, 25 S. E. 232.

⁷⁴ *Connors v. Holland*, 113 Mass. 50; *Kissam v. Dierkes*, 49 N. Y. 602; *Strother v. Law*, 54 Ill. 413; *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Schwab Clothing Co. v. Claunch* (Tex. Civ. App.) 29 S. W. 922. Contra in Illinois by statute. 1 Stim. Am. St. Law, § 1924 C. And see *Williams v. Washington*, 40 S. C. 457, 19 S. E. 1.

⁷⁵ *Clark v. Griffin*, 148 Mass. 540, 20 N. E. 169; 2 Jones, Mortg. (5th Ed.) § 1797.

⁷⁶ *Holland v. Bank*, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

⁷⁷ *Vaughan v. Marable*, 64 Ala. 60; *O'Brien v. Oswald*, 45 Minn. 59, 47 N. W. 316; *Bedell v. McClellan*, 11 How. Prac. (N. Y.) 172.

⁷⁸ *McCalley v. Otey*, 99 Ala. 584, 12 South. 406, 42 Am. St. Rep. 87; *Platt v. McClure*, Fed. Cas. No. 11,218, 3 Woodb. & M. 151.

⁷⁹ *Clark v. Mitchell*, 81 Minn. 438, 84 N. W. 327; *Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353.

⁸⁰ *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424; *Cassady v. Wallace*, 102 Mo. 575, 15 S. W. 138; *Eason v. Dortch*, 136 N. C. 291, 48 S. E. 741.

⁸¹ *Flower v. Elwood*, 66 Ill. 438; *Taylor v. Hopkins*, 40 Ill. 442. See *McHany v. Schenk*, 88 Ill. 357.

⁸² *Sanford v. Kane*, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602; *Holmes v. Lumber Co.*, 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; *Hathorn v. Butler*, 73 Minn. 15, 75 N. W. 743; *Bush v. Sherman*, 80 Ill. 160.

however, a power of sale is made personal to the mortgagee, without mentioning assigns, it cannot be exercised by an assignee.⁸³ The beneficiary under a deed of trust cannot exercise the power,⁸⁴ and the same is true of an assignee of the beneficiary. In the latter case, the power remains in the trustee, who must exercise it for the benefit of the assignee.⁸⁵ Upon the death of the mortgagee, the power may be exercised by his personal representatives.⁸⁶ In case of the death or resignation of a trustee, a new trustee may be appointed by the court.⁸⁷

Manner of Sale

The manner of conducting the sale is usually specified in the mortgage, although in many states it is regulated by statute. Notice of the sale is usually required, and the requirements of the statute must be strictly observed.⁸⁸ The deed may, however, expressly waive notice,⁸⁹ and a private sale may be authorized.⁹⁰ The time of the sale,⁹¹ also the place,⁹² if specified by the mortgage or by the statute, must be complied with, as also the mode, and conditions of the sale,⁹³ as by public auction,⁹⁴ if so required. The sale must, likewise, be conducted in a thoroughly fair and

⁸³ *Flower v. Elwood*, 66 Ill. 438; *Wilson v. Spring*, 64 Ill. 14.

⁸⁴ *Cushman v. Stone*, 69 Ill. 516; *Singleton v. Scott*, 11 Iowa, 589; *Sargent v. Howe*, 21 Ill. 148.

⁸⁵ *Whittelsey v. Hughes*, 39 Mo. 13; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; *Western Maryland Railroad Land & Imp. Co. v. Goodwin*, 77 Md. 271, 26 Atl. 319; *Barrick v. Horner*, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283.

⁸⁶ *Miller v. Clark*, 56 Mich. 337, 23 N. W. 35; *Richmond v. Hughes*, 9 R. I. 223; *Stevens v. Shannahan*, 160 Ill. 330, 43 N. E. 350; *Collins v. Hopkins*, 7 Iowa, 463.

⁸⁷ *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424; *Davis v. Lusk*, 191 Ill. 620, 61 N. E. 483; *New York Security & Trust Co. v. Electric Light Co.*, 157 N. Y. 689, 51 N. E. 1092.

⁸⁸ *Chace v. Morse*, 189 Mass. 559, 76 N. E. 142; *Reading v. Waterman*, 46 Mich. 107, 8 N. W. 691; *Judd v. O'Brien*, 21 N. Y. 186; *Sawyer v. Bradshaw*, 125 Ill. 440, 17 N. E. 812.

⁸⁹ *Princeton Loan & Trust Co. v. Munson*, 60 Ill. 371.

⁹⁰ *In re Shore*, 6 Manitoba, 305. So in England by statute.

⁹¹ *Hall v. Towne*, 45 Ill. 493; *Richards v. Finnegan*, 45 Minn. 208, 47 N. W. 788; *Lathrop v. Tracy*, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229; *Stewart v. Brown* (Mo. 1891) 16 S. W. 389; *Lester v. Bank*, 17 R. I. 88, 20 Atl. 231.

⁹² *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868; *Patterson v. Reynolds*, 19 Ind. 148; *Colcord v. Bettinson*, 131 Mass. 233; *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585.

⁹³ *Calloway v. Bank*, 54 Ga. 441; *Carpenter v. Mining Co.*, 65 N. Y. 43; *Emmons v. Van Zee*, 78 Mich. 171, 43 N. W. 1100; *Muller's Adm'x v. Stone*, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

⁹⁴ *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005; *Greenleaf v. Queen*, 1 Pet. (U. S.) 138, 7 L. Ed. 85.

reasonable manner, in order to obtain the highest price.⁹⁵ In the absence, however, of a statutory provision, or express direction in the instrument creating the power, the sale need not be in parcels.⁹⁶

Who may Purchase

Any person may, as a rule, purchase at a foreclosure sale, unless his relations with the mortgagor are of such a fiduciary character as to make the sale fraudulent.⁹⁷ The mortgagee, or trustee, however, who exercises the power, is not usually allowed to become the purchaser either directly, or through an agent or other indirect means,⁹⁸ unless permission is given in the mortgage,⁹⁹ or expressly allowed by statute.¹ A purchase by the mortgagee, however, is only voidable, and not void.² The beneficiary, however, under a deed of trust, may purchase.³

Proceeds of the Sale

The mortgagee, or trustee under a deed of trust, or other person authorized to exercise the power of sale, may apply the proceeds of

⁹⁵ *Atkins v. Crumpler*, 118 N. C. 532, 24 S. E. 367; *McGuire v. Briscoe*, Fed. Cas. No. 8,813a, 2 Hayw. & H. 54; *Simonton v. Insurance Co.*, 90 Minn. 24, 95 N. W. 451; *Givens v. McCray*, 196 Mo. 306, 93 S. W. 374, 113 Am. St. Rep. 736.

⁹⁶ *Pryor v. Baker*, 133 Mass. 459; *Johnson v. Williams*, 4 Minn. 260 (Gil. 183); *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Holmes v. Lumber Co.*, 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; *Bay View Land Co. v. Myers*, 62 Minn. 265, 64 N. W. 816; *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544; *Singleton v. Scott*, 11 Iowa, 589; *Gray v. Shaw*, 14 Mo. 341.

⁹⁷ *Eastman v. Littlefield*, 164 Ill. 124, 45 N. E. 137; *Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194; *Otto v. Schlapkahl*, 57 Iowa, 226, 10 N. W. 651.

⁹⁸ *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Clark v. Simmons*, 150 Mass. 357, 23 N. E. 108; *Dobson v. Racey*, 8 N. Y. 216; *Learned v. Geer*, 139 Mass. 31, 29 N. E. 215; *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Harper v. Ely*, 56 Ill. 179; *Tipton v. Wortham*, 93 Ala. 321, 9 South. 596; *Joyner v. Farmer*, 78 N. C. 196.

⁹⁹ *Griffin v. Marine Co.*, 52 Ill. 130; *Jones v. Pullen*, 115 N. C. 465, 20 S. E. 624; *Garland v. Watson*, 74 Ala. 323; *Hall v. Towne*, 45 Ill. 493; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Elliott v. Wood*, 45 N. Y. 71; *Lass v. Sternberg*, 50 Mo. 124. Cf. *Stephen v. Beall*, 22 Wall. (U. S.) 329, 22 L. Ed. 786; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

¹ See statutes of different states. *Allen v. Chatfield*, 8 Minn. 435 (Gil. 386); *McLaughlin v. Hanley*, 12 R. I. 61.

² *Cunningham v. Railroad Co.*, 156 U. S. 400, 15 Sup. Ct. 361, 39 L. Ed. 471; *Burns v. Thayer*, 115 Mass. 89; *Mulvey v. Gibbons*, 87 Ill. 367; *Connolly v. Hammond*, 51 Tex. 635; *Averitt v. Elliot*, 109 N. C. 560, 13 S. E. 785.

³ *Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745; *Ellsworth v. Harmon*, 101 Ill. 274; *Jones v. Hagler*, 95 Ala. 529, 10 South. 345; *Easton v. Bank*, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. Ed. 210.

the sale to the payment of the entire mortgage debt.⁴ Expenses incurred in connection with the sale may also be paid out of the proceeds,⁵ as may also reasonable fees for attorneys, if authorized by statute,⁶ or by the provisions of the mortgage deed.⁷ If there is a surplus, after the payment of all the lawful charges under which the sale is made, it may be applied to the payment of a junior mortgagee, who has duly asserted his right to the fund.⁸ Any residue remaining after all persons entitled to rights in the surplus have been paid belongs to the mortgagor.

Foreclosure in Equity

As previously stated, the original method of foreclosure was by a bill in equity, and at the present time courts of equity retain jurisdiction in foreclosure proceedings, unless a statutory form of foreclosure is made exclusive, even though other methods of foreclosure may be available.⁹ In the federal courts, foreclosure by a bill in equity is the only method that can be pursued, regardless of the local state statutes.¹⁰

A bill for foreclosure should, in general, allege the execution and delivery of the mortgage, also of the mortgage note or other obligation secured, a description of the property,¹¹ and the maturity and nonpayment of the debt.¹² It should also contain a prayer for

⁴ Holden v. Gilbert, 7 Paige (N. Y.) 208; Davis v. Dodson, 4 Ariz. 168, 35 Pac. 1058; Taylor v. Burgess, 26 Minn. 547, 6 N. W. 350.

⁵ Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279, 21 N. E. 569; Cooper v. McNeill, 9 Ill. App. 97.

⁶ See statutes of different states. And see Morse v. Loan Ass'n, 60 Minn. 316, 62 N. W. 112.

⁷ Tompkins v. Drennen, 95 Ala. 463, 10 South. 638; Ellason v. Sidle, 61 Minn. 285, 63 N. W. 730; Guignon v. Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Brady v. Dilley, 27 Md. 570. And see Duffy v. Smith, 132 N. C. 38, 43 S. E. 501.

⁸ Donahue v. Hubbard, 154 Mass. 537, 28 N. E. 909, 14 L. R. A. 123, 26 Am. St. Rep. 271; Barber v. Cary, 11 Barb. (N. Y.) 549; Converse v. Bank, 152 Mass. 407, 25 N. E. 733. See Waller v. Harris, 7 Paige (N. Y.) 167.

⁹ Hallowell v. Ames, 165 Mass. 123, 42 N. E. 558; Fuller v. Van Geesen, 4 Hill (N. Y.) 171; Price v. Bank, 14 Ark. 50; Bateman v. Archer, 65 Ga. 271; Old Colony Trust Co. v. Great White Spirit Co., 178 Mass. 92, 59 N. E. 673.

¹⁰ United States Mortgage Co. v. Sperry, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. Ed. 969; Keith & Perry Coal Co. v. Bingham, 97 Mo. 196, 10 S. W. 32; Ray v. Tatum, 72 Fed. 112, 18 C. C. A. 464.

LOUISIANA. In Louisiana, where the civil law prevails, mortgages are usually foreclosed by a proceeding known as a hypothecary action, similar to a suit in equity. Bonnacaze v. Lieux, 52 La. Ann. 285, 26 South. 832; Learned v. Walton, 42 La. Ann. 455, 7 South. 723.

¹¹ Koons v. Carney, 87 Ind. 34; Scott v. Sells, 88 Cal. 599, 26 Pac. 350; Schoenewald v. Rosenstein (City Ct. Brook.) 5 N. Y. Supp. 766; Stevenson v. Kurtz, 98 Mich. 493, 57 N. W. 580.

¹² Harvey v. Truby, 62 App. Div. 503, 71 N. Y. Supp. 86; Martin v. Mc-

the foreclosure of the equity of redemption¹³ and a decree for the sale of the property.¹⁴ If a personal judgment is desired, it should be specifically asked for,¹⁵ as is also true in case of a desire for a deficiency decree.¹⁶ In describing the property, the description in the mortgage may be copied, or reference made to a copy of the mortgage annexed to the bill.¹⁷

Strict Foreclosure

The decree in a foreclosure suit by bill in equity may be either for strict foreclosure, or for the sale of the property. In strict foreclosure, the decree cuts off, forthwith, the equity of redemption; that is, unless the mortgagor redeems within a limited time after the decree, the estate will become absolute in the mortgagee.¹⁸ The time allowed for such redemption is within the discretion of the court.¹⁹ Strict foreclosure, however, being harsh and inequitable, is not favored by the courts,²⁰ but may be decreed, in some states, especially where the mortgagor is insolvent, and where the property would not sell for the amount of the mortgage debt.²¹

Decree of Sale

In most states, instead of a strict foreclosure, a sale of the mortgaged land is decreed.²² Instead, however, of directing the entire

Reynolds, 6 Mich. 70; Miller v. McConnell, 118 Ky. 293, 80 S. W. 1103; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163; Coulter v. Bower, 64 How. Prac. (N. Y.) 132; Skelton v. Kintner, 2 Ind. 476.

¹³ Hait v. Ensign, 61 Iowa, 724, 17 N. W. 163; Herring v. Neely, 43 Iowa, 157.

¹⁴ Snow v. Trotter, 3 La. Ann. 268; Santacruz v. Santacruz, 44 Miss. 714.

¹⁵ Rollins v. Forbes, 10 Cal. 299; Long v. Herrick, 26 Fla. 356, 8 South. 50.

¹⁶ Skinner v. Loan Ass'n, 46 Fla. 547, 35 South. 67; Bank of California v. Dyer, 14 Wash. 279, 44 Pac. 534.

¹⁷ Moore v. Titman, 33 Ill. 358; Scott v. Zartman, 61 Ind. 328; Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382; Krathwohl v. Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

¹⁸ Gates v. Railroad Co., 53 Conn. 333, 5 Atl. 695; Ellis v. Leek, 127 Ill. 60, 20 N. E. 218, 3 L. R. A. 259; Kendall v. Treadwell, 5 Abb. Prac. (N. Y.) 16; Hitchcock's Heirs v. Bank, 7 Ala. 386; Sheldon v. Patterson, 55 Ill. 507; Cauffman v. Sayre, 2 B. Mon. (Ky.) 202; Shaw v. Railroad Co., 5 Gray (Mass.) 162; Heyward v. Judd, 4 Minn. 483 (Gil. 375); Woods v. Shields, 1 Neb. 453; Bolles v. Duff, 43 N. Y. 469; Higgins v. West, 5 Ohio, 554.

¹⁹ Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47; Ellis v. Leek, 127 Ill. 60, 20 N. E. 218, 3 L. R. A. 259.

²⁰ Froidevaux v. Jordan, 64 W. Va. 338, 62 S. E. 686, 131 Am. St. Rep. 911; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; McCaughey v. McDuffie (1903) 141 Cal. xviii, 74 Pac. 751.

²¹ Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530; Miles v. Stehle, 22 Neb. 740, 36 N. W. 142; Drew v. Smith, 7 Minn. 301 (Gil. 231); Higgins v. West, 5 Ohio, 554.

²² Jones v. Lapham, 15 Kan. 540; Moore v. Crandall, 146 Iowa, 25, 124

mortgaged premises to be sold, the decree may, in some states, order that only such part of the land as may be necessary to pay the debt shall be included in the sale.²³ The amount due the mortgagee is paid him out of the proceeds of the sale, while any surplus is applied for the benefit of the mortgagor, in paying off other incumbrances according to their priority.²⁴ The sale is made by an officer of the court or by the person designated by statute, and the manner of conducting it is usually prescribed by statute.²⁵ In some states, before such a sale becomes effective, it must be confirmed by the court.²⁶

Parties—In General

There are two kinds of parties to a foreclosure suit, namely, necessary parties and proper parties.²⁷ Necessary parties are those who must be made parties to the suit in order to give validity to the decree. Certain other persons, on the other hand, may be proper parties, in the sense that they are so connected with the subject-matter that making them parties to the suit is no ground for objection, although they are not necessary to the decree.²⁸

N. W. 812, 140 Am. St. Rep. 276; *Hall v. Metcalfe*, 114 Ky. 886, 72 S. W. 18; *Ashmore v. McDonnell*, 39 Kan. 669, 18 Pac. 821; *Schwartz v. Palm*, 65 Cal. 54, 2 Pac. 735.

²³ *Moore v. Crandall*, 146 Iowa, 25, 124 N. W. 812, 140 Am. St. Rep. 276; *Quigley v. Beam's Adm'r*, 137 Ky. 325, 125 S. W. 727; *Treiber v. Shafer*, 18 Iowa, 29; *Kirby v. Childs*, 10 Kan. 639; *Bernhardt v. Lymburner*, 85 N. Y. 172. And see the statutes of the different states.

²⁴ *Stubbs v. Lee*, 105 La. 642, 30 South. 169; *Hart v. Wingart*, 83 Ill. 282; *State Bank of Deep River v. Brown*, 128 Iowa, 665, 105 N. W. 49; *Hoffman v. Meyer*, 6 Kan. 398; *Burchell v. Osborne*, 119 N. Y. 486, 23 N. E. 896; *McIntire v. Garmany*, 8 Ga. App. 802, 70 S. E. 198; *Wayne International Bldg. & Loan Ass'n v. Moats*, 149 Ind. 123, 48 N. E. 793; *Termansen v. Matthews*, 49 App. Div. 163, 63 N. Y. Supp. 115; *Cummings v. Burleson*, 78 Ill. 281; *Caryl v. Stafford*, 69 Hun. 318, 23 N. Y. Supp. 534; *Bangs v. Fallon*, 179 Mass. 77, 60 N. E. 403. The costs of the sale and delinquent taxes, if any, are first to be paid, however, out of proceeds.

²⁵ The directions of the decree, or of the statute, must be strictly followed. *Woolf v. Realty Co.*, 134 App. Div. 484, 119 N. Y. Supp. 288; *Langsdale v. Mills*, 32 Ind. 380; *Doe ex dem. Heighway v. Pendleton*, 15 Ohio, 735; *Cummings v. Burleson*, 78 Ill. 281.

²⁶ *Gerhardt v. Ellis*, 134 Wis. 191, 114 N. W. 495; *Zinkeisen v. Lewis*, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28; *Martin v. Kelly*, 59 Miss. 652.

²⁷ See *Tyler v. Hamilton*, 62 Fed. 187; *Galford v. Gillett*, 55 Ill. App. 576; *Pettingill v. Hubbell*, 53 N. J. Eq. 584, 32 Atl. 76; *London, Paris & American Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027.

²⁸ *Dow v. Seely*, 29 Ill. 495; *Havens v. Jones*, 45 Mich. 253, 7 N. W. 818; *MacMillan v. Clements*, 33 Ind. App. 120, 70 N. E. 997.

Same—Parties Plaintiff

The mortgagee, or whoever may be the real and beneficial owner of the debt secured, is a necessary party plaintiff.²⁹ This rule also applies to the person who legally represents the mortgagee for the purpose of collecting the debt, as his receiver,³⁰ assignee in bankruptcy,³¹ or guardian.³² In case the mortgage has been assigned, the suit should be brought by the assignee, provided the assignment is absolute and unconditional,³³ and a mortgagee who has assigned all his interest, so that the legal ownership of the mortgage and of the debt is in the assignee, is not a necessary party.³⁴ If, however, the assignment was merely for security, the mortgagee must be made a party.³⁵ An assignee of the mortgage, to whom the bond or note secured thereby has not been transferred, cannot foreclose the mortgage,³⁶ although in states where an assignment of the note carries the mortgage with it an assignee of the note without the mortgage may bring foreclosure without joining the mortgagee with him.³⁷ When several notes are secured by the same mortgage, all the holders should join as plaintiffs,³⁸ or the holder of one note can file a bill to foreclose, making the holders of the other

²⁹ *Anglo-Californian Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077; *First State Bank of Le Sueur v. Bank*, 93 Minn. 317, 101 N. W. 309; *Swenney v. Hill*, 65 Kan. 826, 70 Pac. 868; *Equitable Land Co. v. Allen*, 84 Neb. 514, 121 N. W. 800.

³⁰ *Iglehart v. Bierce*, 36 Ill. 133.

³¹ *Norton v. Ohrns*, 67 Mich. 612, 35 N. W. 175.

³² *Comer v. Bray*, 83 Ala. 217, 3 South. 554.

³³ *Patten v. Hotel Co.*, 153 Cal. 460, 96 Pac. 296; *Burt v. Moore* (1900) 9 Kan. App. 885, 61 Pac. 332; *Pratt v. Poole*, 133 N. Y. 686, 31 N. E. 628; *Barker v. Flood*, 103 Mass. 474; *Moore v. Olive*, 114 Iowa, 650, 87 N. W. 720.

³⁴ *Thulin v. Anderson*, 154 Ill. App. 41; *Clark v. Mackin*, 95 N. Y. 346; *Strawn v. Shank*, 110 Pa. 259, 20 Atl. 717; *Cutler v. Clementson*, 67 Fed. 409; *Whitney v. McKinney*, 7 Johns. Ch. (N. Y.) 144; *McGuffey v. Finley*, 20 Ohio, 474; *Garrett v. Puckett*, 15 Ind. 485. But see *Saenger v. Nightingale*, 48 Fed. 708.

³⁵ *Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658; *Johnson v. Hart*, 3 Johns. Cas. (N. Y.) 322; *Stevens v. Campbell*, 13 Wis. 375; *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76; *Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658. Or where he has guaranteed payment. *Burnett v. Hoffman*, 40 Neb. 569, 58 N. W. 1134.

³⁶ *Cooper v. Newland*, 17 Abb. Prac. (N. Y.) 342; *Merritt v. Bartholick*, 47 Barb. (N. Y.) 253.

³⁷ *Briggs v. Hannowald*, 35 Mich. 474; *Gower v. Howe*, 20 Ind. 396; *Swett v. Stark*, 31 Fed. 858.

³⁸ *Boyer v. Chandler*, 160 Ill. 394, 43 N. E. 803, 32 L. R. A. 113; *Johnson v. Brown*, 31 N. H. 405; *Koester v. Burke*, 81 Ill. 436; *Chamberlin v. Beck*, 68 Ga. 346; *Guthrie v. Treat*, 66 Neb. 415, 92 N. W. 595, 103 Am. St. Rep. 718. All persons interested in the mortgage debt should join as plaintiffs. *Pogue v. Clark*, 25 Ill. 351; *Shirkey v. Hanna*, 3 Blackf. (Ind.) 403, 26 Am. Dec. 426; *Hawke v. Banning*, 3 Minn. 67 (Gil. 30); *Mangels v. Brewing Co.*, 53 Fed. 513.

notes defendants.³⁹ A trustee should, as a rule, join with him the beneficiaries under the trust deed,⁴⁰ although a trustee may foreclose in his own name without joining the beneficiaries, when their number is very large.⁴¹ On the death of the mortgagee, his personal representative is the proper party to bring foreclosure,⁴² and mortgages given to persons in their official capacity may be foreclosed by their successors in office.⁴³

Same—Parties Defendant

Unless he has parted with all his interest in the property, a mortgagor is always a necessary party defendant.⁴⁴ Where, however, he has sold absolutely the premises, he is not a necessary party, unless a personal judgment is desired against him.⁴⁵ In general, all persons should be made parties who have any interest in the mortgaged premises, since such persons, if not joined, may redeem from the mortgage.⁴⁶ A trustee in a deed of trust is a neces-

³⁹ *Pettibone v. Edwards*, 15 Wis. 95; *Myers v. Wright*, 33 Ill. 284; *Goodall v. Mopley*, 45 Ind. 355. That the holders of the notes cannot be joined as plaintiffs, see *Swenson v. Plow Co.*, 14 Kan. 387. Contra, *Pogue v. Clark*, 25 Ill. 351. Joint mortgagees may join, though the debts secured are several. *Shirkey v. Hanna*, 3 Blackf. (Ind.) 403, 26 Am. Dec. 426.

⁴⁰ See *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083; *Ring v. Pier Co.*, 77 N. J. Eq. 422, 77 Atl. 1054; *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706; *Butler v. Farry*, 68 N. J. Eq. 760, 63 Atl. 240. And see the statutes of the different states.

⁴¹ *Alton Water Co. v. Brown*, 166 Fed. 840, 92 C. C. A. 598; *Robertson v. Vancleave*, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; *Shaw v. Railroad Co.*, 5 Gray (Mass.) 162; *Chicago & G. W. Railroad Land Co. v. Peck*, 112 Ill. 408; *Lambertville Nat. Bank v. Paper Co.* (N. J.) 15 Atl. 388, 1 L. R. A. 334.

⁴² *Merritt v. Daffin*, 24 Fla. 320, 4 South. 806; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *Shaw v. McNish*, 1 Barb. Ch. (N. Y.) 326; *Dayton v. Dayton*, 7 Ill. App. 136. See *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661, holding that where the mortgagee is dead, foreclosure proceedings purporting to be instituted by him are void.

⁴³ *Iglehart v. Bierce*, 36 Ill. 133.

⁴⁴ *Block v. Thomson*, 120 Ill. App. 424; *Heffron v. Gage*, 149 Ill. 182, 36 N. E. 569; *Michigan Ins. Co. of Detroit v. Brown*, 11 Mich. 265; *Swift v. Edson*, 5 Conn. 532; *Craig v. Miller*, 41 S. C. 37, 19 S. E. 192; *Baker v. Collins*, 4 Tex. Civ. App. 520, 23 S. W. 493; *Kay v. Whitaker*, 44 N. Y. 565; *Michigan Ins. Co. of Detroit v. Brown*, 11 Mich. 265; *Moore's Lessee v. Starks*, 1 Ohio St. 369.

⁴⁵ *Brockway v. McClun*, 243 Ill. 196, 90 N. E. 374; *Broomell v. Anderson*, 5 Sadler (Pa.) 142, 8 Atl. 764; *West v. Miller*, 125 Ind. 70, 25 N. E. 143; *Stiger v. Bent*, 111 Ill. 328; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Miller v. Thompson*, 34 Mich. 10; *Jones v. Lapham*, 15 Kan. 540; *Stevens v. Campbell*, 21 Ind. 471.

⁴⁶ *Moulton v. Cornish*, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; *Finch v. Magill*, 37 Kan. 761, 15 Pac. 907; *Wall v. Nay*, 30 Mo. 494; *Shinn v. Shinn*, 91 Ill. 477; *Chase v. Abbott*, 20 Iowa, 154; *Gaines v. Walker*, 16 Ind.

sary party, since he holds the legal title;⁴⁷ but when the beneficiaries under a trust deed are very numerous, it is not necessary to make them defendants.⁴⁸ A purchaser of the mortgaged premises subsequent to the mortgage is not, however, a necessary party, since the decree of foreclosure will be valid, although he is not joined.⁴⁹ If, however, it is desired to cut off his right and equity of redemption, he should be made a party.⁵⁰ On the other hand, if he is not made a party, his rights will not be affected by the decree.⁵¹ A purchaser, however, who has not recorded his deed before the suit, there being, also, no other notice of his rights, need not be made a party, and his rights will be cut off by the decree.⁵² The same is also true of a purchaser pendente lite; no notice of his rights being given to those in interest.⁵³ Where, however, there have been successive conveyances of the property since the execution of the mortgage, the intervening grantees, who have conveyed all their interests, are neither necessary nor proper parties.⁵⁴ Unless the statute otherwise provides, the heirs or devisees of the owner of the equity of redemption, who dies seised before the commencement of the suit, are necessary parties defendant;⁵⁵ and the

361; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Brainard v. Cooper*, 10 N. Y. 356; *Kennedy v. Moore*, 91 Iowa, 39, 58 N. W. 1066; *Hunt v. Nolen*, 40 S. C. 284, 18 S. E. 798.

⁴⁷ *Gardner v. Brown*, 21 Wall. (U. S.) 36, 22 L. Ed. 527.

⁴⁸ *Van Vechten v. Terry*, 2 Johns. Ch. (N. Y.) 197; *Willis v. Henderson*, 4 Scam. (Ill.) 13, 38 Am. Dec. 120.

⁴⁹ *Baker v. Potts*, 73 App. Div. 29, 76 N. Y. Supp. 406; *Johnson v. Friant*, 140 Cal. 260, 73 Pac. 993; *Alsop v. Stewart*, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169.

⁵⁰ *Anderson v. Thompson*, 3 Ariz. 62, 20 Pac. 803; *Watson v. Railroad Co.*, 91 Mich. 198, 51 N. W. 990; *San Diego Realty Co. v. McGinn*, 7 Cal. App. 264, 94 Pac. 374; *Boatmen's Bank v. Bank*, 70 Kan. 624, 79 Pac. 125; *Hulett v. Insurance Co.*, 114 Pa. 142, 6 Atl. 554.

⁵¹ *Becker v. Howard*, 66 N. Y. 5; *Alsop v. Stewart*, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; *Thompson v. Smith*, 96 Mich. 258, 55 N. W. 886; *Mevey's Appeal*, 4 Pa. 80; *Sumner v. Coleman*, 20 Ind. 486.

⁵² *Oakford v. Robinson*, 48 Ill. App. 270; *Boice v. Insurance Co.*, 114 Ind. 480, 15 N. E. 825; *Shippen v. Kimball*, 47 Kan. 173, 27 Pac. 813; *Hatfield v. Malcolm*, 71 Hun, 51, 24 N. Y. Supp. 596. See *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368.

⁵³ *Daniels v. Henderson*, 49 Cal. 242; *Norris v. Ile*, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; *Bank of Utica v. Finch*, 1 Barb. Ch. (N. Y.) 75; *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *McPherson v. Housel*, 13 N. J. Eq. 299.

⁵⁴ *Scarry v. Eldridge*, 63 Ind. 44; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Lockwood v. Benedict*, 3 Edw. Ch. (N. Y.) 472.

⁵⁵ *Currier v. Teska*, 84 Neb. 60, 120 N. W. 1015, 133 Am. St. Rep. 602; *McGown v. Yerks*, 6 Johns. Ch. (N. Y.) 450; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; *Holland v. Holland*, 131 Ind. 196, 30 N. E. 1075; *Stark v.*

same rule applies to legatees whose legacies are charges on the mortgaged premises.⁵⁶ In some states, however, by force of statute, foreclosure proceedings may be instituted against the personal representative of a deceased mortgagor,⁵⁷ and the personal representative should, in all cases, be made a party when a personal judgment is desired against the deceased mortgagor's estate.⁵⁸ The wife of the mortgagor, who has joined in the mortgage, must be made a defendant, to cut off her dower;⁵⁹ but, when she did not join in the mortgage, she is not a proper party,⁶⁰ unless some defense as to her dower has arisen subsequently to the mortgage.⁶¹ The wife may be a necessary party, however, when the mortgage is on the homestead.⁶² Where, on the other hand, a mortgage is given for purchase money, the wife need not be joined.⁶³ Junior mortgagees are proper parties,⁶⁴ although not necessary, since, if not made parties, they may redeem.⁶⁵ Likewise a junior mortgagee, who has assigned his mortgage for security, is a proper party.⁶⁶ On the death of a junior mortgagee, his personal representative is a proper party defendant.⁶⁷ Senior mortgagees need

Brown, 12 Wis. 572, 78 Am. Dec. 762; *Abbott v. Godfrey's Heirs*, 1 Mich. 178; *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653.

⁵⁶ *McGown v. Yerks*, 6 Johns. Ch. (N. Y.) 450.

⁵⁷ *Tryon v. Munson*, 77 Pa. 250; *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372; *Seals v. Chadwick*, 2 Pennewill (Del.) 381, 45 Atl. 718; *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704.

⁵⁸ *Heidgerd v. Reis*, 135 App. Div. 414, 119 N. Y. Supp. 921; *Roberts v. Tunnell*, 165 Ill. 631, 46 N. E. 713.

⁵⁹ *Davis v. Taylor-Lowenstein & Co.*, 158 Ala. 227, 47 South. 653; *Camp v. Small*, 44 Ill. 37; *State v. Kennett*, 114 Ind. 160, 16 N. E. 173; *Foster v. Hickox*, 38 Wis. 408; *Wright v. Langley*, 36 Ill. 381; *Mills v. Van Voorhies*, 20 N. Y. 412; *Gibson v. Crehore*, 5 Pick. (Mass.) 146. And see *Moomey v. Maas*, 22 Iowa, 380, 92 Am. Dec. 395.

⁶⁰ *Barker v. Burton*, 67 Barb. (N. Y.) 458; *Fletcher v. Holmes*, 32 Ind. 497.

⁶¹ *Barr v. Vanalstine*, 120 Ind. 590, 22 N. E. 965.

⁶² *Hefner v. Urton*, 71 Cal. 479, 12 Pac. 486; *Sargent v. Wilson*, 5 Cal. 504.

⁶³ *Lohmeyer v. Durbin*, 206 Ill. 574, 69 N. E. 523; *Short v. Raub*, 81 Ill. 509; *Amphlett v. Hibbard*, 29 Mich. 298.

⁶⁴ *Nathans v. Hope*, 100 N. Y. 615, 3 N. E. 77; *Campbell v. Bane*, 119 Mich. 40, 77 N. W. 322; *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443; *Hughes v. Riggs*, 84 Md. 502, 36 Atl. 269.

⁶⁵ *Aholtz v. Zellar*, 88 Ill. 24; *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407, 12 N. E. 522; *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293; *Gower v. Winchester*, 33 Iowa, 303; *Jewett v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501. And see *Rose v. Chandler*, 50 Ill. App. 421.

⁶⁶ *Dalton v. Smith*, 86 N. Y. 176; *Bard v. Poole*, 12 N. Y. 495.

⁶⁷ *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *Lockman v. Reilly*, 95 N. Y. 64.

not be made defendants, although they may be.⁶⁸ In case they are not joined, their rights are not affected.⁶⁹ Judgment creditors of the mortgagor having a lien upon the land are proper, although not necessary, parties, because they may redeem if they are not made parties.⁷⁰ General creditors, however, having no liens, should not be made parties.⁷¹ Adverse claimants of the mortgaged land, since they derive no title from the mortgagor, are not even proper parties defendant to the foreclosure suit, because their claims to title cannot be litigated in such a proceeding.⁷² This rule is also generally held to include tax title claimants.⁷³ The holders of equitable estates or liens should, however, be made defendants,⁷⁴ as should also persons having vested estates in remainder in the mortgaged premises.⁷⁵ Persons, however, having only expectant or contingent interests, need not be made parties.⁷⁶

Foreclosure by Action at Law

In many states, by force of statute, mortgages may be foreclosed by an action in a court of law; judgment for foreclosure and sale being the usual means for enforcing the mortgage.⁷⁷ Mere posses-

⁶⁸ *Porter v. Hamill*, 95 Ark. 97, 128 S. W. 570; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Forrer v. Kloke*, 10 Neb. 373, 6 N. W. 428; *Dickerson v. Uhl*, 71 Mich. 398, 39 N. W. 472; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Strobe v. Downer*, 13 Wis. 11, 80 Am. Dec. 709; *Frost v. Koon*, 30 N. Y. 428; *Bexar Bldg. & Loan Ass'n v. Newman* (Tex. Civ. App.) 25 S. W. 461.

⁶⁹ *McMurtry v. Masonic Temple Co.*, 86 Ky. 206, 5 S. W. 570; *Forrer v. Kloke*, 10 Neb. 373, 6 N. W. 428.

⁷⁰ *Sutherland v. Tyner*, 72 Iowa, 232, 33 N. W. 645; *White v. Bartlett*, 14 Neb. 320, 15 N. W. 702; *De Lashmut v. Sellwood*, 10 Or. 319; *Brainard v. Cooper*, 10 N. Y. 356; *Commonwealth v. Robinson*, 96 Ky. 553, 29 S. W. 306.

⁷¹ *McGowan v. Bank*, 7 Ala. 823; *Gardner v. Lansing*, 28 Hun (N. Y.) 413; *Sumner v. Skinner*, 80 Hun, 201, 30 N. Y. Supp. 4.

⁷² *Pool v. Horton*, 45 Mich. 404, 8 N. W. 59; *Gage v. Perry*, 93 Ill. 176; *Joslin v. Williams*, 61 Neb. 859, 86 N. W. 473; *Summers v. Bromley*, 28 Mich. 125; *Pelton v. Farmin*, 18 Wis. 222; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398.

⁷³ *Runner v. White*, 60 Ill. App. 247; *Tinsley v. Mines Co.*, 20 Colo. App. 61, 77 Pac. 12; *Williams v. Cooper*, 124 Cal. 666, 57 Pac. 577.

⁷⁴ *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909; *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555. As to joining as defendants persons entitled in remainder or reversion, see *Nodine v. Greenfield*, 7 Paige (N. Y.) 544, 34 Am. Dec. 363; *Eagle Fire Ins. Co. v. Cammet*, 2 Edw. Ch. (N. Y.) 127; 2 Jones, *Mortg.* (5th Ed.) § 1401.

⁷⁵ *Hope v. Shevill*, 137 App. Div. 86, 122 N. Y. Supp. 127; *Hodges v. Walker*, 76 App. Div. 305, 78 N. Y. Supp. 447.

⁷⁶ *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805; *United States Trust Co. of New York v. Roche*, 116 N. Y. 120, 22 N. E. 265.

⁷⁷ *Lowell v. Daniels*, 2 Cush. (Mass.) 234; *Fuller v. Van Geesen*, 4 Hill (N. Y.) 171; *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N. Y. Supp. 435.

sion of the property may also, if so stipulated, be obtained by the legal action of ejectment;⁷⁸ and the common-law writ of *scire facias* is recognized, also, in some states, as a proper means for instituting foreclosure proceedings.⁷⁹ In states where, under the doctrine of statutory, or code, procedure, the formal distinction between actions at law and suits in equity is abolished, a suit to foreclose a mortgage may be indifferently regarded as a suit in equity or as an action at law, although the nature of the suit is substantially of an equitable character.⁸⁰ The general principles, moreover, of statutory foreclosure, are the same as those already discussed in connection with foreclosure in equity. Instead of a bill in equity, a petition, or complaint, is usually filed, setting forth practically the same allegations as are required in the ordinary equity suit. The same general rules as to parties also apply, as do, likewise, the rules relating to the sale of the property and deficiency judgments. In brief, the procedure under the ordinary statutory or legal action of foreclosure is practically the same as that in foreclosure in equity, except where the local statutes, which must, of course, be consulted in any particular case, have modified, in more or less detail, the practice.

SAME—STATUTORY RIGHT OF REDEMPTION

212. In distinction from the equity of redemption, which is cut off by foreclosure, a right of redemption is given by statute, in a number of states, for the express purpose of redeeming the property after a foreclosure sale has been made.

In many states, after the mortgaged property has been sold under foreclosure proceedings, the statutes provide that it may, nevertheless, be redeemed within a certain specified time.⁸¹ This statutory right of redemption must be distinguished, however, from the equitable right of redemption, which has already been considered.⁸² The equity of redemption, as we have seen, is

⁷⁸ *Allen v. Pierce*, 163 Ala. 612, 50 South. 924, 136 Am. St. Rep. 92; *Pollock v. Maison*, 41 Ill. 516; *Bradfield v. Hale*, 67 Ohio St. 316, 65 N. E. 1008.

⁷⁹ *Excelsior Sav. Fund v. Cochran*, 220 Pa. 634, 70 Atl. 432; *Russell v. Brown*, 41 Ill. 183; *Chickering v. Failes*, 26 Ill. 507.

⁸⁰ *State ex rel. Wyandotte Lodge*, No. 35, I. O. O. F., v. *Evans*, 176 Mo. 310, 75 S. W. 914; *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501.

⁸¹ See the statutes of the several states.

⁸² *Supra*.

barred by foreclosure.⁸³ The statutory right of redemption does not accrue until the mortgage has been foreclosed.⁸⁴

Statutes giving a right to redeem after foreclosure are construed liberally,⁸⁵ but a person desiring to take advantage of the right must strictly conform to the requirements specified in the statute.⁸⁶ For example, only such persons as the statute designates may exercise this right of redemption,⁸⁷ and the statutes also usually prescribe the order of priority in which persons may redeem.⁸⁸ The time in which the right may be exercised after the foreclosure sale is also specified by the statute,⁸⁹ and the court decreeing a sale cannot deny the right, or modify the time thus allowed.⁹⁰ The amount necessary to redeem is usually fixed by the statutes, and is generally the price paid at the foreclosure sale, plus interest.⁹¹ The procedure for effecting the redemption is likewise usually directed by the statute, and must be observed.⁹² The proceedings, however, need not necessarily be brought in the same court in which the foreclosure sale was decreed.⁹³ As distinguished from a waiver of the equity of redemption, a statutory right to redeem may be released in advance, or pending the statutory period of time allowed for the redemption.⁹⁴

⁸³ *Supra*.

⁸⁴ *Levy v. Burkle* (Cal. 1887) 14 Pac. 564; *De Wolf v. Haydn*, 24 Ill. 525.

⁸⁵ *North Dakota Horse & Cattle Co. v. Serungard*, 17 N. D. 466, 117 N. W. 453, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717; *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871; *Lightbody v. Lammers*, 98 Minn. 203, 108 N. W. 846.

⁸⁶ *Nichols v. Tingstad*, 10 N. D. 172, 86 N. E. 694.

⁸⁷ *Hiller v. Nelson* (Ky.) 118 S. W. 292; *Beadle v. Cole*, 173 Ill. 136, 50 N. E. 809.

⁸⁸ *Morse v. Trust Co.*, 184 Ill. 255, 56 N. E. 369; *Cuilerier v. Brunelle*, 37 Minn. 71, 33 N. W. 123; *Wylie v. Welch*, 51 Wis. 351, 8 N. W. 207. And see the statutes of the several states.

⁸⁹ *Mahaffy v. Faris*, 144 Iowa, 220, 122 N. W. 934, 24 L. R. A. (N. S.) 840; *Dunn v. Rodgers*, 43 Ill. 260; *Lancy v. Bank*, 117 Mass. 431, 59 N. E. 115.

⁹⁰ *Hollingsworth v. Campbell*, 28 Minn. 18, 8 N. W. 873; *Reading v. Watterman*, 46 Mich. 107, 8 N. W. 691.

⁹¹ *Johns v. Anchors*, 153 Ala. 498, 45 South. 218; *Dows v. Blanchard* (Iowa, 1887) 27 N. W. 492; *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11.

⁹² *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512; *Stephens v. Mitchell*, 103 Iowa, 65, 72 N. W. 434; *Wilcoxson v. Miller*, 49 Cal. 193.

⁹³ *Grob v. Cushman*, 45 Ill. 119.

⁹⁴ *Tenney v. Blanchard*, 8 Gray (Mass.) 579; *Armstrong v. Sanford*, 7 Minn. 49 (Gil. 34); *Fields v. Helms*, 82 Ala. 449, 3 South. 106.

CHAPTER XXI

LIENS OTHER THAN MORTGAGES

213. Mechanics' Liens.

214. Judgment Liens.

215. Other Liens.

MECHANICS' LIENS

213. Mechanics' liens are liens created by statute for the purpose of securing to mechanics, materialmen, and contractors a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure.

Nature of Mechanics' Liens

A mechanic's lien may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon.¹

Mechanics' liens are purely the creation of statute,² and such statutes, with local variations, exist in all our American states.³ These liens have been compared to mortgages,⁴ and also vendors' liens for the unpaid purchase price.⁵ They are of an equitable nature,⁶ the doctrine upon which they are founded resting upon considerations of natural justice, that persons who have enhanced the value of property, by incorporating therein their labor or materials, should have preferred claims on such property for the value of such labor or materials.⁷

¹ Quoted from *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 136, 12 Sup. Ct. 181, 35 L. Ed. 961.

² The civil law recognizes mechanics' liens. *Domat*, Civ. Law §§ 1741, 1742, 1744. But they are not known to the English common law. *Durling v. Gould*, 83 Me. 134, 21 Atl. 833; *Martin v. Burns*, 54 Kan. 641, 39 Pac. 177; *Birmingham Iron Foundry v. Manufacturing Co.*, 78 N. Y. 30.

³ *Shaw v. Young*, 87 Me. 271, 32 Atl. 897. See the statutes of the several states.

⁴ *Springston v. Wheeler*, 3 Ind. T. 388, 58 S. W. 658.

⁵ *Mochon v. Sullivan*, 1 Mont. 470; *Springston v. Wheeler*, 3 Ind. T. 388, 58 S. W. 658; *Ex parte Schmidt*, 62 Ala. 252.

⁶ See cases in note 5, *supra*.

⁷ *Mochon v. Sullivan*, 1 Mont. 470, 472.

Who Entitled to Liens

The statutes specify the persons who are entitled to mechanics' liens, and the statute of the particular state must be consulted in each case, since they vary more or less in this respect, and only such persons as are designated by the statute can acquire such a lien.⁸ Some of the earlier statutes confined such liens to mechanics,⁹ and some specified particular classes of mechanics. In an early Georgia case, it was held, for example, that a statute giving such a lien to "masons and carpenters" did not entitle a plasterer to a lien.¹⁰ The scope of the statutes has been generally extended, however, and in most states they apply to mechanics,¹¹ laborers,¹² and materialmen.¹³ In fact, it may be said, in general, that the statutes are extended to all persons who have made repairs or improvements upon the real property of another under contract with or at the request of the owner.¹⁴ In many states, contractors are included within the statutory provisions,¹⁵ as are also subcontractors.¹⁶

Under statutes giving a lien to any "person," corporations and partnerships are included, as are also foreign corporations.¹⁷

⁸ *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Fox v. Rucker*, 30 Ga. 525; *Dye v. Forbes*, 34 Minn. 13, 24 N. W. 309.

⁹ *Fox v. Rucker*, 30 Ga. 525; *Savannah & C. R. Co. v. Callahan*, 49 Ga. 506; *Sweet v. James*, 2 R. I. 270.

¹⁰ *Fox v. Rucker*, 30 Ga. 525.

¹¹ *Thurman v. Pettitt*, 72 Ga. 38; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Gulledge v. Preddey*, 32 Ark. 433.

¹² *Vincent v. Mill Co.*, 7 Wash. 566, 35 Pac. 396; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272; *Holden v. Mining Co.*, 6 Brit. Col. 439.

¹³ *Street Lumber Co. v. Sullivan*, 201 Mass. 484, 87 N. E. 905, 16 Ann. Cas. 354; *Green Bay Lumber Co. v. Adams*, 107 Iowa, 672, 78 N. W. 699; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919.

¹⁴ See *Sweet v. James*, 2 R. I. 270. And see *STELTZ v. ARMORY CO.*, 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. 872, *Burdick Cas. Real Property*.

¹⁵ *Bryan v. Whitford*, 66 Ill. 33. A lessee who by contract with the lessor undertakes to make certain improvements on the leased premises is not a contractor within meaning of the mechanic's lien law, but an agent of the lessor. *Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S. W. 405.

¹⁶ *Newhall v. Kastens*, 70 Ill. 156; *Urin v. Waugh*, 11 Mo. 412; *Smith v. Wilcox*, 44 Or. 323, 74 Pac. 708, 75 Pac. 710.

¹⁷ *Doane v. Clinton*, 2 Utah, 417; *Yates v. Meadville*, 56 Pa. 21; *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779.

NONRESIDENTS.—It is generally held that nonresidents may obtain a lien as well as residents within the state. *Stout v. Sawyer*, 37 Mich. 313; *Atkins v. Little*, 17 Minn. 342 (Gil. 320); *In re Simonds Furnace Co.*, 30 Misc. Rep. 209, 61 N. Y. Supp. 974.

Property and Estates Subject to Lien

The statutes must be consulted in order to determine in any particular jurisdiction what property may be subject to a mechanic's lien. Generally, every kind of private property may be subjected to such liens, including churches, and college buildings.¹⁸ The property of private corporations is not exempt,¹⁹ but public property generally is,²⁰ as, for example, buildings owned by a county,²¹ and public school buildings.²² Under some of the statutes, mechanics' liens cannot be enforced against homesteads,²³ although they may be in most states.²⁴

As a rule, the right of the lien extends to any interest in lands,²⁵ including equitable estates and interests in general.²⁶ In most states, a mechanic's lien may also attach to a leasehold.²⁷

Grounds for the Lien

The right to a mechanic's lien, under the varying terms of the statutes, may be founded upon the erection of new buildings,²⁸ and

¹⁸ Jones v. Congregation, 30 La. Ann. 711; Ray County Sav. Bank v. Cramer, 54 Mo. App. 587; University of Lewisburg v. Reber, 43 Pa. 305; Presbyterian Church v. Allison, 10 Pa. 413.

¹⁹ In re Simonds Furnace Co., 30 Misc. Rep. 209, 61 N. Y. Supp. 974.

²⁰ Clark v. Beyrle, 160 Cal. 306, 116 Pac. 739; National Fireproofing Co. v. Town of Huntington, 81 Conn. 632, 71 Atl. 911, 20 L. R. A. (N. S.) 261, 129 Am. St. Rep. 228. In Kansas a mechanic's lien can attach against public property. Wilson v. School Dist., 17 Kan. 104.

²¹ Burlington Mfg. Co. v. Commissioners, 67 Minn. 327, 69 N. W. 1091; Snow v. Commissioners, 112 N. C. 335, 17 S. E. 176.

²² Staples v. City of Somerville, 176 Mass. 237, 57 N. E. 380; Jordon v. Board of Education, 39 Minn. 298, 39 N. W. 801; Poillon v. New York, 47 N. Y. 666.

²³ Volker-Scowcroft Lumber Co. v. Vance, 36 Utah, 348, 130 Pac. 970, 24 L. R. A. (N. S.) 321, Ann. Cas. 1912A, 124; Coleman v. Ballandi, 22 Minn. 144. See Kansas Lumber Co. v. Jones, 32 Kan. 195, 4 Pac. 74; Green v. Tenold (1905) 14 N. D. 46, 103 N. W. 398, 116 Am. St. Rep. 638.

²⁴ Appeal of Laucks, 24 Pa. 426; Tinsley v. Boykin, 46 Tex. 592; Halde-man v. McDonald (Tex. Civ. App.) 58 S. W. 1040.

²⁵ Strauchen v. Pace, 195 N. Y. 167, 88 N. E. 51; Hathaway v. Davis, 32 Kan. 693, 5 Pac. 29; Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725; Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

²⁶ Seitz v. Railway Co., 16 Kan. 133; Salzer Lumber Co. v. Clafin, 16 N. D. 601, 113 N. W. 1036; Weaver v. Sheeler, 124 Pa. 473, 17 Atl. 17; Id., 118 Pa. 634, 12 Atl. 558; Harsh v. Morgan, 1 Kan. 293; Miller v. Schmitt (Sup.) 67 N. Y. Supp. 1077; Liggett v. Stoops, 132 Mo. App. 218, 111 S. W. 881.

²⁷ Crutcher v. Block, 19 Okl. 246, 91 Pac. 895, 14 Ann. Cas. 1029; Hathaway v. Davis, 32 Kan. 693, 5 Pac. 29; Forbes v. Yacht Club, 175 Mass. 432, 56 N. E. 615; Poole v. Fellows, 25 R. I. 64, 54 Atl. 772; Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725; Deatherage v. Sheidley, 50 Mo. App. 490.

²⁸ Combs v. Lippincott, 35 N. J. Law, 481; Warren v. Freeman, 187 Pa. 455, 41 Atl. 290, 67 Am. St. Rep. 583. See STELTZ v. ARMORY CO., 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872, Burdick Cas. Real Property.

also upon repairs made to existing buildings.²⁹ Under some of the statutes, however, a lien giving mechanics a lien upon houses "erected" by them does not include a lien for repairs.³⁰ In some states, the statutes expressly provide that a lien may be grounded upon improvements upon buildings,³¹ although it has been held that the term "improvements" as employed in a statute does not apply to mere additions or repairs to a building, the word being construed to mean an independent structure.³²

In connection with the erection or construction of "buildings," the decisions of the particular state should be consulted, since a more restricted meaning is given to this term in some states than in others. For example, a limekiln constructed of brick and stone has been held not a "building,"³³ and a vessel building on the stocks is not a "building on land."³⁴ On the other hand, a boiler house has been held to be included within the term "building."³⁵

The right to a lien may usually be based upon the addition of fixtures to the premises,³⁶ and under such a right work and materials furnished in connection with the installation of permanent machinery may be made the basis of a lien.³⁷ Under some statutes, a lien is also allowed for the construction of sidewalks.³⁸ With reference to the furnishing of materials, the lien extends to all materials such as ordinarily enter into or are used in the construction of buildings, and which are within the express or implied terms of the building contract.³⁹ In general, however,

²⁹ *Kelley v. Mills*, 126 Mass. 148; *Smyers v. Beam*, 158 Pa. 57, 27 Atl. 884; *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632; *STELTZ v. ARMORY CO.*, supra.

³⁰ *Kirk v. Taliaferro*, 8 Smedes & M. (Miss.) 754; *Warren v. Freeman*, 187 Pa. 455, 41 Atl. 290, 67 Am. St. Rep. 583.

³¹ *Electric Supply Co. v. Purslow*, 138 Iowa, 745, 117 N. W. 28; *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294; *Harris v. Schultz*, 64 Iowa, 539, 21 N. W. 22.

³² *Getchell v. Allen*, 34 Iowa, 559.

³³ *Cowdrick v. Morris*, 9 Pa. Co. Ct. R. 312.

³⁴ *Stewart v. Gorgoza*, Fed. Cas. No. 13,428.

³⁵ *Short v. Miller*, 120 Pa. 470, 14 Atl. 374.

³⁶ *Rieser v. Commeau*, 129 App. Div. 490, 114 N. Y. Supp. 154; *McGreary v. Osborne*, 9 Cal. 119.

³⁷ *R. Haas Electric & Mfg. Co. v. Park Co.*, 236 Ill. 452, 462, 86 N. E. 248, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060; *Buchannan v. Cole*, 57 Mo. App. 11, 17.

³⁸ *Leiper v. Minnig*, 74 Ark. 510, 86 S. W. 407, 4 Ann. Cas. 1013; *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

³⁹ *Hazard Powder Co. v. Byrnes*, 21 How. Prac. (N. Y.) 189; *Angler v. Distilling Co.*, 178 Mass. 163, 59 N. E. 630; *Weatherly v. Van Wyck*, 128 Cal. 329, 60 Pac. 846. See *STELTZ v. ARMORY CO.*, 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872, *Burdick Cas. Real Property*.

both with reference to the materials furnished and the labor or services performed, the claim must be founded either upon a contract with the owner of the property,⁴⁰ or upon his consent that the materials should be furnished or the labor performed.⁴¹ In some states, in order to protect the owner from liability beyond his contract price, and to give notice to all persons furnishing labor or materials as to the extent of the owner's liability, the statutes require the contract to be filed or recorded in some public office.⁴²

Procedure to Perfect the Lien

Under most of the statutes, no lien can attach unless the owner is given written notice by the claimant of his intention to file such a lien unless his claim is paid.⁴³ In some states, however, a lien may attach independently of such a notice.⁴⁴ Where a notice is required, the statutes fix the time within which the notice must be served⁴⁵ and, usually, the required contents of the notice.⁴⁶ The amount due⁴⁷ and the grounds of the claim⁴⁸ should be stated, and in some states there should be a sufficient description of the premises affected by the claim.⁴⁹ The notice must be served in the manner pointed out by the statute.⁵⁰

⁴⁰ *Doane v. Bever*, 63 Kan. 458, 65 Pac. 693; *Vickery v. Richardson*, 189 Mass. 53, 73 N. E. 136; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292.

⁴¹ *Sibley v. Casey*, 6 Mo. 164; *Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 554; *Brown v. Haddock*, 199 Mass. 480, 85 N. E. 573.

⁴² *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Foster v. Stone's Heirs*, 20 Pick. (Mass.) 542; *Buck v. Brian*, 2 How. (Miss.) 874; *McClallan v. Smith*, 11 Cush. (Mass.) 238.

⁴³ *Street Lumber Co. v. Sullivan*, 201 Mass. 484, 87 N. E. 905, 16 Ann. Cas. 354; *Hill v. Mathewson*, 56 Conn. 323, 15 Atl. 368; *French v. Hussey*, 159 Mass. 206, 34 N. E. 362; *Kenney v. Appgar*, 93 N. Y. 539; *Newell v. Machine Co.*, 17 R. I. 74, 20 Atl. 158.

⁴⁴ See *Ainslie v. Kohn*, 16 Or. 363, 19 Pac. 97.

⁴⁵ *Hill v. Mathewson*, 56 Conn. 323, 15 Atl. 368; *Cary-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899; *Weidle v. Railway Co.*, 152 Ill. App. 292; *Langworthy Lumber Co. v. Hunt*, 19 N. D. 433, 122 N. W. 865.

⁴⁶ *Leifer Mfg. Co. v. Gross*, 93 Ark. 277, 124 S. W. 1039; *McDonald v. Erwin*, 53 Fla. 1079, 43 South. 872; *Hess v. Poultney*, 10 Md. 257; *Beckhard v. Rudolph*, 68 N. J. Eq. 315, 59 Atl. 253.

⁴⁷ *Chandler Lumber Co. v. Fehlau*, 137 Wis. 204, 117 N. W. 1057; *Levin v. Hesslerberg*, 135 App. Div. 155, 119 N. Y. Supp. 1021; *Gilman v. Gard*, 29 Ind. 291.

⁴⁸ *Day v. Railway Co.*, 224 Pa. 193, 73 Atl. 206; *Thomas v. Barber*, 10 Md. 380; *Hausmann Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587, 67 N. W. 1136.

⁴⁹ See *Bambrick v. King*, 59 Mo. App. 284.

⁵⁰ *Fehling v. Goings*, 67 N. J. Eq. 375, 58 Atl. 642; *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

After serving the required notice upon the owner, the lien is usually created by filing a claim or statement of the demand in the office of the public official designated by the statute.⁵¹ The statutes limit the time in which the claim may be filed,⁵² and in some states it varies according to the nature of the claim; that is, whether it be a claim filed for wages due, materials furnished, or whether filed by a contractor or subcontractor.⁵³ The statutes also provide for the contents of the claim, with particular reference to the amount due, the services rendered, or the materials furnished.⁵⁴ The property to which the claim applies must also be identified.⁵⁵ The claim is generally required to be verified.⁵⁶

Effect of the Lien

Upon the perfecting of the lien,⁵⁷ it becomes a general lien and attaches to the debtor's entire interest in the realty affected.⁵⁸ It does not attach, however, to any personal property upon the premises,⁵⁹ and does not apply to any other realty not connected with the claim.⁶⁰ As a rule, it extends to the whole of the lot or tract of land in question, including the buildings thereon.⁶¹ The statute may, however, limit the area of the land to which the

⁵¹ Kelley v. Springer, 235 Ill. 493, 85 N. E. 593; Campbell v. Jacobson, 145 Ill. 389, 34 N. E. 39; Sisson v. Holcomb, 58 Mich. 634, 26 N. W. 155; Skillin v. Moore, 79 Me. 554, 11 Atl. 603; Watkins v. Bugge, 56 Neb. 615, 77 N. W. 83.

⁵² Collins v. Drew, 67 N. Y. 149; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315; Badger Lumber Co. v. Parker, 85 Kan. 134, 116 Pac. 242, 35 L. R. A. (N. S.) 901; Norton & Gorman Contracting Co. v. Construction Co., 195 N. Y. 81, 87 N. E. 777. See STELTZ v. ARMORY CO., 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872, Burdick Cas. Real Property.

⁵³ Georgia Steel Co. v. White, 136 Ga. 492, 71 S. E. 890; Higley v. Ringle, 57 Kan. 222, 45 Pac. 619; Kennebec Framing Co. v. Pickering, 142 Mass. 80, 7 N. E. 30. See STELTZ v. ARMORY CO., supra.

⁵⁴ Deatherage v. Woods, 37 Kan. 59, 14 Pac. 474; Patrick v. Smith, 120 Mass. 510.

⁵⁵ Penrose v. Calkins, 77 Cal. 396, 19 Pac. 641; Ely v. Wren, 90 Pa. 148.

⁵⁶ Martin v. Burns, 54 Kan. 641, 39 Pac. 177; McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429; Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358; Nofziger Lumber Co. v. Solomon, 13 Cal. App. 621, 110 Pac. 474.

⁵⁷ McDonald v. Erwin, 53 Fla. 1079, 43 South. 872; King v. Smith, 42 Minn. 286, 44 N. W. 65.

⁵⁸ Garrett Lumber Co. v. Loftus, 82 Kan. 556, 109 Pac. 179; Rollin v. Cross, 45 N. Y. 766; Weaver v. Sheeler, 124 Pa. 473, 17 Atl. 17; Id., 118 Pa. 634, 12 Atl. 558; Getto v. Friend, 46 Kan. 24, 26 Pac. 473.

⁵⁹ Wagar v. Briscoe, 38 Mich. 587; Springfield Foundry & Machine Co. v. Cole, 130 Mo. 1, 31 S. W. 922.

⁶⁰ Bayard v. McGraw, 1 Ill. App. 134; Rice v. Nantasket Co., 140 Mass. 256, 5 N. E. 524.

⁶¹ Davidson v. Stewart, 200 Mass. 393, 86 N. E. 779; Orr v. Fuller, 172 Mass. 597, 52 N. E. 1091; Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57.

lien applies,⁶² and may also provide that any part of the premises may be sold, under permission of the court, when the remaining part will be sufficient security for all the claims.⁶³ Under some statutes, for example, the lien extends only to one acre of land, if in the country, and to a "lot," if in a city.⁶⁴ The word "lot" has been construed to mean, however, not the city lot marked out on the city plats, but the whole parcel of land intended to be used in connection with the building giving rise to the lien.⁶⁵ In most states, the lien dates from the commencement of the labor or of the furnishing of the materials, or from the commencement of the building connected with the lien,⁶⁶ and the statutes also generally fix the duration of the lien; that is, the time in which it may be enforced.⁶⁷

Mortgages or other liens upon the property in existence when the mechanic's lien attaches have priority,⁶⁸ but after the mechanic's lien has attached it is prior to all subsequent incumbrances.⁶⁹

Discharge of the Lien

A mechanic's lien may be extinguished by payment of the claim,⁷⁰ and proportionally so by part payment.⁷¹ The lienor may also execute a release in discharge of the lien.⁷² Some states

⁶² *Evans v. Sanford*, 65 Minn. 271, 68 N. W. 21; *Gerard v. Birch*, 28 N. J. Eq. 317.

⁶³ *North Presbyterian Church of Chicago v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261.

⁶⁴ *Tuttle v. Howe*, 14 Minn. 145 (Gil. 113), 100 Am. Dec. 205; *Engleman v. Graves*, 47 Mo. 348.

⁶⁵ *Hill v. Railroad Co.*, 11 Wis. 214. And see *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986.

⁶⁶ *Lavergne v. Construction Co.*, 166 Ala. 289, 52 South. 318; *Appeal of Parrish*, 83 Pa. 111; *Bassett v. Swarts*, 17 R. I. 215, 217, 21 Atl. 352.

⁶⁷ *Freeman v. Cram*, 3 N. Y. 305; *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

⁶⁸ *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. 474, 21 L. R. A. 347; *Blackmar v. Sharp*, 23 R. I. 412, 50 Atl. 852; *Ward v. Yarnelle*, 173 Ind. 535, 91 N. E. 7, 13; *Martsolf v. Barnwell*, 15 Kan. 612; *Erwin v. Acker*, 126 Ind. 133, 25 N. E. 888.

⁶⁹ *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Ivey v. White*, 50 Miss. 142; *Getto v. Friend*, 46 Kan. 24, 26 Pac. 473; *Appeal of Norris*, 30 Pa. 122; *Thomas v. Hoge*, 58 Kan. 166, 48 Pac. 844; *Osborne v. Barnes*, 179 Mass. 597, 61 N. E. 276.

⁷⁰ *Bopp v. Wittich*, 88 Mo. App. 129; *Hulburt v. Just*, 126 Mich. 337, 85 N. W. 872.

⁷¹ *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152; *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855.

⁷² *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65; *Burns v. Carlson*, 53 Minn. 70, 54 N. W. 1055; *Brown v. Williams*, 120 Pa. 24, 13 Atl. 519, 6 Am. St. Rep. 689.

provide for the filing of a bond by the owner of the property, for the security of mechanics and materialmen.⁷³ The bond is usually approved by the court, and is filed in some designated public office.⁷⁴ When filed, it has the effect of discharging liens that have already attached to the premises,⁷⁵ and of preventing other liens from attaching.⁷⁶ The bond, in other words, is a substitute security for the property.⁷⁷ A contractor's bond, common in building contracts, whereby the contractor engages to secure the owner of the premises from all liabilities for mechanics' liens, is an entirely different matter, of course, and is a personal contract between the owner and the contractor.⁷⁸ It is not a substitute security that is binding upon the workmen and materialmen, but only a contract of indemnity in case such liens are filed and enforced by the lienors.⁷⁹

A mechanic's lien may be waived by one having a right to the lien, either by express agreement,⁸⁰ or by such conduct or dealings on his part as will amount to a waiver.⁸¹ A person entitled to

⁷³ *People, for Use of Kroenke, v. Trust Co.*, 154 Mich. 614, 118 N. W. 586; *Main St. Hotel Co. of Horton v. Hardware Co.*, 56 Kan. 448, 43 Pac. 769; *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498; *Kille v. Bentley*, 6 Kan. App. 804, 51 Pac. 232; *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201.

⁷⁴ See *Kille v. Bentley*, 6 Kan. App. 804, 51 Pac. 232; *Sulzer v. Ross*, 12 Pa. Super. Ct. 206.

⁷⁵ *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201; *Risse v. Mill Co.*, 55 Kan. 518, 40 Pac. 904.

⁷⁶ *Risse v. Mill Co.*, 55 Kan. 518, 40 Pac. 904; *In re Burstein* (Sup.) 68 N. Y. Supp. 742; *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498.

⁷⁷ *In re Hurwitz*, 58 Misc. Rep. 379, 110 N. Y. Supp. 1105; *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201; *Morton v. Tucker*, 145 N. Y. 244, 40 N. E. 3.

⁷⁸ *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; *Kaufmann v. Cooper*, 46 Neb. 644, 69 N. W. 796; *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41.

⁷⁹ *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974; *Allen County v. Guaranty Co.*, 122 Ky. 825, 93 S. W. 44, 29 Ky. Law Rep. 356; *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson*, 124 Iowa, 599, 100 N. W. 550; *Brink v. Bartlett*, 105 La. 336, 29 South. 958; *Oberbeck v. Mayer*, 59 Mo. App. 289. See *KERTSCHER & CO. v. GREEN*, 205 N. Y. 522, 99 N. E. 146, Ann. Cas. 1913E, 561, *Burdick Cas. Real Property*.

⁸⁰ *Matthews v. Young*, 16 Misc. Rep. 525, 40 N. Y. Supp. 26; *Benedict v. Hood*, 134 Pa. 289, 19 Atl. 635, 19 Am. St. Rep. 698; *Cushing v. Hurley*, 112 Minn. 83, 127 N. W. 441.

⁸¹ *American Bridge Co. v. Honstain*, 113 Minn. 16, 128 N. W. 1014; *Dymond v. Bruhns*, 101 Ill. App. 425; *Portsmouth Iron Co. v. Murray*, 38 Ohio St. 323; *Harris v. Bridge Co.*, 93 Fed. 355, 35 C. C. A. 341; *Kilpatrick v. Railroad Co.*, 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741.

a mechanic's lien does not, however, waive his right thereto by taking a promissory note for the amount due him.⁸²

Enforcement of the Lien

The statutes usually provide for the enforcement of mechanics' liens, and point out the procedure in connection therewith.⁸³ In most jurisdictions the proceedings are generally equitable in their nature,⁸⁴ and in many states a mechanic's lien is foreclosed by sale, much after the analogy of a mortgage. The details of the procedure vary, however, in different jurisdictions, and the statutes must be followed.⁸⁵

The proceedings are generally held to be in rem,⁸⁶ and consequently must be brought in a court having jurisdiction of the land.⁸⁷ The statutes also fix the time within which the proceedings to enforce the lien may be brought.⁸⁸ In some states mechanics' liens are enforced by the remedy of attachment.⁸⁹

The enforcement suit is usually begun by filing the bill, complaint, or petition, according to the practice of the particular state; the facts giving rise to the lien being set out.⁹⁰ In some states a personal judgment may be rendered against the debtor, but so far as the lien is concerned the judgment is in rem, against the prop-

⁸² *Bashor v. Nordyke & Marmon Co.*, 25 Kan. 222; *McLean v. Wiley*, 176 Mass. 233, 57 N. E. 347; *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318; *Eddy Hotel Co. v. Loyd*, 90 Ark. 340, 119 S. W. 264.

⁸³ *Burger v. Cigar Co.*, 225 Pa. 400, 407, 74 Atl. 219; *Harty Bros. & Harty Co. v. Polakow*, 237 Ill. 559, 86 N. E. 1085; *Nunnally v. Dorand*, 110 Ala. 539, 18 South. 5.

⁸⁴ *Burns Lumber Co. v. W. J. Reynolds Co.*, 148 Ill. App. 356; *McGraw v. Bayard*, 96 Ill. 146; *Raven v. Smith*, 148 N. Y. 415, 43 N. E. 63; *George v. Everhart*, 57 Wis. 397, 15 N. W. 387. See *STELTZ v. ARMORY CO.*, 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872, *Burdick Cas. Real Property*.

⁸⁵ *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420; *Kimball v. Moody*, 97 Ga. 549, 25 S. E. 338; *O'Brien v. Gooding*, 194 Ill. 466, 62 N. E. 898.

⁸⁶ *McCarthy v. Neu*, 93 Ill. 455; *Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566.

⁸⁷ *Prather Engineering Co. v. Railway Co.*, 152 Mich. 582, 116 N. W. 376; *Mathews v. Heisler*, 58 Mo. App. 145; *Boyle v. Gould*, 164 Mass. 144, 41 N. E. 114; *Gelston v. Thompson*, 29 Md. 595; *White v. Millbourne*, 31 Ark. 486.

⁸⁸ *McIntosh v. Schroeder*, 154 Ill. 520, 39 N. E. 478; *Squier v. Parks*, 56 Iowa, 407, 9 N. W. 324; *Kelly v. Construction Co.*, 133 App. Div. 579, 118 N. Y. Supp. 123.

⁸⁹ *De Soto Lumber Co. v. Loeb*, 110 Tenn. 251, 75 S. W. 1043; *Summerlin v. Thompson*, 31 Fla. 369, 12 South. 667; *Oakland Mfg. Co. v. Lemieux*, 98 Me. 488, 57 Atl. 795.

⁹⁰ *Cook v. Brick Co.*, 98 Ala. 409, 12 South. 918; *Crawford v. Crockett*, 55 Ind. 220.

erty itself,⁹¹ and usually directs that the property be sold.⁹² The statute may provide, however, for a redemption of the property, as in the case of a mortgage sale.⁹³

JUDGMENT LIENS

214. A judgment lien is created only by statute. It is not an interest or estate in land, but merely a right, superior to all subsequent claims, liens, incumbrances, or conveyances, to subject the interest or estate of the judgment debtor in the land to the satisfaction of the judgment debt.

Nature and Requirements

At common law a debtor's lands were not liable for his debts, and a judgment was not a lien upon real property.⁹⁴ Judgment liens are, therefore, created only by statute,⁹⁵ and in the absence of a statutory provision a judgment does not become a lien on the debtor's land.⁹⁶ The lien of judgments of federal courts is also created and regulated by the law of the state in which the judgment is rendered.⁹⁷

A judgment lien is not a title to lands, but is merely a security against subsequent purchasers and incumbrancers.⁹⁸ In order to con-

⁹¹ *Porter v. Miles*, 67 Ala. 130; *Lecoutour v. Peters*, 57 Mo. App. 449; *Treusch v. Shryock*, 55 Md. 330.

⁹² *Riggs v. Stewart*, 14 Daly (N. Y.) 434, 14 N. Y. St. Rep. 695; *Brown v. Jones*, 52 Minn. 484, 55 N. W. 54; *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65; *Gauhn v. Mills*, 2 Abb. N. C. (N. Y.) 114; *Bradley v. Simpson*, 93 Ill. 93; *Tower v. Moore*, 104 Iowa, 345, 73 N. W. 823.

⁹³ *State v. Kerr*, 51 Minn. 417, 53 N. W. 719; *Keller v. Coman*, 162 Ill. 117, 44 N. E. 434; *State v. Eads*, 15 Iowa, 114, 83 Am. Dec. 399.

⁹⁴ *VAUGHN v. SCHMALSLE*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, *Burdick Cas. Real Property*; *In re Boyd*, Fed. Cas. No. 1,746, where it is said that after the Statute of Westminster II (13 Edw. I, c. 18, A. D. 1285) allowed the creditor to take a moiety of the debtor's land upon a writ of elegit, and hold the same until the rents and profits satisfied the debt, it was said that a judgment was such a lien; *Low v. Skaggs*, 105 S. W. 439, 31 Ky. Law R. 1292; *Shrew v. Jones*, Fed. Cas. No. 12,818.

⁹⁵ *Street v. Duncan*, 117 Ala. 571, 23 South. 523; *Ives v. Beecher*, 75 Conn. 564, 54 Atl. 207; *Bridges v. Cooper*, 98 Tenn. 394, 39 S. W. 723.

⁹⁶ *In re Brandes' Estate*, 145 Iowa, 743, 122 N. W. 954; *Kiser v. Sawyer*, 4 Kan. 503; *Appeal of Groves*, 68 Pa. 143.

⁹⁷ *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; *In re Morris' Estate*, 6 Phila. (Pa.) 134. See the federal act of August 1, 1888, 25 Stat. 357, c. 729 (U. S. Comp. St. 1901, p. 701). And see *BOURN v. ROBINSON*, 49 Tex. Civ. App. 157, 107 S. W. 873, *Burdick Cas. Real Property*.

⁹⁸ *Sill v. Swackhammer*, 103 Pa. 7; *Swarts v. Stees*, 2 Kan. 236, 85 Am. Dec. 588; *VAUGHN v. SCHMALSLE*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, *Burdick Cas. Real Property*.

stitute a judgment lien, the judgment itself must be valid,⁹⁹ and it must be final.¹ A judgment by confession,² or default,³ is sufficient, however, to establish a lien. Moreover, a decree in a court of equity for the payment of money may create a lien on lands, equally with a judgment of a court of law.⁴ Under the laws of many states a judgment must be entered in the judgment docket before it can operate as a lien, especially with reference to subsequent third parties,⁵ and in some states it is provided by statute that an abstract of a judgment must be recorded in some public office, as, for example, in the office of the county clerk, in order to make it effective as a lien.⁶

Lien Attaches When

The time when a judgment lien attaches, or becomes operative, depends upon the jurisdiction, and the statutes should be consulted in any particular state. A judgment lien, it is said, attaches from its date, but the date of a judgment is determined in different states by different rules. For example, in some states, a judgment dates from the first day of the term in which it is rendered;⁷ in other states, from the last day of such term;⁸ in still others, from the day of its actual rendition.⁹ In states where a judgment must be docketed in order to make it effective as a lien,¹⁰ the judgment becomes a lien from the date of its docketing.¹¹ A judgment or an

⁹⁹ *Hill v. Armistead*, 56 Ala. 118; *Bartlett v. Spicer*, 75 N. Y. 528; *Beach v. Atkinson*, 87 Ga. 288, 13 S. E. 591.

¹ *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; *Grant v. Bennett*, 96 Ill. 513; *Linsley v. Logan*, 33 Ohio St. 376.

² *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Lauffer v. Cavett*, 87 Pa. 479.

³ *Sellers v. Burk*, 47 Pa. 344.

⁴ *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Appeal of Hohman*, 127 Pa. 209, 17 Atl. 902.

⁵ *Sweetland v. Buell*, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 673; *Roll v. Rea*, 57 N. J. Law, 647, 32 Atl. 214; *Callanan v. Votruba*, 104 Iowa, 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am. St. Rep. 538; *VAUGHN v. SCHMALSLE*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, *Burdick Cas. Real Property*; *Gurnee v. Johnson's Ex'r*, 77 Va. 712.

⁶ *Sorrell v. Vance*, 102 Ala. 207, 14 South. 738; *Beardsley v. Beecher*, 47 Conn. 408.

⁷ *Cramer v. Iler*, 63 Kan. 579, 66 Pac. 617; *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429.

⁸ *Chase v. Gilman*, 15 Me. 64.

⁹ *Samson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596; *Baltimore Annual Conference v. Schell*, 17 Wis. 308.

¹⁰ *Supra*.

¹¹ *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30; *Appeal of Hamilton*, 103 Pa. 368; *Wolfe v. Langford*, 14 Cal. App. 359, 112 Pac. 203; *Callanan v. Votruba*, 104 Iowa, 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am. St. Rep. 538;

amendment nunc pro tunc—that is, as if rendered at a prior time—does not become a lien from such prior time, but only from the date of its actual entry.¹²

Affect What Property

A judgment lien attaches only to the interest or estate of the judgment debtor in the land.¹³ It attaches to a life estate,¹⁴ including the estate of curtesy,¹⁵ to vested remainders and reversions,¹⁶ and, in some states, to leasehold interests.¹⁷ It attaches, as a rule, to all the lands of the debtor in the county in which the judgment is rendered,¹⁸ although, as generally provided by statute, it does not extend to lands situated in other counties of the state, unless a transcript of the judgment is filed in some designated public office of such other counties.¹⁹ A judgment has no effect as a lien in any other state, however, than that in which it is rendered.²⁰

Property exempt from execution,²¹ including homesteads,²² are not subject to judgment liens. Moreover, as a rule, equitable interests in lands are not affected by liens arising from judgments at law,²³ although, in some states, they are made subject to such liens by statute or judicial decision.²⁴

VAUGHN v. SCHMALESLE, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, Burdick Cas. Real Property.

¹² Cockey v. Milne's Lessee, 16 Md. 200; Davidson v. Richardson, 50 Or. 323, 89 Pac. 742, 91 Pac. 1080, 17 L. R. A. (N. S.) 319, 126 Am. St. Rep. 738.

¹³ Moore v. Scruggs, 131 Iowa, 692, 109 N. W. 205, 117 Am. St. Rep. 437; Holden v. Garrett, 23 Kan. 98; Millard v. McMullin, 68 N. Y. 345; Robisson v. Miller, 158 Pa. 177, 27 Atl. 887.

¹⁴ Verdin v. Slocum, 71 N. Y. 345; Bridge v. Ward, 35 Wis. 687.

¹⁵ Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Lancaster County Bank v. Stauffer, 10 Pa. 398.

¹⁶ Sayles v. Best, 140 N. Y. 368, 35 N. E. 636; Williams v. Amory, 14 Mass. 20; Winter v. Dunlap, 84 Kan. 519, 114 Pac. 1057.

¹⁷ Ives v. Beecher, 75 Conn. 564, 54 Atl. 207; Hayden v. Goppinger, 67 Iowa, 106, 25 N. W. 743. See, however, BOURN v. ROBINSON, 49 Tex. Civ. App. 157, 107 S. W. 873, Burdick Cas. Real Property.

¹⁸ Appeal of McCullough, 34 Pa. 248; Sapp v. Wightman, 103 Ill. 150; Fiske v. Anderson, 33 Barb. (N. Y.) 71; VAUGHN v. SCHMALESLE, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, Burdick Cas. Real Property.

¹⁹ Mudge v. Livermore, 148 Iowa, 472, 123 N. W. 199; Neil v. Colwell, 66 Pa. 216; Berry v. Reed, 73 Ind. 235.

²⁰ Billan v. Hercklebrath, 23 Ind. 71; Smith v. Eyre, 149 Pa. 272, 24 Atl. 288.

²¹ King v. Easton, 135 Ind. 353, 35 N. E. 181; Dumbould v. Rowley, 113 Ind. 353, 15 N. E. 463.

²² Rodgers v. Bank, 82 Mo. App. 377; Davenport v. Fleming, 154 N. C. 291, 70 S. E. 472. See Homesteads, ante, chapter IX.

²³ Pettus v. Gault, 81 Conn. 415, 71 Atl. 509; Kirkwood v. Koester, 11 Kan. 471; Flint v. Chaloupka, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771.

²⁴ In re Fair Hope North Savage Fire Brick Co.'s Assigned Estate, 183 Pa. 96, 38 Atl. 519; Robisson v. Miller, 158 Pa. 177, 27 Atl. 887.

Judgments do not create liens on lands previously conveyed in good faith,²⁵ although they may so operate upon lands previously conveyed in fraud of creditors.²⁶ In most states a judgment is also a lien upon lands acquired after the rendition of the judgment.²⁷

Priorities

Judgment liens take priority over subsequent liens, incumbrances, or conveyances.²⁸ They are subordinate, however, to previous claims, of which there is notice, whether liens, incumbrances, or conveyance, created in good faith.²⁹ With reference to the priority of two or more judgment liens themselves, the one prior in time is superior.³⁰ Where two judgments are entered on the same day, some states hold that preference will be given to the one first entered;³¹ others, that there is no priority in such a case, but that the judgments are to be paid pro rata, if the fund is insufficient to satisfy all the judgments;³² and others hold that the creditor who first sues out execution will be given priority.³³

With reference to priority in connection with prior deeds or mortgages not recorded, and of which there is no actual notice, the cases are conflicting; some holding that the lien of a judgment will hold against such unrecorded claims,³⁴ and others holding the contrary.³⁵

²⁵ *Mercur v. Railroad Co.*, 171 Pa. 12, 32 Atl. 1126; *Mott v. Hospital*, 55 N. J. Eq. 722, 37 Atl. 757.

²⁶ *In re Lowe* (D. C.) 19 Fed. 589; *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707; *Eastman v. Schettler*, 13 Wis. 324. Cf. *In re Estes* (D. C.) 3 Fed. 134.

²⁷ *Babcock v. Jones*, 15 Kan. 296; *Steele v. Taylor*, 1 Minn. 274 (Gil. 210); *Smith v. Thompson*, 169 Mo. 553, 69 S. W. 1040; *VAUGHN v. SCHMALSLER*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, *Burdick Cas. Real Property*.

²⁸ *Kirkwood v. Koester*, 11 Kan. 471; *Seeberger v. Campbell*, 88 Iowa, 63, 55 N. W. 20; *Kuhn v. Bank*, 74 Kan. 456, 87 Pac. 551, 118 Am. St. Rep. 332.

²⁹ *Appeal of Beekman*, 38 Pa. 385; *Anglo-American Land, Mortgage & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063; *Watson v. Bowman*, 142 Iowa, 528, 119 N. W. 623.

³⁰ *Jackson v. King* (1902) 64 Kan. 886, 67 Pac. 1112; *In re Cake's Estate*, 186 Pa. 412, 40 Atl. 568; *Sigworth v. Meriam*, 66 Iowa, 477, 24 N. W. 4.

³¹ *German Security Bank v. Campbell*, 99 Ala. 249, 12 South. 436, 42 Am. St. Rep. 55; *Herron v. Walker*, 69 Miss. 707, 12 South. 259.

³² *Ladley v. Creighton*, 70 Pa. 490; *McLean v. Rockey*, Fed. Cas. No. 8,891; *Bruce v. Vogel*, 38 Mo. 100.

³³ *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Kisterson v. Tate*, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419.

³⁴ *Richards v. Steiner Bros.*, 166 Ala. 353, 52 South. 200; *Gary v. Newton*, 201 Ill. 170, 66 N. W. 267; *Hunt v. Swayze*, 55 N. J. Law, 33, 25 Atl. 850.

³⁵ *McCalla v. Investment Co.*, 77 Kan. 770, 94 Pac. 126, 14 L. R. A. (N. S.) 1258; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Bird v. Adams*, 56 Iowa, 292, 9 N. W. 224; *Appeal of Mellon*, 32 Pa. 121; *VAUGHN v. SCHMALSLER*, 10 Mont. 186, 25 Pac. 102, 10 L. R. A. 411, *Burdick Cas. Real Property*.

Duration and Discharge

The duration of a judgment lien is regulated by the express provisions of the various statutes, it being generally provided that a lien shall lose its force unless execution be taken out within a certain specified time, usually from one to several years.³⁶ The death of the judgment debtor does not, as a rule, terminate the lien.³⁷ In some states, moreover, a lien upon its statutory termination may be continued by a revival of the judgment.³⁸ A judgment lien may also be discharged by payment or satisfaction of the judgment,³⁹ or by the release of the creditor.⁴⁰ In case the debtor's interest in the property affected by the lien is less than a fee, a judgment lien will also be discharged by the termination of his estate or interest.⁴¹

OTHER LIENS

215. In addition to the liens already considered, real property may be subjected to other claims or charges created by statutory enactments, or by a court of equity.

In General

In addition to the liens created by mortgages, mechanics' liens, and judgment liens, there are various other possible liens which may attach to real property. For example, land may be subjected to claims or charges arising from tax liens,⁴² from various assessment liens in connection with public improvements,⁴³ from agricultural or crop liens,⁴⁴ for liens for improvements made by bona

³⁶ *Thomas v. Van Meter*, 164 Ill. 304, 45 N. E. 405; *Smalley v. Bowling*, 64 Kan. 818, 68 Pac. 630; *Smith v. Hogg*, 52 Ohio St. 527, 40 N. E. 406; *Appeal of Jameson*, 6 Pa. 280; *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30.

³⁷ *In re Wiley's Estate*, 138 Cal. 301, 71 Pac. 441; *McAfee v. Reynolds*, 130 Ind. 33, 28 N. E. 423, 18 L. R. A. 211, 30 Am. St. Rep. 194; *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162; *BOURN v. ROBINSON*, 49 Tex. Civ. App. 157, 107 S. W. 873, *Burdick Cas. Real Property*.

³⁸ *Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Wetmore v. Wetmore*, 155 Pa. 507, 26 Atl. 694; *Verner v. Bookman*, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870.

³⁹ *Purse v. Estes*, 165 Mo. 49, 65 S. W. 245; *Branch Bank at Mobile v. Ford*, 13 Ala. 431; *Page v. Benson*, 22 Ill. 484.

⁴⁰ *Snyder v. Crawford*, 98 Pa. 414; *Dalby v. Cronkhite*, 22 Iowa, 222.

⁴¹ *Moore v. Pitts*, 53 N. Y. 85; *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636; *Stockett v. Howard*, 34 Md. 121.

⁴² See post, chapter XXIV.

⁴³ *Infra*.

⁴⁴ *Infra*.

fide occupants,⁴⁵ for liens in connection with owelty of partition,⁴⁶ and for liens arising from the debts of a deceased owner.⁴⁷

As to their origin, the various liens or charges upon land are equitable, or statutory. Various equitable liens, such as vendors' and vendees' liens, have already been considered in connection with equitable mortgages.⁴⁸ As a rule, where a contract shows an intention to create a lien, based upon an adequate consideration, equity will give effect to such intention, and will enforce it against all persons with notice who are in privity with the original party.⁴⁹ Equity may also create liens for the purpose of promoting right and justice, as, for example, where one in good faith, but under mistake, makes improvements that are of permanent and material benefit to the property of another.⁵⁰

Statutory liens are usually construed strictly,⁵¹ and the conditions leading up to their existence must be carefully observed.⁵² For example, the statutes generally provide that assessments made for municipal improvements, such as streets, sidewalks, intersections, sewers, drains, waterworks, parks, and other public works, shall constitute a lien upon the property assessed;⁵³ but such special assessments do not become liens unless the statute does so provide.⁵⁴ Some statutes also provide that advances for the raising of crops may, by agreement, create liens, usually known as agricultural or crop liens.⁵⁵ Such liens, however, do not, as a rule, attach to the land, but only to the crop produced by means of the advances made.⁵⁶ As in the case of all other liens, however, in or-

⁴⁵ *Infra*.

⁴⁶ See Partition in connection with Joint Ownership, chapter XII.

⁴⁷ *Infra*.

⁴⁸ See chapter XVIII.

⁴⁹ *In re New Glenwood Canning Co.*, 150 Iowa, 696, 130 N. W. 800; *Patrick v. Morrow*, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107; *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580.

⁵⁰ *Phillips v. Browne*, 20 R. I. 79, 37 Atl. 490; *Haggerty v. McCanna*, 25 N. J. Eq. 48.

⁵¹ *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Gile v. Atkins*, 93 Me. 223, 44 Atl. 896, 74 Am. St. Rep. 341.

⁵² *Higgins v. Higgins*, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57; *Miller v. Factory*, 26 Md. 478.

⁵³ *New York v. Colgate*, 12 N. Y. 140; *Hoyt v. Fass*, 64 Wis. 273, 25 N. W. 45.

⁵⁴ *Cemansky v. Fitch*, 121 Iowa, 186, 96 N. W. 754; *Meadville City v. Dickson*, 129 Pa. 1, 18 Atl. 513.

⁵⁵ *Boyett v. Potter*, 80 Ala. 476, 2 South. 534; *Wallace v. Palmer*, 36 Minn. 126, 30 N. W. 445.

⁵⁶ *Wallace v. Palmer*, 36 Minn. 126, 30 N. W. 445; *Succession of Waddell*, 44 La. Ann. 361, 10 South. 808.

der to make such liens effective against third persons, there must be actual notice of the lien, or it must be recorded.⁵⁷

Liens for improvements made in good faith by occupants are, likewise, recognized by statute in some jurisdictions,⁵⁸ and it has previously been pointed out that, independently of statute, equity may decree a lien or charge upon land for improvements.⁵⁹

In connection, moreover, with partition suits, when an owelty of partition is ordered by the court, the amount may be regarded as a sum due to a vendor of land, and as secured by a vendor's lien upon the land.⁶⁰

In the case of title by devise or descent, the devisee or the heir will take the land subject to any lien or claim which the creditors of the decedent may have upon it for the security of his debts.⁶¹

Priorities

Where liens are given by statute and are merely legal, the one that is prior in time takes precedence,⁶² and between equitable liens, equal in other respects, the elder is, likewise, preferred.⁶³ A specific equitable lien on land has preference, moreover, over a subsequent legal lien by judgment.⁶⁴ In some states, however, the priority of statutory liens is fixed by the statutes creating them.⁶⁵ If liens attach concurrently, each lienor is usually entitled to a pro rata satisfaction.⁶⁶

⁵⁷ *Flower v. Skipwith*, 45 La. Ann. 895, 13 South. 152; *Watson v. May*, 62 Ark. 435, 35 S. W. 1108; *Griel v. Lehman*, Durr & Co., 59 Ala. 419; *Martin v. Hawthorn*, 3 N. D. 412, 57 N. W. 87.

⁵⁸ *Mercer v. Justice*, 63 Kan. 225, 65 Pac. 219; *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 180; *McDonald v. Rankin*, 92 Ark. 173, 122 S. W. 88.

⁵⁹ *Supra*. And see *Robards v. Robards*, 85 S. W. 718, 27 Ky. Law Rep. 494; *Bright v. Boyd*, Fed. Cas. No. 1,875, 1 Story, 478; *Id.*, Fed. Cas. No. 1,876, 2 Story, 605.

⁶⁰ *Stortz v. Ruttiger*, 249 Ill. 494, 94 N. E. 181; *Stewart v. Bank*, 101 Pa. 342; *Robinson v. Robinson*, 24 R. I. 222, 52 Atl. 992.

⁶¹ See post, chapter XXIII.

⁶² *Puryear v. Taylor*, 12 Grat. (Va.) 401.

⁶³ *Munroe v. Bonanno* (Sup.) 28 N. Y. Supp. 375; *Jordan v. Everett*, 93 Tenn. 390, 24 S. W. 1128.

⁶⁴ *Dwight v. Newell*, 3 N. Y. 185.

⁶⁵ See the statutes of the several states.

⁶⁶ *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; *Stiles v. Galbreath* (1905) 69 N. J. Eq. 222, 60 Atl. 224.

PART IV

THE ACQUISITION AND TRANSFER OF REAL PROPERTY

CHAPTER XXII

TITLE—IN GENERAL

- 216. Title Defined.
- 217. Acquisition of Land by Nation or State.
- 218. Acquisition of Land by Private Persons.
- 219. Public Grant.
- 220. Accretion.
- 221. Private Grant.
- 222. Conveyances.
- 223. Common-Law Conveyances.
- 224. Conveyances under Statute of Uses.
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- 226. Transfers of Registered Titles.
- 227. Title by Estoppel.
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- 229. Adverse Possession.
- 230. Against whom Possession is Adverse.
- 231. Interest or Estate Acquired.
- 232. Abandonment after Title is Acquired.

TITLE DEFINED

216. Title, as a foundation of ownership in general, may be defined as the lawful cause or ground of possessing that which is our own. As applied to real property, title is the means whereby the ownership of land is acquired. Title to land is said to be either by—

- (a) Descent; or
- (b) Purchase.

The word "title"¹ is used with a variety of meanings. Even when used as a legal term, it is sometimes said to mean "ownership,"² or "an estate in fee,"³ or "a right of possession,"⁴ or

¹ Literally, an inscription, a name, as the title of a legislative act, etc.

² *Livingston v. Ruff*, 65 S. C. 284, 43 S. E. 678.

³ *Gillespie v. Broas*, 23 Barb. (N. Y.) 370, 381; *Jones v. Gardner*, 10 Johns. (N. Y.) 266, 269.

⁴ *Rodgers v. Palmer*, 33 Conn. 155, 156; *Dunster v. Kelly*, 110 N. Y. 558, 18 N. E. 261.

"the evidence of one's right of possession."⁸ Such uses of the word are special, however, and apply only in particular instances. As connected with ownership in general whether of real or of personal property,⁹ title is the lawful means of possessing that which is one's own.⁷ As applied to real property, title is the means whereby the owner of lands acquires his estates therein.⁸

The acquisition of an estate in lands is said to be either by descent or purchase, or, in other words, by act of law or by act of the parties.⁹

Title by descent is a title by which one person upon the death of another acquires the real property of the latter as his heir at law. By act of the law itself the title to lands of the ancestor is cast upon the heir.¹⁰

Title by purchase is not limited to the popular meaning of the word "purchase," namely, the buying of land for money or other valuable consideration,¹¹ but includes every mode of acquiring an estate except that of descent.¹² It includes title by devise, or will, conveyance, occupancy, matter of record, escheat, adverse possession, execution sale, eminent domain—in fact, every lawful method of acquisition by act of the parties, as opposed to descent.¹³

Title by purchase is also said to be either original or derivative. Original title arises when the subject-matter of ownership, not being at the time the property of another, is acquired by first

⁸ *Chapman v. Dougherty*, 87 Mo. 617, 620, 56 Am. Rep. 469; *Patty v. Middleton*, 82 Tex. 586, 591, 17 S. W. 909, 911.

⁹ *Pratt v. Fountain*, 73 Ga. 261, 262; *Hunt v. Eaton*, 55 Mich. 362, 21 N. W. 429.

⁷ *Titulus est justa causa possidendi id quod nostrum est*: 1 Coke, 345b; 2 Blk. Comm. 195. It is sometimes said that this definition applies only to title to lands. Coke, however, borrowed his definition from the civil, or Roman, law. In that system, *justa causa* is synonymous with *justus titulus*, being the legal ground by which acquisition is made valid, as, for example, sale, legacy, dowry, payment of a debt, or free gift. C. 3, 32, 24; *Hunter*, Rom. Law, 283.

⁸ 2 Blk. Comm. 195; Co. Litt. 345; *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, 360; *Donovan v. Pitcher*, 53 Ala. 411, 417, 25 Am. Rep. 634; *Kamphouse v. Gaffner*, 73 Ill. 453, 458; *Arrington v. Liscom*, 34 Cal. 365, 385, 94 Am. Dec. 722.

⁹ Co. Litt. 18b; *Stephen's Comm.* I, 255.

¹⁰ *Orr v. White*, 106 Ind. 341, 6 N. E. 909, 910.

¹¹ 2 Blk. Comm. 241.

¹² *Falley v. Gribbling*, 128 Ind. 110, 115, 26 N. E. 794; *Bennett v. Hibbert*, 88 Iowa, 154, 163, 55 N. W. 93; *City of Enterprise v. Smith*, 62 Kan. 815, 816, 62 Pac. 324; *Stamm v. Bostwick*, 40 Hun (N. Y.) 35, 38.

¹³ Co. Litt. 18b; *Delaney v. City of Salina*, 34 Kan. 532, 9 Pac. 271, 276; *Burt v. Insurance Co.*, 106 Mass. 364, 8 Am. Rep. 339. See cases, also, in preceding note.

occupancy or by accession. Derivative title is such title as is connected with acquisition from a former owner.

ACQUISITION OF LAND BY THE NATION OR STATE

217. A sovereign state, or nation, may acquire lands by (a) discovery, occupation, conquest and cession; also by (b) grant, eminent domain, confiscation, and escheat. The states of our American Union may acquire lands by the methods indicated in the latter group, although not by the former; such methods being the prerogative of the nation.

Discovery, Occupation, Conquest, and Cession

The acquisition of land by a sovereign state may be considered either from the viewpoint of public law or of private law. The former refers more appropriately to the acquisition of territorial jurisdiction; the latter, to the acquisition of land as a private owner. The means by which a nation may acquire territorial jurisdiction form a very important part of international law, and require but brief mention here.

The most usual methods of acquiring territorial jurisdiction on the part of a sovereign state are discovery, occupation, conquest, and cession. To these may be added, for particular cases, prescription and accretion.

In earlier times, nations claimed jurisdiction to lands by the right of discovery alone. So much controversy was raised, however, by this doctrine, that it became the established principle, later, that occupation must follow discovery in order to constitute a recognized right to jurisdiction.

Title by conquest is said to exist where the territory of another nation has been held for so long a time by the enemy in military occupation that it is regarded, in international law, as having come under the permanent jurisdiction of the enemy. At the cessation of hostilities, lands claimed by conquest may be ceded in the treaty of peace.

Title by cession may arise by gift, by exchange, or by sale; the latter mode being the most common. For example, the United States bought Louisiana from France, in 1803; Florida from Spain, in 1819; Mexico ceded to the United States, in 1848, the California territory, including the present state of California, and also Utah, Arizona, New Mexico, and parts of Colorado and Wyoming; we purchased Alaska from Russia, in 1867; and the Philippines, Guam, and Porto Rico from Spain, in 1898.

Title by prescription is seldom asserted. It has arisen, however, at times, where the territorial rights of nations have been recognized from the fact of long-continued possession of certain lands. Title by accretion may also be applied to national rights in connection with changes in the boundary lines between nations. The principles governing title in such cases are the same as apply to private titles.¹⁴

Original Titles in the United States

The original title to lands on this continent was acquired by various European nations by discovery and occupation. The Indians, like all other uncivilized peoples, were not regarded by the law of nations as having territorial jurisdiction. Such peoples are admitted, however, "to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil of their own will, except to the government claiming the right of pre-emption. * * * The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been questioned."¹⁵

England acquired title to the land within the limits of the original American colonies partly by discovery, and partly by conquest and cession. These crown rights were granted to certain proprietors and corporations. The various colonies were either royal or proprietary. The crown retained the right to the soil in royal colonies, and granted lands therein.¹⁶ In a proprietary colony, the title to the soil was vested by the royal grant in the proprietors,¹⁷ and they in turn disposed of the lands at their pleasure.¹⁸ The proprietors, also, in many instances purchased the rights of the Indians. These purchases from the Indians were held not to convey the freehold, but merely to release the rights of the grantors.¹⁹ Private persons

¹⁴ See Accretion, *infra*.

¹⁵ 3 Kent, Comm. 379, 380; *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. Ed. 997; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. Ed. 162. See, as to Indian titles, 1 Dembitz, Land Tit. § 65.

¹⁶ *Montgomery v. Doe*, 13 Smedes & M. (Miss.) 161. See, also, *In re Proprietary Claims*, 10 Haz. Reg. (Pa.) 113.

¹⁷ *Montgomery v. Doe*, *supra*; *Conn v. Penn*, Fed. Cas. No. 3,104, Pet. C. C. 496.

¹⁸ *Conn v. Penn*, *supra*. See, also, *Hurst v. Durnell*, Fed. Cas. No. 6,927, 1 Wash. C. C. 262.

¹⁹ *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 17, 8 L. Ed. 25; *United States v. Cook*, 19 Wall. (U. S.) 591, 22 L. Ed. 210.

were, in the main, prohibited from buying lands from the Indians without authority from the government of the colony in which the lands were situated.²⁰

The rights of the crown of Great Britain passed as a result of the Revolutionary War to the states,²¹ and the thirteen original states, upon achieving their independence, became the owners of the land within their borders not previously disposed of to private owners.²² When new states were created out of the original domains of the older states, such new states, in turn, became vested with the title of the vacant lands within their borders.²³ The ownership by the United States of lands within the territorial jurisdictions of all these states was acquired by cession from the individual states.²⁴ The territorial jurisdiction of the United States has been vastly increased, however, as we have seen, by various purchases. The title to all unoccupied lands in such ceded territory became vested, consequently, in the United States,²⁵ as was not true in the case of the original states, and of new states carved out of their territory. When, however, new states were formed out of the lands purchased from other nations, the title to the land in such states, not owned by private persons, remained in the United States,²⁶ and formed the bulk of the once vast domain of the public lands of the United States.

Grant

Using the term "grant" to designate a private conveyance, in distinction from the term "cession," which technically applies to the ceding of territory by a nation, either the United States or a state may acquire land from private persons by any of the modes of conveyance which operate between individuals. In the same way, a state may convey land to the United States, or the United States to a state.

²⁰ *Goodell v. Jackson*, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351. And see *Marshall, C. J.*, in *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681.

²¹ *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. Ed. 997; *Commonwealth v. City of Roxbury*, 9 Gray (Mass.) 451; *People v. Ferry Co.*, 68 N. Y. 71, 78.

²² *People v. Livingston*, 8 Barb. (N. Y.) 253; *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189; *State v. Pinckney*, 22 S. C. 484. See, also, *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. Ed. 565.

²³ *Pollard v. Hagan*, *supra*.

²⁴ *Id.*

²⁵ *People ex rel. Attorney General v. Folsom*, 5 Cal. 373; *State v. Kennard*, 57 Neb. 711, 78 N. W. 282; *Id.*, 56 Neb. 254, 76 N. W. 545; *Irvine v. Marshall*, 20 How. (U. S.) 558, 561, 15 L. Ed. 994.

²⁶ *Stoner v. Royar*, 200 Mo. 444, 98 S. W. 601; *Irvine v. Marshall*, 20 How. (U. S.) 558, 15 L. Ed. 994.

Eminent Domain

The acquisition of land by the United States, or by a state, under the power of eminent domain, is considered elsewhere in this work.²⁷

Confiscation and Escheat

At common law, persons attainted of treason and felony were subject to the forfeiture of their lands to the crown.²⁸ While this part of the common law has not been recognized in the United States,²⁹ yet acts known as "Confiscation Acts" have, at various times, been passed by Congress. Under the act of 1861,³⁰ land used for insurrectionary purposes with the consent of the owner was subject to forfeiture, and could be sold.³¹

The common-law rule of escheat still, however, generally prevails. By this rule, if a person dies intestate, leaving no heirs, his real property goes to the state.³²

ACQUISITION OF LAND BY PRIVATE PERSONS

218. Title may be acquired by private persons in the following ways:

- (a) By public grant.
- (b) By private grant.
- (c) By estoppel.
- (d) By adverse possession.
- (e) By accretion.
- (f) By devise.
- (g) By descent.
- (h) By official grant.

²⁷ See post, chapter XXIV.

²⁸ 2 Blk. Comm. 290.

²⁹ It is also abolished by statute in England, Forfeiture Act of 1870, 33 & 34 Vict. c. 23.

³⁰ Act Aug. 6, 1861, c. 60, 12 Stat. 319.

³¹ See 1 Stim. Am. St. Law, § 1162. The United States constitution forbids forfeiture beyond the life of the offender. Under Act July 17, 1862, c. 195, 12 Stat. 589, confiscating the property of persons in rebellion, the offender had no estate remaining in him which he could convey. *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473. When a forfeiture is enforced, the United States or state takes only the title of the offender. *Borland v. Dean*, 4 Mason, 174, Fed. Cas. No. 1,660; *Shields v. Shift*, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. Ed. 445; *Kirk v. Lynd*, 106 U. S. 315, 1 Sup. Ct. 296, 27 L. Ed. 193.

³² 1 Stim. Am. St. Law, art. 115. And see Title by Descent, post, chapter XXIII.

SAME—PUBLIC GRANT

219. Title may be acquired by individuals directly from the United States or from a state. Conveyance by way of public grant is usually made by an instrument known as a "patent."

Public Lands

Land owned by the United States or by a state and intended for sale and settlement are generally known as "public lands."³³ The legal title to the national public lands is vested in the United States,³⁴ and the power to dispose of such lands is vested in congress.³⁵ When, however, the federal government has granted lands to a state, the authority of congress over such lands is terminated.³⁶ Private persons may obtain title to public lands by direct conveyance; such mode of acquisition being usually termed a "public grant." Before, however, entry can be lawfully made upon public lands by private persons, or title granted, it is necessary, in absence of special statute to the contrary,³⁷ that they should have been surveyed in accordance with the federal law.³⁸

The Survey of Public Lands

The statutes of the United States provide for a rectangular system of survey of the public lands.³⁹ These statutes⁴⁰ direct that the public lands shall be divided by north and south lines run according to the true meridian,⁴¹ and by other lines crossing

³³ *Martin v. Burford*, 181 Fed. 922, 104 C. C. A. 360; *RIERSON v. RAILROAD CO.*, 59 Kan. 32, 51 Pac. 901, *Burdick Cas. Real Property*; *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806.

³⁴ *Union Mill & Min. Co. v. Ferris*, Fed. Cas. No. 14,371, 2 Sawy. 176.

³⁵ *McCracken v. Todd*, 1 Kan. 148; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401; *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*.

³⁶ *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 30 South. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143.

³⁷ *Carson v. Smith*, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539.

³⁸ *Stark v. Starr*, 6 Wall. (U. S.) 402, 18 L. Ed. 925; *Daniels v. Lansdale*, 43 Cal. 41; *Rector v. Gaines*, 19 Ark. 70.

³⁹ This system originated in this country. It was recommended on May 7, 1784, by a committee of Congress of which Thomas Jefferson was chairman. The system was first applied to the public lands northwest of the Ohio river.

⁴⁰ See Rev. St. § 2395 et seq. (U. S. Comp. St. 1901, pp. 1471, 1473).

⁴¹ The dominant north and south lines are known as principal meridians, there being thirty of these at the present time. Six of these are numbered,

them at right angles,⁴² so as to form townships of six miles square.⁴³

The township is further subdivided into sections,⁴⁴ containing, as nearly as may be, six hundred and forty acres each, by running, each way, parallel lines at the end of every two miles, and by making a corner on each of such lines at the end of every mile. The sections are numbered, beginning with number one in the northeast section and proceeding west and east alternately till the thirty-six are completed.⁴⁵ Fractional sections are, at times, caused by lakes and meandering streams and by Indian or other reservations.⁴⁶

Where the exterior lines of the township exceed, or do not extend, six miles, the excess or deficiency is added to or deducted from the western or northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from north to south.⁴⁷

Plats of the public survey must be filed in the district land office,⁴⁸ and also in the general land office.⁴⁹ The plat and the description, when filed by the surveyor general, are controlling and conclusive.⁵⁰ In case however, of a conflict between the field notes and the plat, the field notes govern, and the land department may correct the plat.⁵¹ The courts, however, will not correct alleged mistakes in the surveys, unless such mistakes are established by positive evidence.⁵²

By this system of survey any portion of land may be located with certainty and accuracy. While the section of six hundred and forty acres, a square mile, is the unit of the actual survey,

being designated as "the first principal meridian," "the second principal meridian," and so on. The other twenty-four meridians are named from the locality in which they are placed. Other north and south lines, known as guide meridians, are located at regular distances.

⁴² The dominant east and west lines are known as base lines. There are twenty-three principal base lines at the present time.

⁴³ Rev. St. U. S. 1878, §§ 2395, 2396.

⁴⁴ Rev. St. §§ 2395; 2396 (U. S. Comp. St. 1901, pp. 1471, 1473).

⁴⁵ Rev. St. §§ 2395, 2396 (U. S. Comp. St. 1901, pp. 1471, 1473). See Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240.

⁴⁶ Wilson v. Hoffman, 70 Mich. 552, 38 N. W. 558; Goltermann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

⁴⁷ Rev. St. § 2395 (U. S. Comp. St. 1901, p. 1471).

⁴⁸ Rev. St. § 2223 (U. S. Comp. St. 1901, p. 1362).

⁴⁹ Id.

⁵⁰ Murphy v. Tanner, 176 Fed. 537, 100 C. C. A. 125; Gleason v. White, 199 U. S. 54, 25 Sup. Ct. 782, 50 L. Ed. 87; Tolleston Club of Chicago v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

⁵¹ Harrington v. Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

⁵² Blair v. Brown, 17 Wash. 570, 50 Pac. 483.

yet, in practice, the sections are divided into halves, quarters, eighths, or even smaller parts. A quarter section, containing one hundred and sixty acres, is a very common subdivision. In order to describe any section, or any fractional part thereof, the number of the section is given, as, for example, section 27, or the north-east quarter of section 27, in a township north or south of a particular base line, and "range" east or west of some principal meridian; each tier of townships running north and south being known as a "range." Descriptions of this kind are common in deeds in those states where the government surveys have been made, and such descriptions are sufficient.⁵³

The Land Department

The sale of the public lands has, by federal statute, been placed under the control of the secretary of the interior.⁵⁴ For the carrying out of this part of the public business, a bureau, known as the land department, has been created, under the supervision of the commissioner of the general land office,⁵⁵ and to the officers of this bureau, as a quasi judicial tribunal,⁵⁶ the execution and administration of the public land laws are intrusted.⁵⁷ The decision of the commissioner in connection with the issuing of a patent, if unreversed upon appeal to the secretary of the interior, is conclusive in all judicial proceedings as to the legal title.⁵⁸ When, however, a patent has been issued by the land department, and accepted by the grantee, all control of the executive department of the government over the title ceases.⁵⁹

Patents

The usual method of conveyance by public grant is a patent, and, as a general rule,⁶⁰ the issuance of a patent in the name of the United States is necessary to pass the title in public lands to a

⁵³ *Bowen v. Prout*, 52 Ill. 354.

⁵⁴ *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*; *Rev. St. U. S.* 1878, § 441.

⁵⁵ *Rev. St. U. S.* 1878, § 446 et seq. See *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*.

⁵⁶ *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *New Dunderberg Min. Co. v. Old*, 79 Fed. 598, 25 C. C. A. 116.

⁵⁷ *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488; *Cosmos Exploration Co. v. Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; *Warnekros v. Cowan*, 13 Ariz. 42, 108 Pac. 238.

⁵⁸ *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 20 L. Ed. 485.

⁵⁹ *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848. And see *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*.

⁶⁰ See *Statutory Grants*, *infra*.

private owner.⁶¹ A certificate of purchase issued to a purchaser of public lands,⁶² or the land receiver's final receipt of payment for the same,⁶³ entitles the lawful holder to a patent, but it does not in itself convey the title.⁶⁴ It gives, however, to the holder an equitable title, and is binding upon the government.⁶⁵ However, after the lapse of twenty years, there is a presumption that a patent has been issued to the certificate holder.⁶⁶

A patent is the highest evidence of title.⁶⁷ All patents are issued in the name of the United States,⁶⁸ and the federal statutes require that they shall be signed by the president,⁶⁹ or in the name of the president by his secretary,⁷⁰ or by an executive clerk,⁷¹ and countersigned by the recorder of the general land office,⁷² and recorded in the general land office, in books kept for that purpose.⁷³ These provisions are mandatory, and must be strictly observed in order to give the patent validity.⁷⁴ A description that identifies the land conveyed is sufficient.⁷⁵ The

⁶¹ *Knapp v. Lumber Co.*, 145 Wis. 528, 130 N. W. 504, 140 Am. St. Rep. 1091; *Hagan v. Ellis*, 39 Fla. 463, 22 South. 727, 63 Am. St. Rep. 167; *Niles v. Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171.

⁶² *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336; *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488.

⁶³ The receiver's final receipt is an acknowledgment by the government that it has received full pay for the land and that it holds the legal title in trust for the entryman and will in due course issue to him a patent therefor. *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488.

⁶⁴ *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336.

⁶⁵ *Fulton v. Doe*, 5 How. (Miss.) 751; *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336; *American Mortg. Co. of Scotland v. Hopper* (C. C.) 56 Fed. 67. There is a conflict in the cases as to the effect of a receipt or a certificate. Some state cases hold that it gives the holder a sufficient legal title to maintain ejectment. *Bates v. Herron*, 35 Ala. 117; *Moore v. Coulter*, 31 Ga. 278; *Galipot ex dem. Bruner v. Manlove*, 2 Ill. (1 Scam.) 156; *Carman v. Johnson*, 29 Mo. 94. It is held, however, by the Supreme Court of the United States, that a patent is necessary in order to divest the United States of its title. *Niles v. Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171.

⁶⁶ *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124.

⁶⁷ *Irvine v. Tarbat*, 105 Cal. 237, 38 Pac. 896; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, 10 L. Ed. 235. And see *Maxey v. O'Connor*, 23 Tex. 238.

⁶⁸ Rev. St. § 458 (U. S. Comp. St. 1901, p. 259).

⁶⁹ Rev. St. § 458 (U. S. Comp. St. 1901, p. 259).

⁷⁰ Rev. St. § 458 (U. S. Comp. St. 1901, p. 259).

⁷¹ Act June 19, 1878, c. 329, § 1, 20 Stat. 183 (U. S. Comp. St. 1901, p. 257).

⁷² Rev. St. § 458 (U. S. Comp. St. 1901, p. 259).

⁷³ Rev. St. § 458 (U. S. Comp. St. 1901, p. 259). And see *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*.

⁷⁴ *McGarrahan v. Mining Co.*, 96 U. S. 316, 24 L. Ed. 630.

⁷⁵ *Mapes v. Scott*, 94 Ill. 379; *McArthur v. Browder*, 4 Wheat. (U. S.) 488, 4 L. Ed. 622.

seal of the general land office must, however, be affixed to all patents for the public lands.⁷⁶

Between two patents, the first issued is superior, and the second conveys nothing.⁷⁷ A patent, moreover, can be assailed only for fraud or mistake, and can be avoided only by the government, or by suit in its name.⁷⁸ It cannot be attacked in a collateral proceeding.⁷⁹ Until the patent is issued, the legal title remains in the United States,⁸⁰ although an equitable title in the holder of a certificate of entry may be sold or devised, and it descends to his heirs,⁸¹ and the heir, devisee, or assignee may claim the patent by virtue of the certificate.⁸² If the claimant dies before the patent is issued, it is issued to his heir or devisee.⁸³ If it is issued in the name of the holder of the certificate after his death, it takes effect for the benefit of the heirs, devisees, or assignees.⁸⁴

Statutory Grants

The authority vested in congress to dispose of the public lands may be exercised either by general or special acts.⁸⁵ Consequently, without the issuance of a patent, public lands may be conveyed to a state, a corporation, or an individual by direct legislation.⁸⁶ For

⁷⁶ Rev. St. § 459 (U. S. Comp. St. 1901, p. 259).

⁷⁷ *Stockton v. Williams*, 1 Doug. (Mich.) 546, 560.

⁷⁸ *Carter v. Thompson* (C. C.) 65 Fed. 329; *San Pedro & Canon del Agua Co. v. United States*, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *United States v. Mining Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571. But see *Tameling v. Emigration Co.*, 93 U. S. 644, 23 L. Ed. 998.

⁷⁹ *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Webber v. Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493; *Paterson v. Ogden*, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31.

⁸⁰ *United States v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *SIMS v. MORRISON*, 92 Minn. 341, 100 N. W. 88, *Burdick Cas. Real Property*.

⁸¹ *Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *SIMS v. MORRISON*, *supra* (entryman after perfecting final proof of entry may sell to a third person). See, also, *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482.

⁸² *Brush v. Ware*, 15 Pet. (U. S.) 93, 10 L. Ed. 672; *Forsythe v. Ballance*, 6 McLean, 562, Fed. Cas. No. 4,951.

⁸³ *Galt v. Galloway*, 4 Pet. (U. S.) 332, 7 L. Ed. 876; *Reeder v. Barr*, 4 Ohio, 458, 22 Am. Dec. 762; *Shanks v. Lucas*, 4 Blackf. (Ind.) 476.

⁸⁴ *Schedda v. Sawyer*, 4 McLean, 181, Fed. Cas. No. 12,443; *Stubblefield v. Boggs*, 2 Ohio St. 216; *Phillips v. Sherman*, 36 Ala. 189; *Johnson v. Parcels*, 48 Mo. 549. The federal statute expressly provides for this. See Rev. St. § 2448 (U. S. Comp. St. 1901, p. 1512).

⁸⁵ *Irvine v. Marshall*, 20 How. (U. S.) 558, 15 L. Ed. 994; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, 10 L. Ed. 235.

⁸⁶ *Hall v. Jarvis*, 65 Ill. 302; *Morrow v. Whitney*, 95 U. S. 551, 24 L. Ed. 456; *Republican River Bridge Co. v. Railway Co.*, 12 Kan. 409, affirmed in 92 U. S. 315, 23 L. Ed. 515.

example, direct land grants have been made to a number of the newer states for public school purposes.⁸⁷ Likewise, to a number of states seventy-two sections of the public lands in such states have been granted for the support of a state university.⁸⁸ When the title to such lands has become vested in the state, their subsequent control and disposal are entirely within the authority of the state.⁸⁹

Numerous grants of public lands have also been made to railroads as aids in their construction, such grants usually consisting of the odd-numbered sections of land within a certain distance from the line of the road, on each side.⁹⁰ The title, as a rule, to any particular section does not vest in the railroad corporation until the company has filed a map of its location.⁹¹ Land, however, in these tracts which has previously been settled upon under the general land laws is excluded from such grants.⁹²

Spanish, Mexican, and French Grants

Large areas of the present continental territory of the United States were, at one time, under the sovereignty of Spain, or Mexico, or France. Florida, including parts of Georgia, Alabama, and Mississippi, the Louisiana Purchase tract, Texas, New Mexico, Arizona, California, Nevada, and Utah fall within this statement. "The object of Spain, as of all the European powers who made settlements in America, was to derive strength and revenue from her colonies. To accomplish this, grants of lands to individuals became indispensable."⁹³ Out of such land grants, actual or alleged, have arisen

⁸⁷ Sections 16 and 36 in each township have been usually designated in these grants. See *State v. Stringfellow*, 2 Kan. 263; *State ex rel. Kittel v. Jennings*, 47 Fla. 302, 307, 35 South. 986; *Johanson v. Washington*, 190 U. S. 179, 23 Sup. Ct. 825, 47 L. Ed. 1008.

⁸⁸ See U. S. Comp. St. 1901, p. 1384.

⁸⁹ *Mayers v. Byrne*, 19 Ark. 308; *Widner v. State*, 49 Ark. 172, 4 S. W. 657; *State v. Tanner*, 73 Neb. 104, 102 N. W. 235; *Bushey v. Hardin*, 74 Kan. 285, 86 Pac. 146.

⁹⁰ See *United States v. Railroad Co.*, 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560.

⁹¹ *Weeks v. Bridgman*, 41 Minn. 352, 43 N. W. 81; *Id.*, 46 Minn. 390, 49 N. W. 191; *Walbridge v. Commissioners*, 74 Kan. 341, 86 Pac. 473; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 72 Iowa, 505, 34 N. W. 304.

RIGHT OF WAY.—Congress by a general statute has also granted to railroads a right of way through the public lands. See *RIERSON v. RAILWAY CO.*, 59 Kan. 32, 51 Pac. 901, *Burdick Cas. Real Property*.

⁹² *Trodick v. Railroad Co.*, 164 Fed. 913, 90 C. C. A. 653; *Harmon v. Clayton*, 51 Iowa, 36, 50 N. W. 541; *Brown v. Corson*, 16 Or. 388, 19 Pac. 66, 21 Pac. 47.

⁹³ *Marshall, C. J.*, in *United States v. Clarke*, 8 Pet. (U. S.) 436, 8 L. Ed. 1001.

numerous questions of title which have required from time to time the decisions of the courts.⁹⁴ On the Pacific coast, in particular, many land grants came from Spanish and Mexican sources, both of which were often overlaid by the claims of the first settlers.⁹⁵

Grants of land previously made in territory acquired by the United States from other countries have usually been expressly protected by provisions in the treaties executed at the time.⁹⁶ For example, by the treaties with Mexico, in 1848, and also in 1853, titles which depended upon Mexican and Spanish grants were confirmed.⁹⁷ By the third article of the treaty of 1803 with France, the inhabitants of the ceded territory were to be maintained and protected in the free enjoyment of their liberty, property, and religion.⁹⁸ Irrespective, however, of treaty, it is an established principle of the law of nations that the inhabitants of a ceded territory shall be protected in their property rights.⁹⁹ Moreover, congress, at different times, has by express legislation recognized and confirmed the claims to land in territory ceded to the United States,¹ and special courts have been created for the hearing and determining of such claims.²

⁹⁴ *United States v. Ducros*, 15 How. (U. S.) 38, 14 L. Ed. 591; *Brown v. O'Connor*, 1 Cal. 419; *Eslava's Heirs v. Bolling*, 22 Ala. 721; *United States v. Pena*, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. Ed. 251.

⁹⁵ *Mr. Justice Field in appendix to 168 U. S. 715. And see United States v. Vallejo*, 1 Black, 541, 17 L. Ed. 232.

⁹⁶ *Ward v. Mulford*, 32 Cal. 365; *Magee v. Doe*, 9 Fla. 382.

⁹⁷ See 9 Stat. 929, art. 8; 10 Stat. 1035, art. 5; Act March 3, 1891, c. 539, § 6, 26 Stat. 856 (U. S. Comp. St. 1901, p. 767).

⁹⁸ *Les Bois v. Bramell*, 4 How. (U. S.) 449, 11 L. Ed. 1051.

⁹⁹ *Barker v. Harvey*, 181 U. S. 481, 21 Sup. Ct. 690, 45 L. Ed. 963; Alaskan lands granted in fee simple by Russia prior to the treaty of cession did not pass to the United States. *Callsen v. Hope* (D. C.) 75 Fed. 758; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379. Where a grant was annulled by the ceding sovereignty while the land remained under its jurisdiction, a deed from the grantee to an American citizen conveys no title. *Doe ex dem. Clark v. Braden*, 16 How. (U. S.) 635, 14 L. Ed. 1090.

¹ See *United States v. De Morant*, 123 U. S. 335, 8 Sup. Ct. 189, 31 L. Ed. 171; *Lavergne's Heirs v. Elkin's Heirs*, 17 La. 220.

² *Johnson v. Van Dyke*, 20 Cal. 225; *United States v. Watkins*, 97 U. S. 219, 24 L. Ed. 952. The Court of Private Claims, created by Congress in 1891, was expressly created for the purpose of protecting and settling claims for lands resting upon Spanish and Mexican grants in New Mexico, Arizona, Utah, Nevada, Colorado, and Wyoming. 9 Stat. 929, art. 8; 10 Stat. 1035, art. 5; Act March 3, 1891, c. 539, 26 Stat. 854 (U. S. Comp. St. 1901, p. 764); *Lás Animas Land Grant Co. v. United States*, 179 U. S. 205, 21 Sup. Ct. 92, 45 L. Ed. 153. This court passed out of existence in 1904. Act March 3, 1903, c. 1007, 32 Stat. 1144.

Town Sites

The federal statutes⁸ provide that persons who have actually settled upon public lands,* and who desire to lay out and establish a town or city upon and around the land thus settled upon, may,⁵ upon proper entry being made in trust for the occupants of the land,⁶ and according to their respective interests,⁷ procure title thereto at the minimum price.⁸ In enacting these laws, congress had in view the individual interests of bona fide settlers upon small parcels of public land, and they were not intended for the especial benefit of municipal organizations or corporations.⁹

The entry is made by filing at the local land office the claim to the land for town-site purposes.¹⁰ A mere possession or occupancy of the land, without filing any entry or plat, gives no right to the land against a subsequent grantee of the United States.¹¹ The entry and payment vests the title in the officials making the entry,¹² but only as trustees, however, for the occupants according to their shares.¹³ This trust continues till the trustees have disposed of the entire tract of land included in the town site.¹⁴ The trustees should execute deeds to the legal oc-

⁸ Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1457).

⁴ *In re Selby*, 6 Mich. 193; *Carson v. Smith*, 12 Minn. 546 (Gil. 458).

⁵ *Winfield Town Co. v. Maris*, 11 Kan. 128; *Pascoe v. Green*, 18 Colo. 326, 32 Pac. 824.

⁶ *Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573, 30 L. R. A. (N. S.) 183.

⁷ *Newhouse v. Simino*, 3 Wash. 648, 29 Pac. 263.

⁸ *Newhouse v. Simino*, 3 Wash. 648, 29 Pac. 263. The federal statutes (Rev. St. § 2357 [U. S. Comp. St. 1901, p. 1444]) fix the price of public lands along the lines of railroads at two dollars and fifty cents per acre, and at one dollar and twenty-five cents per acre for other lands. See *United States v. Ingram*, 172 U. S. 327, 19 Sup. Ct. 177, 43 L. Ed. 465. And see, in general, *Town Sites*, 32 Cyc. 838 et seq.

⁹ *Jones v. City of Petaluma*, 38 Cal. 397.

¹⁰ *Leech v. Rauch*, 3 Minn. 448 (Gil. 332); *Newhouse v. Simino*, 3 Wash. 648, 29 Pac. 263. See note 12, *infra*.

¹¹ *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428.

¹² The federal statutes provide that the corporate authorities of the town, if it is incorporated, or the judge of the county court, if the town is not incorporated, may make the entry at the proper land office. See Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1457); *Newhouse v. Simino*, 3 Wash. 648, 29 Pac. 263. And see *McTaggart v. Harrison*, 12 Kan. 62. See, also, *UNITED STATES ex rel. McBRIDE v. SCHURZ*, 102 U. S. 378, 26 L. Ed. 167, *Burdick Cas. Real Property*.

¹³ *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Goldberg v. Kidd*, 5 S. D. 169, 58 N. W. 574; *Clark v. Titus*, 2 Ariz. 147, 11 Pac. 312; *Denver v. Kent*, 1 Colo. 336; *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 445.

¹⁴ *Town of Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791.

cupants,¹⁵ and such deeds need not recite their authority or power to make the conveyance.¹⁶ Although no patent has been issued to the trustees, yet if entry has been made they may give a valid deed,¹⁷ since the patent, when issued, relates back to the date of entry.¹⁸

Disposal of Public Lands in General

All the vacant public lands of the United States not reserved or excepted by the federal statutes are subject to entry and sale under the general land laws.¹⁹ Congress has power, however, to designate the persons or classes of persons to whom conveyances of the public land may be made,²⁰ and no sale of any part of the public domain can be made by any officer of the government except as authorized by statute.²¹

Various statutes providing for the entry and disposal of public lands have been passed by congress. Some of these statutes are now, however, repealed. One of the most important of these, and one under which many individual titles were acquired, was the pre-emption law,²² giving to one who had settled upon the public lands an opportunity to purchase the same, thus making his title good and preventing his expulsion as a trespasser.²³

The timber culture act,²⁴ which permitted the acquiring of land by planting and cultivating timber, has also been repealed.²⁵

The principal way in which public land may be obtained, at the present time, by individuals, is under the federal homestead law. This statute, however, and the requirements under it, have already been considered in a previous chapter.²⁶ Under the timber

¹⁵ *Sherry v. Sampson*, 11 Kan. 611; *Hall v. Doran*, 6 Iowa, 433.

¹⁶ *Burbank v. Ellis*, 7 Neb. 156; *Green v. Barker*, 47 Neb. 934, 66 N. W. 1032.

¹⁷ *Taylor v. Railroad Co.*, 45 Minn. 66, 47 N. W. 453.

¹⁸ *Taylor v. Railroad Co.*, 45 Minn. 66, 47 N. W. 453.

¹⁹ *McCracken v. Todd*, 1 Kan. 148; *Sherman v. Buick*, 93 U. S. 209, 23 L. Ed. 849.

²⁰ *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. Ed. 534; *United States v. Shannon* (C. C.) 151 Fed. 863.

²¹ *McGarrahan v. Mining Co.*, 49 Cal. 331, affirmed in 96 U. S. 316, 24 L. Ed. 630.

²² Rev. St. U. S. §§ 2257-2288. This statute was repealed by the act of March 3, 1891, 26 Stat. 1097 (U. S. Comp. St. 1901, pp 1379-1386).

²³ See *Nix v. Allen*, 112 U. S. 129, 5 Sup. Ct. 70, 28 L. Ed. 675; *Brown v. Throckmorton*, 11 Ill. 529.

²⁴ See Rev. St. U. S. §§ 2464-2468.

²⁵ Act March 3, 1891, c. 561, 26 Stat. 1095. See U. S. Comp. St. 1901, p. 1535.

²⁶ See chapter IX, Homesteads.

and stone land act,²⁷ land valuable for stone and timber, but not for cultivation, may be sold to citizens of the United States for two dollars and fifty cents per acre. Not more than one hundred and sixty acres can be bought by one person, however, and an affidavit of good faith is required.²⁸

Sale of State Lands

A state may dispose of its lands by authority of the legislature,²⁹ and, as in the case of the federal government, it may prescribe who may become purchasers.³⁰ The title may be transferred by a special legislative act,³¹ or by a patent issued in accordance with law.³²

In construing grants from the state, the presumption, in cases of uncertainty, doubt, or ambiguity, is always in favor of the state, thus varying from the usual rule, which is, that in conveyances all presumptions are in favor of the grantee and against the grantor.³³

A patent from the state conveys to the grantee merely the state's interest in the land,³⁴ since the patent is not a modern warranty deed but only a conveyance in the nature of a quitclaim.³⁵ A patent, moreover, takes effect from its date and not from the time of its delivery.³⁶ While title cannot be obtained against the

²⁷ Act June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545). See reference to this act in *SIMS v. MORRISON*, 92 Minn. 341, 100 N. W. 88, *Burdick Cas. Real Property*.

²⁸ *Olson v. United States*, 133 Fed. 849, 67 C. C. A. 21; *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784.

²⁹ *Chisholm v. Caines* (C. C.) 67 Fed. 285; *Patterson v. Trabue*, 3 J. J. Marsh. (Ky.) 598; *Weiler v. Monroe County*, 76 Miss. 492, 25 South. 352.

³⁰ *State v. Nashville University*, 4 Humph. (Tenn.) 157; *Blakeley v. Kingsbury*, 6 Cal. App. 707, 93 Pac. 129.

³¹ *Hall v. Jarvis*, 65 Ill. 302; *Cary v. Whitney*, 48 Me. 516.

³² *Lovin v. Carver*, 150 N. C. 710, 64 S. E. 775; *Innes v. Crawford*, 2 Bibb (Ky.) 412; *Chinoweth v. Haskell*, 3 Pet. (U. S.) 92, 7 L. Ed. 614; *Miller v. Moss*, 65 Tex. 179.

³³ *Martin v. Waddell*, 16 Pet. (U. S.) 367, 411, 10 L. Ed. 997; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 589, 9 L. Ed. 773; *Mayor, etc., of Allegheny v. Railroad Co.*, 26 Pa. 355; *Townsend v. Brown*, 24 N. J. Law, 80; *Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66, 88, 16 L. Ed. 500; *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N. E. 124, 24 L. R. A. (N. S.) 79; *City of Oakland v. Water Front Co.*, 118 Cal. 160, 50 Pac. 277; *Archibald v. Railway Co.*, 157 N. Y. 574, 52 N. E. 567.

³⁴ *Drinkard v. Barnett*, 16 Tex. Civ. App. 550, 41 S. W. 198; *Asher v. Howard*, 122 Ky. 175, 91 S. W. 270.

³⁵ *Innes v. Crawford*, 2 Bibb (Ky.) 412.

³⁶ *Innes v. Crawford*, 2 Bibb (Ky.) 412; *Heath v. Ross*, 12 Johns. (N. Y.) 140.

state by adverse possession,³⁷ yet a grant from the state may be presumed by long continued possession.³⁸

SAME—ACCRETION

220. Title by accretion arises where sand or soil by the action of water is gradually and imperceptibly deposited on riparian lands. New land thus formed belongs to the riparian owner on whose shore the deposit is formed.

The action of water in depositing gradually and imperceptibly sand, soil, or other earthy matter upon the banks or shores of riparian lands is known as "accretion."³⁹ The new land thus formed is likewise called, at times, accretion,⁴⁰ although the term "alluvion" is more usually applied to the land,⁴¹ and "accretion" to the process. Accretion is a phase of accession, the latter being a broader term and including various modes of acquisition, whereby the owner of corporeal property becomes the owner of an addition by growth, increase, or labor.

When land is suddenly and forcibly removed from a riparian owner by an inundation or current, or by a sudden change in the course of waters, so that a considerable portion is thus perceptibly transferred from one owner and deposited upon the land of another owner, the process is known as avulsion.⁴² To constitute accretion, however, there must be an imperceptible action of the water, a momentarily insensible addition of matter.⁴³ In other words, it is a gradual process as distinguished from a sudden change.⁴⁴ When accretion takes place, and the particles of the soil of one owner are gradually worn away and deposited upon the land of

³⁷ See Adverse Possession, *infra*.

³⁸ *Bullard v. Barksdale*, 33 N. C. 461; *Reed v. Earnhart*, 32 N. C. 516.

³⁹ *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195; *In re Broadway in Borough of Bronx*, 137 App. Div. 652, 122 N. Y. Supp. 281.

⁴⁰ *Stern v. Fountain*, 112 Iowa, 96, 83 N. W. 826; *Morgan v. Scott*, 26 Pa. 51.

⁴¹ *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195; *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516, affirmed in 18 Wall. (U. S.) 628, 21 L. Ed. 813.

⁴² *Denny v. Cotton*, 3 Tex. Civ. App. 634, 22 S. W. 122.

⁴³ *Halsey v. McCormick*, 18 N. Y. 147; *Bennett v. Manufacturing Co.*, 103 Iowa, 207, 72 N. W. 507.

⁴⁴ *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270; *County of St. Clair v. Lovington*, 23 Wall. (U. S.) 68, 23 L. Ed. 59; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. (Mass.) 551.

another, the title is held to pass to the latter, because the soil so deposited cannot be identified by its former owner.⁴⁵ When, however, a sudden change, or avulsion, transfers a considerable portion of soil from one owner and deposits it upon the land of another, title does not pass to the latter if the soil so transferred is removed within a reasonable time, and while it can be identified.⁴⁶ When islands are formed in nonnavigable rivers, if the land on each side is owned by different persons, the island, if wholly on one side of the channel, belongs to the owner on whose side it forms.⁴⁷ If, however, the island is formed in the middle of the stream, it belongs to the opposite owners in severalty, the dividing line running according to the original thread.⁴⁸ Islands formed, however, in navigable rivers, or in the sea, are the property of the state or of the United States, according to the ownership of the fee in the land under the water.⁴⁹ The owner of land which is being

⁴⁵ *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; *Stern v. Fountain*, 112 Iowa, 96, 83 N. W. 826; *Morgan v. Scott*, 26 Pa. 51; *Lovington v. St. Clair Co.*, 64 Ill. 56, 16 Am. Rep. 516; *Miller v. Hepburn*, 8 Bush (Ky.) 326; *Gifford v. Yarborough*, 5 Bing. 163; *Foster v. Wright*, 4 C. P. Div. 438; *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206; *Camden & A. Land Co. v. Lippincott*, 45 N. J. Law, 405. The fact that accretions are caused by obstructions placed in the river by third persons does not change the rule. *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002; *Bigelow v. Hoover*, 85 Iowa, 161, 52 N. W. 124, 39 Am. St. Rep. 296; *Watson v. Horne*, 64 N. H. 416, 13 Atl. 789. Seaweed cast upon the beach belongs to the owner of the soil. *Emans v. Turnbull*, 2 Johns. (N. Y.) 314, 3 Am. Dec. 427.

⁴⁶ *Sweatman v. Holbrook*, 38 S. W. 691, 39 S. W. 258, 18 Ky. Law Rep. 870; *Woodbury v. Short*, 17 Vt. 387, 389, 44 Am. Dec. 344. When a parcel of land is suddenly left bare by the sea or a navigable river, it belongs to the state. *Halsey v. McCormick*, 18 N. Y. 147; *Attorney General v. Chambers*, 4 De Gex & J. 55. See, also, *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242. And so land gradually covered by the sea belongs to the state. *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 322, 3 Am. Dec. 427; *In re Hull & S. Ry.*, 5 Mees. & W. 327.

⁴⁷ *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715. When an island formed in midchannel is subsequently connected with the mainland by the water having receded, the title to the island is not changed. *City of Victoria v. Schott*, 9 Tex. Civ. App. 332, 29 S. W. 681.

⁴⁸ *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Strange v. Spalding*, 29 S. W. 137, 17 Ky. Law Rep. 305; *Inhabitants of Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Johnston v. Jones*, 1 Black (U. S.) 209, 222, 17 L. Ed. 117.

⁴⁹ 3 Washb. Real Prop. (5th Ed.) 61; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

washed away may protect his property by any lawful means which will stop the action of the water, but he must not divert the current so as to direct it against the land of another person, to the latter's injury.⁵⁰ When land is formed by reliction, that is, by the gradual receding of a stream, lake, or pond, it belongs to the adjoining owners.⁵¹ Property which has been acquired by accretion is transferred by a deed which describes the stream or other body of water as one of its boundaries.⁵² A lessee of land is also entitled as lessee to the new land formed by accretion.⁵³

The right to alluvion extends to the owner of even a narrow strip of land along the bank or shore of a body of water.⁵⁴ It cannot be claimed, however, by one whose land does not extend to the water line,⁵⁵ or by one whose land is separated from the shore by a public street or road.⁵⁶

SAME—PRIVATE GRANT

221. Title may be obtained by grant from a private owner by means of any form of conveyance recognized by the law of the jurisdiction in which the land is situated.

222. CONVEYANCES—The methods and instruments by which title is conveyed may be conveniently classed under the following groups:

- (a) Common-law conveyances.
- (b) Conveyances operating under the statute of uses.

⁵⁰ *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Menzies v. Breadalbane*, 3 Bligh (N. S.) 414.

⁵¹ *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; *McCamon v. Stagg*, 2 Kan. App. 479, 43 Pac. 86; *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 48; *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270; *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695; *Boorman v. Sunnuchs*, 42 Wis. 233; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479. But not when drained by artificial means. *Noyes v. Collins*, 92 Iowa, 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571.

⁵² *Hunter v. Witt*, 50 S. W. 985, 21 Ky. Law Rep. 35; *Bartlett v. Corliss*, 63 Me. 287; *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415; *Camden & A. Land Co. v. Lippincott*, 45 N. J. Law, 409.

⁵³ *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. 553; *Cobb v. Lavalley*, 89 Ill. 331, 31 Am. Rep. 91.

⁵⁴ *Banks v. Ogden*, 2 Wall. (U. S.) 57, 69, 17 L. Ed. 818; *Saulet v. Shepherd*, 4 Wall. (U. S.) 508, 18 L. Ed. 442; *Bristol v. Carroll Co.*, 95 Ill. 84.

⁵⁵ *Winter v. New Orleans*, 26 La. Ann. 310; *Sweringen v. St. Louis*, 151 Mo. 348, 52 S. W. 346.

⁵⁶ *St. Louis v. Railroad Co.*, 114 Mo. 13, 21 S. W. 202; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649.

- (c) Modern conveyances.
- (d) Transfer of registered titles.

223. SAME—COMMON-LAW CONVEYANCES—The common-law conveyances are divided into:

- (a) Primary, which include:
 - (1) Feoffment.
 - (2) Gift.
 - (3) Grant.
 - (4) Lease.
 - (5) Exchange.
 - (6) Partition.
- (b) Secondary, which include:
 - (1) Release.
 - (2) Confirmation.
 - (3) Surrender.
 - (4) Assignment.
 - (5) Defeasance.

At common law, the term "grant" had a particular meaning.⁵⁷ In modern times, however, when speaking of private grant, we mean any form of private conveyance.⁵⁸ Blackstone divides conveyances of land into two classes, namely, conveyances at common law, and conveyances which receive their force and efficacy by virtue of the statute of uses.⁵⁹ To these should be added modern conveyances in general, and, in some states, certificate transfers of registered titles.

Conveyances at Common Law

At common law, conveyances are known as original and primary, or derivative and secondary.⁶⁰ By the former, the benefit or estate is created or first arises;⁶¹ by the latter, the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.⁶²

Original conveyances are feoffment, gift, grant, lease, exchange, and partition.⁶³ Derivative conveyances are release, confirmation, surrender, assignment, and defeasance.⁶⁴

⁵⁷ *Infra*.

⁵⁸ The word "grant" has become a generic term applicable to the transfer of all classes of real property. *Lambert v. Smith*, 9 Or. 185, 193.

⁵⁹ 2 Blk. Comm. 309.

⁶⁰ 2 Blk. Comm. 309.

⁶¹ 2 Blk. Comm. 309, 310.

⁶² 2 Blk. Comm. 310, 324.

⁶³ 2 Blk. Comm. 310.

⁶⁴ 2 Blk. Comm. 310.

Conveyances Under the Statute of Uses

To the conveyances at common law are added, by force of the statute of uses, covenants to stand seised to uses, bargain and sale of lands, and conveyances by lease and release.⁶⁵

Feoffment

"Feoffment is a species of the genus gift."⁶⁶ It was originally the gift of a feoff, or fief, or fee, but became applied in time to the gift of any freehold estate in lands accompanied by delivery of possession,⁶⁷ which was a ceremonial observance known as "livery of seisin." The purpose of this ceremony was to furnish evidence of the gift, and was an absolute requirement to the validity of a feoffment.⁶⁸ The ceremony consisted of a symbolical delivery of the corporeal possession of land by the grantor, or feoffor, as he was called, to the grantee, or feoffee. The parties, with their witnesses, went upon the land, and the feoffor gave to the feoffee a stick, twig, piece of turf, or a handful of earth taken from the land. Sometimes a ring, a cross, or a knife was handed over, anything, in fact, as a token of the delivery.⁶⁹ As a further part of the ceremony, the feoffor used proper, and technical, words which were to show that he intended to transfer the land to the feoffee, and which also marked out, or limited, the estate, or the interest, in the land which the feoffor intended the feoffee to have. The words "I give" (Latin, *do*) were the proper words to use for the conveyance, while the words "to him" (i. e., the feoffee) "and his heirs," or "to him and the heirs of his body," in case of a "gift,"⁷⁰ designated the limitation, either as a fee simple or a fee tail.⁷¹ A distinction was made between livery in deed and livery in law. The former arose when the livery of seisin took place on the land itself; the latter when the parties were not actually on the land—as when the transfer was made in sight of the premises, but without an actual entry on them.⁷² In the latter case, the feoffor pointing out the land, bade the feoffee enter and take possession of it. Should the feoffee do so within the lifetime

⁶⁵ 2 Blk. Comm. 338. And see *infra*. ⁶⁶ P. & M. II, 82; Britton, I, 221.

⁶⁷ "Feoffment" is derived from the verb to enfeoff, feoffare, or infeudare, to give one a feud. 2 Blk. Comm. 309; Litt. § 57; Co. Litt. 9a.

⁶⁸ P. & M. II, 84.

⁶⁹ For an account of these ancient ceremonies see P. & M. II, 84; Holdsworth, Hist. of Eng. Law, p. 188. See, also, 2 Blk. Comm. 310, 313; Perry v. Price, 1 Mo. 553; Bryan v. Bradley, 16 Conn. 474.

⁷⁰ See *infra*.

⁷¹ Litt. § 1; Co. Litt. 9a; 2 Blk. Comm. 310; Williams, Real Prop. (7th Ed.) 176.

⁷² Digby, Hist. Real Property (4th Ed.) 145.

of the parties, the feoffment was valid in law.⁷³ Livery of seisin also required an abjuration of the land by the donor, or feoffor; that is, he had to leave, or vacate, the land, leaving the feoffee in possession.⁷⁴ No writing was necessary to give evidence to livery of seisin, although writings became customary in very early times.⁷⁵

In later times, however, livery of seisin was usually accompanied with a written deed, especially when the limitations of the estate granted were numerous. Such a deed, however, was only an evidence of title, and not a conveyance itself.⁷⁶ A writing was not legally required till the statute of frauds.⁷⁷

Gift

Gift is a word of the largest signification,⁷⁸ and generically includes feoffment.⁷⁹ In time, however, it was the term applied to a conveyance creating an estate in fee tail. The only difference between a gift and a feoffment was that the former, while accompanied by the same ceremony as a feoffment, had limitations to the heirs of the body of the first donee; that is, an estate tail was created.⁸⁰

In connection with the ceremony of livery of seisin, the donor indicated, as we have seen, the interest he intended to convey,⁸¹ and a limitation to the heirs of the body came to mean, by way of distinction from a feoffment, a "gift." The same words of conveyance were used, however, in a "gift" as in a "feoffment," but, in time, the term "feoffor" was applied to the creator of a feoff-

⁷³ Co. Litt. 48b; 2 Blk. Comm. 316.

⁷⁴ P. & M. II, 84, 85. Cf. Y. B. 20, 21 Edw. I. (R. S.) 32; Bettisworth's Case (1580) 2 Coke, 31a, 32.

⁷⁵ Bracton, f. 33, C; Litt. §§ 59, 60, 66, 214-217; Co. Litt. 48b, 121b, 143a, 271b; Holdsworth, Hist. of Eng. Law III, 188; A feoffment could well be made by word of mouth. Bracton, 11b, 33b, 38b, 39b. The English Real Prop. Act of 1845 made feoffments void at law unless evidenced by deed.

In Anglo-Saxon days "charters" were used by the king and the powerful. 3 Hallam's Middle Ages, 329.

⁷⁶ French v. French, 3 N. H. 234; Smith v. Lawrence, 12 Mich. 431. Livery might be made by the delivery of the deed. Thoroughgood's Case, 9 Coke, 136a. See JACKSON ex dem. GOUCH v. WOOD, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

⁷⁷ 29 Car. II, c. 3, § 2. And see JACKSON ex dem. GOUCH v. WOOD, *supra*.

⁷⁸ See Allen v. White, 97 Mass. 507.

⁷⁹ *Supra*.

⁸⁰ 2 Blk. Comm. 316; Pierson v. Armstrong, 1 Iowa, 282, 292, 63 Am. Dec. 440.

⁸¹ See Holds. Hist. of Eng. Law, vol. III, pp. 187, 188.

ment in fee simple, and the term "donor" to the creator of a gift in tail.⁸²

Grant

Grants or concessions became the regular method by the common law of transferring the property of incorporeal hereditaments.⁸³ From the time of Littleton,⁸⁴ incorporeal hereditaments, such as advowsons, commons, rents, reversions, etc., have been said to "lie in grant," and not "in livery"; the latter term being used to designate conveyances of corporeal hereditaments, such as lands and houses.⁸⁵ In other words, incorporeal rights can, at common law, be conveyed by a deed,⁸⁶ although, in early times, no deeds were used for such conveyances,⁸⁷ and a ceremony of attornment,⁸⁸ something like a livery of seisin, was necessary.⁸⁹ In modern times, the term "grant" is used to designate all kinds of conveyances,⁹⁰ and the English Real Property Act of 1845⁹¹ made corporeal hereditaments transferable by deed of grant. In fact, a grant is now the regular method, in England, of conveying freeholds.⁹²

Lease

A lease, at common law, is properly a conveyance of any lands or tenements, usually in consideration of rent or other consideration, made for life, for years, or at will, but always for a less time than the lessor has in the premises.⁹³ The usual words of operation are "demise, grant, and farm let."⁹⁴

By this conveyance an estate for life, for years, or at will may

⁸² 2 Blk. Comm. 317; Litt. § 57.

⁸³ 2 Blk. Comm. 317. The technical words were, "dedi et concessi," although any other words showing the intention were sufficient.

⁸⁴ Littleton (§ 628) speaks of advowsons or of such things which pass by way of grant "without livery of seisin." Coke seems to be responsible for quoting Littleton as saying that advowsons "lie not in livery but in grant," a negative that Littleton does not use. See L. Q. R. 5, 36; Holds. Hist. Eng. Law, III, 86.

⁸⁵ Litt. § 183; Co. Litt. 9; 2 Blk. Comm. 317.

⁸⁶ The form which Littleton gives of deeds of grant—indentures and deeds poll—are substantially the same as in modern law. Holds. Hist. of Eng. Law, vol. II, page 492; Litt. §§ 371, 372.

⁸⁷ Holds. Hist. of Eng. Law, III, 87, 88.

⁸⁸ Litt. § 551; Holds. Hist. Eng. Law, II, 492.

⁸⁹ See Holds. Hist. Eng. Law, III, 86, 87.

⁹⁰ Ross v. Adams, 28 N. J. Law, 160; Peck v. Walton, 26 Vt. 85.

⁹¹ 8 & 9 Vict. 106, § 2.

⁹² Laws of England, vol. 10, p. 367.

⁹³ 2 Blk. Comm. 317.

⁹⁴ "Farm, or feorme, is an old Saxon word signifying provision, and it came to be used instead of rent, because anciently the greater part of rents was reserved in provisions, in corn, poultry, and the like, till the use of

be created either in corporeal or incorporeal hereditaments, although livery of seisin is necessary to leases of corporeal hereditaments for life, but for no other.⁹⁵ At the present time a lease is the instrument used to create estates less than freehold, and usually contains a reservation of rent.

At common law a lease of land for any term of years could be made by word of mouth and without livery of seisin. Entry by the lessee was necessary, however, and until such entry he had no estate in the land, but only the interest known as "*interesse termini*."⁹⁶ By the statute of frauds, a writing was required for leases exceeding the term of three years,⁹⁷ although under the statutes in this country the period differs in the various states.⁹⁸ The English Real Property Act of 1845⁹⁹ makes void at law all leases required to be in writing, unless made by deed. Moreover, lessees still have no greater interest, before entry, than an *interesse termini*.¹

Exchange

An exchange is a mutual grant of equal interests, the transfer of one estate being in consideration of the other.² The term does not mean an exchange of writings, but an exchange of land. Only one conveyance is required. Coke says³ that five things are necessary to the perfection of an exchange: (1) The estates must be equal in quantity; that is, a fee simple for fee simple, a lease of twenty years⁴ for a lease of twenty years. (2) The word "exchange" (*excambium*) must be used, as it cannot be supplied by any other word.⁵ (3) There must be an entry in the life of the parties. (4) If the exchange is of things that lie in grant, it must be by deed indented. (5) And if the lands are located in different counties, there ought also to be such a deed. The things

money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of rent or farm." 2 Blk. Comm. pp. 317, 318.

⁹⁵ 2 Blk. Comm. p. 318.

⁹⁶ Litt. §§ 58, 59, 459; Co. Litt. 46b, 270a.

⁹⁷ 29 Car. II, c. 3; JACKSON *ex dem.* GOUCH *v.* WOOD, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

⁹⁸ 1 Stim. Am. St. Law, § 4143.

⁹⁹ 8 & 9 Vict. c. 106.

¹ Laws of Eng. vol. 10, p. 368; Wallis *v.* Hands, 2 Ch. 75 (1893); Lewis *v.* Baker, 1 Ch. 46 (1905).

² 2 Blk. Comm. p. 323; Bixby *v.* Bent, 59 Cal. 522; Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Mitchell *v.* Gile, 12 N. H. 390, 395.

³ Co. Litt. 50, 51.

⁴ Litt. §§ 64, 65; 2 Blk. Comm. 323.

⁵ In early times, however, the word was not necessarily used. Holds. Hist. Eng. Law, vol. III p. 199; Madox, Forms, Nos. 259-261; Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Gamble *v.* McClure, 69 Pa. 282.

exchanged need not be in esse, however, at the time the exchange is made.⁶ Moreover, the estates need not be of the same value,⁷ and no livery of seisin is necessary, even in exchange of freeholds.⁸

An exchange of land can be made only between two parties in interest, and where more than two parties make conveyances each to the other it is not a technical exchange.⁹ Entry must, however, be made by both parties, and if either party dies before entry the exchange is void.¹⁰ Where, in modern practice, mutual conveyances are used, the one in consideration of the other, the incidents of a common-law exchange do not apply, and there is no need of using the word "exchange."¹¹ Technical exchanges of land are practically obsolete in modern conveyancing, mutual deeds of bargain and sale being substituted therefor.¹²

Partition

A partition is where two or more joint tenants, coparceners, or tenants in common, divide the land so held among them in severalty, each taking a distinct part.¹³ The act of thus dividing such land is one of the common-law conveyances. Partitions were generally made by deed, known as a deed of partition, although, in case of coparceners, a deed was not required before the statute of frauds.¹⁴ In their case, there was a parol agreement, followed by entry.¹⁵ In case, however, of joint tenants and tenants in common, a deed was required, since their mutual agreement to the partition was necessary.¹⁶ In case of joint tenants, livery of seisin was not required, since it was impracticable.¹⁷

⁶ Co. Litt. 50. See *Long v. Fuller*, 21 Wis. 123.

⁷ *Wilcox v. Randall*, 7 Barb. (N. Y.) 633.

⁸ 2 Blk. Comm. 323.

⁹ There may, however, be any number of persons on each side. Thus, for example, two or more joint tenants may exchange with two or more tenants in common. 2 Th. Co. Litt. 447, note 8; *Mitchell v. Gile*, 12 N. H. 390, 395; *Hartwell v. De Vault*, 159 Ill. 325, 42 N. E. 789.

¹⁰ 2 Blk. Comm. 323.

¹¹ That an oral exchange of lands is within the statute of frauds, see *GORDON v. SIMMONS*, 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 305, *Burdick Cas. Real Property*. By 8 & 9 Vict. c. 106, § 3, an exchange to be binding at law must be by deed.

¹² *Gamble v. McClure*, 69 Pa. 282.

¹³ 2 Blk. Comm. p. 323. See *Partition*, in this work.

¹⁴ Any one of two or more coparceners could compel partition by a writ of partition, and they could convey, one to the other, by feoffment with livery of seisin. Litt. 250; 2 Blk. Comm. 324; *Holds. Hist. of Eng. Law*, 108.

¹⁵ Litt. 243-246, 250, 290; Co. Litt. 169a, 187a, 192a.

¹⁶ 2 Blk. Comm. 324. Coke, however, says (Co. Litt. 169a) that in case of tenants in common partition may be made by parol, and executed by livery.

¹⁷ *Id.*

The old common-law deed of partition was a single instrument in which each owner was given his allotted part. In modern practice, it is customary to execute as many deeds as there are individual parties, each granting or quitclaiming to the others such grantee's allotted share. It is also held, in a number of jurisdictions in this country, that mere oral partition by owners in possession, followed by actual occupancy of the land thus allotted, is sufficient without the use of deeds.¹⁸

Secondary Conveyances—Release

A release is, technically, the conveyance of a future estate to one having an estate in possession, although, if the grantee have a constructive possession, it is sufficient. For a release no livery of seisin is necessary, but the future estate must be an immediate one; that is, with no intervening estate between the one in possession and the estate which is released.¹⁹ A release is similar to a modern quitclaim deed, except that in the quitclaim possession in the grantee is not necessary.²⁰ In a release, privity of estate between the parties was required.²¹ The usual words in a release are "remise, release, and forever quitclaim."

Same—Confirmation

A confirmation, as a conveyance, is closely allied to a release. It is a conveyance of an estate or right in esse whereby a former voidable conveyance is made sure,²² or whereby a particular estate is increased.²³ Thus, where a tenant for life leases for forty years and dies during the term, such a lease is voidable by the reversioner. The latter may, however, before the death of the tenant for life, confirm the forty years lease, and make it sure. Again, where, for example, A. leases to B. for a term of years, and later the lessor confirms the land to B. for life, or in fee

¹⁸ Taylor v. Millard, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Moore v. Kerr, 46 Ind. 470; Folger v. Mitchell, 3 Pick. (Mass.) 396; Wood v. Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Byers v. Byers, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. Rep. 765; Horgan v. Bickerton, 17 R. I. 483, 23 Atl. 23, 24 Atl. 772.

¹⁹ 2 Blk. Comm. 324.

²⁰ Doe ex dem. McConnel v. Reed, 4 Scam. (Ill.) 117, 38 Am. Dec. 124; Kerr v. Freeman, 33 Miss. 292.

²¹ Smith's Heirs v. Bank, 21 Ala. 125.

²² Adlum v. Yard, 1 Rawle (Pa.) 171, 177, 18 Am. Dec. 608; Ing v. Brown, 3 Md. Ch. 521; English v. Young, 10 B. Mon. (Ky.) 141.

²³ 2 Blk. Comm. 325; Co. Litt. 516.

simple, the former particular estate is enlarged.²⁴ A confirmation cannot be used if the conveyance which it is attempted to validate was originally void,²⁵ although such an instrument might now, in a proper case, be made operative as some other form of conveyance; for instance, as a bargain and sale.²⁶ The proper operative words used in a confirmation are "given, granted, ratified, approved, and confirmed," although any other words sufficiently showing the intention to confirm may be used.²⁷

Same—Surrender

A surrender is the converse of a release. A release operates by the greater estate descending upon the less; a surrender operates by the falling of a less estate into the greater. It is a yielding up of an estate for life or for years; that is, a conveyance by one in possession of a present vested estate of his interest to one entitled to the immediate or next estate in the remainder or reversion.²⁸ As in a release, privity of estate between the parties is necessary, and the surrender can be only to one who holds the next immediate estate.²⁹ Livery of seisin was not required,³⁰ and no deed was necessary to the validity of a surrender.³¹ The technical words used for a conveyance operating as a surrender are "surrendered, granted, and yielded up." Quitclaim deeds are now used in place of surrenders.

Same—Assignment

An assignment differs from a lease in that, in an assignment, the whole interest of the assignor is parted with. It is a transfer, or a making over, of the interest one has in an estate for life or for years.³²

²⁴ 2 Blk. Comm. 325, 326; Co. Litt. 538.

²⁵ Branham v. Mayor, etc., 24 Cal. 585; Barr v. Schroeder, 32 Cal. 609.

²⁶ Fauntleroy's Heirs v. Dunn, 3 B. Mon. (Ky.) 594.

²⁷ 2 Blk. Comm. 325; Co. Litt. 517.

²⁸ Martin v. Stearns, 52 Iowa, 345, 3 N. W. 92; Scott's Ex'x v. Scott, 18 Grat. (Va.) 159.

²⁹ 2 Blk. Comm. 326.

³⁰ 2 Blk. Comm. 326, 365.

³¹ Milling v. Becker, 96 Pa. 182; Thomas v. Cook, 2 Barn. & Ald. 119; Nickells v. Atherstone, 10 Q. B. 944. Cf. Dodd v. Acklom, 6 Mon. & G. 672; Phené v. Popplewell, 12 C. B. (N. S.) 334. But see Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114; Magennis v. MacCulloch, Glib. Ch. 235; Roe v. Archbishop of York, 6 East, 86. A surrender may be implied by the acceptance of another lease, Iye v. Sams, Cro. Eliz. 521; Lyon v. Reed, 13 Mees. & W. 285; but not if the second lease is void, Davison v. Stanley, 4 Burrows, 2210; Doe v. Courtenay, 11 Q. B. 702; Doe v. Poole, 11 Q. B. 713. And see Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

³² 2 Blk. Comm. 327.

The words commonly used in an assignment are "assign, transfer, and set over," although other words clearly showing the intention would be sufficient. The object of an assignment is to put the assignee in the exact place of the assignor, and it has, consequently, been held that, although the entire term be transferred, yet, if the rent to be paid by the assignee differs from the rent payable by the assignor, the conveyance is a lease, and not an assignment.³³ Prior to the statute of frauds, an assignment could be made by parol, although livery of seisin was necessary in case of an assignment for life.

Same—Defeasance

A defeasance is a collateral deed, made in connection with some other conveyance, usually a feoffment, providing that, upon the performance of some condition therein expressed, the original conveyance shall be void or defeated.³⁴ It was formerly much used in connection with mortgages. It differs from a "condition," because a condition is inserted in the original deed, while a defeasance was a separate instrument. In modern practice, it is customary to insert a defeasance clause—that is, a condition—in the mortgage deed itself. A defeasance, if used, must be of equal dignity to the original deed; consequently an unsealed defeasance cannot operate, it is held, to defeat a sealed instrument.³⁵

224. SAME—CONVEYANCES UNDER THE STATUTE OF USES—The conveyances operating under the statute of uses are:

- (a) Covenant to stand seised.
- (b) Bargain and sale.
- (c) Lease and release.

It has been stated, in connection with equitable estates, that the statute of uses made it possible to convey lands by instruments which would have no effect at common law. Three conveyances operating under this statute came into general use. They were covenants to stand seised, bargain and sale, and lease and release.³⁶ These conveyances may be used to create legal estates. The conveyance itself transfers an equitable estate—that is, a use—

³³ *Dunlap v. Bullard*, 131 Mass. 161; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303; *Collamer v. Kelley*, 12 Iowa, 319.

³⁴ 2 Blk. Comm. 327.

³⁵ *Cabell v. Vaughan*, 1 Saund. 291; *Lacy v. Kynaston*, 2 Salk. 575; *Shep. Touch*. 397.

³⁶ See *JACKSON ex dem. GOUCH v. WOOD*, 12 Johns. (N. Y.) 73, *Burdick Cas. Real Property*.

and the statute executes the use in the cestui que use, by transferring the legal estate to him.³⁷ Conveyances arising under the statute of uses require, of course, no livery of seisin. In fact, these conveyances were contrived to avoid such a requirement.

Covenant to Stand Seised

A covenant to stand seised is a conveyance operating under the statute of uses, in which the consideration is either blood or marriage; that is, only a good consideration is required.³⁸ Such a conveyance arises where one seised of lands covenants, in consideration of blood or marriage, that he will stand seised of the land to the use of his wife, child, or kinsman, for life, in tail, or in fee.³⁹ This form of conveyance is practically obsolete in the United States, although the courts, in order to give effect to the intention of the parties, will sometimes construe a conveyance to be a covenant to stand seised.⁴⁰ Although the English rule,⁴¹ as also generally followed by the cases in this country, is that a consideration of blood or marriage is absolutely essential to the validity of a covenant to stand seised,⁴² yet, in Massachusetts, it has been held that a covenant to stand seised may be good, notwithstanding the absence of any such relationship.⁴³ By a covenant to stand seised, a freehold may be conveyed to commence in futuro, and although a consideration may have to be proved to support such a conveyance, yet it is not necessary to express the consideration in the deed.

Bargain and Sale

The conveyance called a bargain and sale is of the same nature as a covenant to stand seised, except that a valuable consideration

³⁷ 2 Blk. Comm. 327; *Chenery v. Stevens*, 97 Mass. 77.

³⁸ *Jackson ex dem. Houseman v. Sebring*, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; *Jackson ex dem. Howell v. Delancey*, 4 Cow. (N. Y.) 427; *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706.

³⁹ 2 Blk. Comm. 338. Leading cases: *Wilkinson v. Tranmarr*, Willes, 682; *Milburn v. Salkeld*, Willes, 673; *Doe ex dem. Dyke v. Whittingham*, 4 Taunt. 20.

⁴⁰ *Eckman v. Eckman*, 68 Pa. 460; *Fisher v. Strickler*, 10 Pa. 348, 51 Am. Dec. 488; *Jackson ex dem. Watson v. McKenny*, 3 Wend. (N. Y.) 233, 20 Am. Dec. 690.

⁴¹ *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494; *Parker v. Nichols*, 7 Pick. (Mass.) 111; *Gale v. Coburn*, 18 Pick. (Mass.) 397, 402.

⁴² *Jackson ex dem. Houseman v. Sebring*, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; *Jackson ex dem. Saunders v. Cadwell*, 1 Cow. (N. Y.) 622; *Jackson ex dem. Howell v. Delancey*, 4 Cow. (N. Y.) 427; *French v. French*, 3 N. H. 234; *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706.

⁴³ *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

is required for its validity.⁴⁴ Many of the cases hold that a recital in the deed of the consideration is sufficient evidence of its having been received, and the requirement of a valuable consideration has become a mere form.⁴⁵ A deed of bargain and sale operates as follows: The conveyance, which is in the form of a contract to sell, whereby the bargainor, for some pecuniary consideration, bargains and sells the land to the bargainee,⁴⁶ raises a use in the bargainee which the statute of uses executes, and thereby conveys the legal estate to the bargainee. In order to give notoriety to conveyances by bargain and sale, which has become the usual form for transfer of land, the English statute of enrollments provides that they shall be made by deed indented, and also enrolled, or else they cannot operate under the statute of uses, as a conveyance of the legal estate.⁴⁷

Although a deed may be insufficient as one of bargain and sale by want of consideration, nevertheless it may, in cases of marital and blood relationship, operate as a covenant, to stand seised. A deed of bargain and sale may also, under the statute of uses, vest a fee in futuro.⁴⁸ The words "bargain and sell" are not necessary, however, to a deed of bargain and sale, since no particular words are required in order to raise a use.⁴⁹

Lease and Release

To evade the requirements of the English statute of enrollments the expedient called a lease and release was devised, and soon became the most usual form for a conveyance for lands.⁵⁰ It operated as follows: A lease for a term, usually for one year, was given to the intended grantee. This was not required to be enrolled, because the statute did not make any provision for chattel interests. By a release, usually dated the next day after the lease, the reversion of the estate was conveyed to the lessee, who in this way acquired the full interest in the land without the use of any conveyance which had to be enrolled.⁵¹

⁴⁴ Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Jackson ex dem. Hudson v. Alexander, 3 Johns. (N. Y.) 484, 3 Am. Dec. 517; Wood v. Beach, 7 Vt. 522.

⁴⁵ Fetrow v. Merriwether, 53 Ill. 278; Jackson v. Fish, 10 Johns. (N. Y.) 456; Jackson v. Dillion's Lessee, 2 Overt. (Tenn.) 261.

⁴⁶ Chenery v. Stevens, 97 Mass. 77.

⁴⁷ 27 Hen. VIII, c. 16 (1535).

⁴⁸ Chancellor v. Windham, 1 Rich. Law (S. C.) 161, 42 Am. Dec. 411; Shep. Touch. by Preston, 511.

⁴⁹ See Jones, Convey. pp. 184, 185.

⁵⁰ 2 Blk. Comm. 343; JACKSON ex dem. GOUCH v. WOOD, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

⁵¹ See French v. French, 3 N. H. 234; Digby, Hist. of the Law of Real Prop. (4th Ed.) 328; Slifer v. Beates, 9 Serg. & R. (Pa.) 166, 177.

A lease and release, however, of a freehold to commence in futuro would be void, because a deed of release was operative only when made to party in actual possession of the land.⁵² A release made, however, to one not in possession may, if it contains apt words, and if based upon a consideration, operate as some other form of a conveyance.⁵³ From the seventeenth century conveyances by lease and release, a transaction employing two deeds, became the common method in England for transferring real property.⁵⁴ Finally, in 1841, Parliament provided that a mere release alone should be effectual to convey freehold estates,⁵⁵ and four years later corporeal hereditaments were made transferable by deed of grant.⁵⁶

225. SAME—MODERN CONVEYANCES—Modern conveyances are conveniently classified as:

- (a) Warranty deeds;
- (b) Quitclaim deeds; and
- (c) Statutory deeds.

In General

The forms of conveyance most frequently referred to, in modern times, in this country, are "warranty deeds" and "quitclaim deeds." These, however, are but the evolutions of conveyances already considered. When the English colonists settled this country, they were familiar with, and used in their transfers of land, the conveyances then in use in the mother country. The colonial laws recognized deeds of feoffment, bargain and sale, and lease and release.⁵⁷ In fact, conveyances under the statute of uses are generally recognized as a part of the common law of this country.⁵⁸

As a matter of fact, the deed in common use to-day is the deed of bargain and sale.⁵⁹ It may, moreover, be said, in general, that any writing which sufficiently describes the parties and the land, and which alleges or admits a sale of the vendor's freehold, for a valuable consideration, will, if properly executed, be regarded as a valid deed of bargain and sale.⁶⁰

⁵² Chancellor v. Windham, 1 Rich. Law (S. C.) 161, 42 Am. Dec. 411.

⁵³ Chancellor v. Windham, 1 Rich. Law (S. C.) 161, 42 Am. Dec. 411.

⁵⁴ Laws of Eng. vol. 10, p. 367.

⁵⁵ 4 & 5 Vict. c. 21.

⁵⁶ Real Prop. Act, 8 & 9 Vict. c. 106, § 2.

⁵⁷ Jones, Convey. p. 183.

⁵⁸ Id.

⁵⁹ Jones, Convey. p. 184. And see JACKSON ex dem. GOUCH v. WOOD, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

⁶⁰ Jones, Convey. p. 184.

Our modern "warranty deed" is nothing more than a deed containing a covenant of warranty,⁶¹ and by common understanding it has come to mean a deed that warrants a good title.⁶² Covenants of warranty are discussed in a subsequent part of this work.⁶³

Our modern "quitclaim deed" is derived from the common-law conveyance known as "release."⁶⁴ As we have seen, the usual words in a release are "remise, release, and forever quitclaim,"⁶⁵ and in a "quitclaim deed" the usual words of conveyance are the same, generally followed by such words as "all the right, title, and interest" that the grantor has in the described premises. At common law, a release, as we have seen, is a secondary conveyance;⁶⁶ but, at the present time, a "quitclaim deed" may, in most states, be used either as a primary or a secondary conveyance, and many states provide by statute that such a deed shall operate to convey whatever right, title, and interest the grantor has in the land at the time of its execution and delivery.⁶⁷ In England, as previously stated, a release has been sufficient as a conveyance since the act of 1841.⁶⁸ It is often said that quitclaim deeds differ from warranty deeds in that the former contain no covenants of warranty, but whether a deed is a quitclaim or not depends largely upon the words used, and the circumstances showing the purpose of the instrument, while the mere omission of a covenant of warranty of title is not a necessary criterion.⁶⁹ A quitclaim deed transfers only the title which the grantor has,⁷⁰ and does not prevent the grantor from setting up a future acquired title.⁷¹ The words employed may, however, make a deed one of bargain and sale, and not a mere quitclaim,⁷² and although it has been said that one holding under a quitclaim deed cannot be

⁶¹ 8 Words and Phrases, p. 7404. *Allen v. Hazen*, 26 Mich. 142, 146.

⁶² *Id.*

⁶³ *Infra.*

⁶⁴ "Quitclaim" is equivalent to the word "release." *Hill v. Dyer*, 3 Greenl. (Me.) 441, 445.

⁶⁵ *Supra.*

⁶⁶ *Supra.*

⁶⁷ See *Jones, Convey.* p. 185, note 8.

⁶⁸ See *Lease and Release, supra.*

⁶⁹ *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304.

⁷⁰ *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32; *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130.

⁷¹ *Frost v. Society*, 56 Mich. 62, 22 N. W. 189; *City and County of San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187.

⁷² *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Cummings v. Dearborn*, 56 Vt. 441; *Hill v. Dyer*, 3 Greenl. (Me.) 441, 445.

regarded as a bona fide purchaser,⁷³ yet, this rule is purely arbitrary and is subject to limitations.⁷⁴ As was stated in connection with releases, quitclaim deeds differ from the former in that, in a quitclaim, possession in the grantee is not necessary.⁷⁵

In a number of states short forms have been prescribed by the statutes, which are declared sufficient to convey various estates in land.⁷⁶ Except where superseded by these statutory conveyances, conveyances operating under the statute of uses may still be employed. The common-law conveyances are, however, still sufficient to transfer lands, though their use is unusual,⁷⁷ with the exception that feoffments have been abolished in some states.⁷⁸ Where statutory forms have been provided, their exclusive use is not required. Many of the deeds now in use have a dual character from the operative words used, which frequently are "give, grant, bargain, and sell." When such words are used, courts will construe them in the way best fitted to give effect to the intention of the parties,⁷⁹ but they will be held to convey legal, rather than equitable, estates, when such construction is possible.⁸⁰

226. SAME—TRANSFERS OF REGISTERED TITLES—Some states have, by statute, provided an optional system of title registration, in order to make the conveyance of land more simple. The prevailing principles of this system are as follows:

- (a) The issuance of a certificate of title to the owner of land making application for such a certificate.
- (b) The creation of an indemnity fund to protect any person who may be injured by the operation of the statute.
- (c) The abolishment of title by adverse possession as to land duly registered.
- (d) The transfer of title only by the registrar acting under due authority.

⁷³ *United States v. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; *United States v. Road Co.*, 148 U. S. 49, 13 Sup. Ct. 465, 37 L. Ed. 362.

⁷⁴ *Id.*

⁷⁵ *Supra*; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *Kerr v. Freeman*, 33 Miss. 292.

⁷⁶ 1 Stim. Am. St. Law, art. 148.

⁷⁷ *Funk v. Creswell*, 5 Iowa, 68; *Brewer v. Hardy*, 22 Pick. (Mass.) 376, 33 Am. Dec. 747; *Rogers v. Fire Co.*, 9 Wend. (N. Y.) 611.

⁷⁸ 1 Stim. Am. St. Law, § 1470.

⁷⁹ *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

⁸⁰ *Sprague v. Woods*, 4 Watts & S. (Pa.) 194.

In 1858, Sir Robert Torrens introduced in Australia a system of registration of titles.⁸¹ A similar system has been inaugurated in a number of our states,⁸² and it is generally referred to as the Australian Title System, or the Torrens System.⁸³ The plan did not originate, however, in Australia. It is based upon the German Grundbuch System, which has been the law in some parts of continental Europe for centuries.⁸⁴

The objects and purposes of this system have been declared to be to provide for a simplification of the registration of title to land, whereby the official certificate will always show the person in

⁸¹ Took effect in South Australia July 1, 1858.

⁸² In California, Colorado, Illinois, Massachusetts, Minnesota, New York, Oregon, and Washington. The Ohio statute was declared unconstitutional. See *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756. The land registration act became operative in the Philippines February 1, 1903. See 41 Am. L. Rev. 751. The system is also in force in England. See *infra*.

⁸³ See *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571.

⁸⁴ *Morris, Land Registration*, 98 et seq.; *People ex rel. Kern v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812; 51 L. R. A. 433; *Id.*, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252. From the twelfth century in Austro-Hungary; from 1809 in Baden, Sheldon, *Land Registration*, 112. The system has also been introduced in Ireland, Switzerland, and Canada. See *Reeves, Real Prop.* II, 1582. The striking difference in the system as applied in this country and as applied abroad is that, with us it is *optional*, while in European countries it is generally compulsory. The English Land Transfer Acts of 1875 and 1897 (the latter being 60 & 61 Vict. c. 65) provide for the transfer of land by registration. In general, registration is voluntary, but it was made compulsory in London in 1897, and one cannot now, in that city, acquire a legal title, under conveyance on sale, except in accordance with the statute. Under the law of 1875, little use was made of the voluntary registration. Moreover, at the present time, the practice of registration is confined almost wholly to the compulsory area of London. See *Laws of Eng.* vol. 24, p. 308, note. The annual conference of the Commissioners on Uniform State Laws, held at Milwaukee in 1912, considered the Torrens system, and a committee, appointed the previous year to seek information as to the working of the system in the states where it has been adopted, reported that, in the opinion of the committee (one member dissenting), "the time is not yet ripe for drafting a uniform law upon this topic. * * * The fact that this system of land title registration has been used but little in the commonwealths which are experimenting with it indicates that there is no very pressing call for it by those whose burdens it is intended to relieve." In Massachusetts, population 3,400,000, the system (February, 1912) had been in force 14 years. The total number of petitions for registration numbered, however, only 3,700. In Cook county, Ill. (population 2,500,000), after being in force 15 years, the applications (to May, 1912) amounted to only 4,885.

whom the title is vested,⁸⁵ and to provide for a simple method of conveying land.⁸⁶ The advocates of the system urge that the lessening of the expense incidental to the examination of titles and the transfer of lands makes it especially desirable to people of small means.

In What the System Consists

While the statutes vary more or less in details, the general outlines of the system are as follows: Any person, claiming to be the owner, who wishes his alleged title to land registered, files an application or petition in court,⁸⁷ setting forth the alleged facts regarding his title, together with a statement as to any liens or incumbrances thereon.⁸⁸ The petition is referred to examiners appointed by the court.⁸⁹ The examiners report, in due time, their findings of fact as to the title,⁹⁰ whereupon, after a hearing, to which all parties in interest are summoned,⁹¹ the court determines whether the title of the land shall be registered or recorded as prayed, and, if so recorded, a certificate of such title is issued to the holder of the record title.⁹² It is held, generally, that the proceedings are in the nature of a proceeding in rem,⁹³ and the statutes generally provide for an appeal from the decree of the court authorizing the registration.⁹⁴

Constitutionality of Statutes

Some of the earlier statutes upon this subject were held unconstitutional,⁹⁵ on the ground that they deprived persons of their

⁸⁵ Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.

⁸⁶ Id.

⁸⁷ In Massachusetts, a special court known as the land court has jurisdiction. See Foss v. Atkins, 193 Mass. 486, 79 N. E. 763.

⁸⁸ See Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

⁸⁹ See Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

⁹⁰ People v. Crissman, 41 Colo. 450, 92 Pac. 949; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

⁹¹ Baart v. Martin, 99 Minn. 197, 108 N. W. 948, 116 Am. St. Rep. 394; People v. Crissman, 41 Colo. 450, 92 Pac. 949.

⁹² It is generally provided that joint owners may receive separate certificates for their individual interests.

⁹³ Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

⁹⁴ Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032.

⁹⁵ People ex rel. Kern v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; State v. Gullbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756.

property without due process of law, and also that they conferred judicial powers upon registers or recorders, who are merely ministerial officers.⁹⁶ The later Illinois statute,⁹⁷ and the statutes in other states, have been upheld, however, by the courts, despite various attempts to have them declared unconstitutional.⁹⁸ Under our constitutional safeguards relative to due process of law, there must be, however, a judicial proceeding for the purpose of determining the initial registration of the title.⁹⁹

Liens and Incumbrances

The particulars of all estates, mortgages, incumbrances, liens, and charges to which the owner's title is subject are indorsed upon the certificate, and also upon the record,¹ and subsequent liens and other incumbrances are also added.² An exception exists, however, in case of federal judgments, taxes, improvement assessments, easements, and short leases, which are not matters of record.³

Indemnity or Assurance Fund

An assurance fund for the indemnity of persons having any interest in the property, or claim against the same, who may sustain any damage by the decree of registration, is provided for in some of the states.⁴ This fund is derived from the applicants for registration, who pay a small per cent. of the assessed value of the property.⁵ Under the Ohio statute, this provision for an indemnity fund was held unconstitutional, on the ground that it amounted to a taking of private property, without the owner's consent, for

⁹⁶ *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

⁹⁷ *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

⁹⁸ *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

⁹⁹ *People ex rel. Kern v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *Id.*, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252.

¹ 65 Cent. L. J. 449, article by W. F. Meier.

² *Laws N. Y.* 1908, c. 444, §§ 32-37, 47-51; *Rev. Laws Mass.* 1902, c. 128, §§ 70-86; *Laws Ill.* 1897, pp. 158-160, §§ 82-90.

³ See valuable article by Prof. Reeves, 8 *Columbia L. Rev.* 438.

⁴ *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571.

⁵ In New York state, it is one-tenth of one per cent. of the last assessed valuation of the property. *Laws N. Y.* 1908, c. 444, § 58 et seq.

a purpose not public.⁶ Under the New York statute, the indemnity fund is optional.⁷

No Title by Adverse Possession

In order to protect the system, it is generally provided by the statutes that, after the land has been registered, no title thereto, adverse or in derogation of the title of the registered owner, shall be acquired merely by any length of possession.

Transfers of Registered Land

After land has been registered, the usual deed is made, in case of a conveyance; but any of the ordinary forms of conveyance purporting to transfer the title operate only as contracts to convey, and as authority to the registrar to transfer the title. The transfer itself is usually effected by the surrender of the duplicate certificate of title and the issuing of a new certificate to the transferee.⁸ If only part of the owner's interest is transferred, another certificate is issued to him for the interest remaining in him. Transfers by descent, devise, or by judicial process are made by the registrar in accordance with the orders and decrees of the court.

SAME—TITLE BY ESTOPPEL

227. Title by estoppel arises when the holder of the real title is prevented by law from asserting it, by reason of his deed, conduct, acts, or statements, against one who had a right to rely upon such deed, conduct, acts, or statements, and who acted upon them in good faith.
228. AFTER-ACQUIRED TITLE—Also, where one without title makes a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired by him will inure to the benefit of the vendee. In other words, the vendor and those claiming under him will be estopped to deny it, and the vendee is said to acquire title by estoppel.

⁶ *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756. In Illinois the court, in sustaining the constitutionality of the act of 1897 as against the various objections urged, said: "In our view of the case the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it." *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

⁷ *Laws N. Y.* 1908, c. 444, § 58 et seq.

⁸ *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571.

Nature of Estoppel

Estoppel arises where a man has done some act, or executed some deed, which estops or precludes him from averring anything to the contrary; its purpose being to prevent duplicity and inconsistency.⁹ The estoppel of a tenant, for example, to deny his landlord's title has been discussed in a preceding chapter.¹⁰

Title by estoppel is that which is created by presumption of law by an estoppel which prevents the actual owner of land from setting up his title against one who has acquired rights in the land in reliance upon a deed, or some acts or representations of the owner, and who would be injured if the owner were permitted to retain his title by showing that his acts or representations were in fact false.¹¹ When such presumptions arise, they are conclusive, and cannot be rebutted by the owner, although he may, of course, show that the alleged acts constituting the alleged estoppel were not done.¹² The estoppel which gives rise to title by estoppel may be either estoppel by deed or estoppel in pais. Estoppel by deed¹³ is an estoppel which prevents a party to a deed and his privies from asserting against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material fact asserted in the deed.¹⁴ Estoppel in pais, or equitable estoppel, otherwise known as estoppel by misrepresentation, arises when one by his acts, conduct, statements, or even silence when he ought to speak, intentionally or with culpable negligence, induces another to believe certain facts, and upon which he relies and acts in good faith, so that he will be injured if the former is permitted to deny the truth of such facts, and thus deprive the one

⁹ 3 Blk. Comm. 308. It is so called "because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." Co. Litt. 352a. And see *Bower v. McCormack*, 23 Grat. (Va.) 310; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 326, 13 L. Ed. 703.

¹⁰ Ante, chapter X.

¹¹ *Bush v. Person*, 18 How. (U. S.) 82, 15 L. Ed. 273; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188, 203.

¹² *Fehley v. Barr*, 66 Pa. 196; *Payment v. Church*, 38 Mich. 776; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; *Hanrahan v. O'Reilly*, 102 Mass. 204. Recitals do not estop a party from showing fraud. *Hickman v. Stewart*, 69 Tex. 255, 5 S. W. 833. An agreement to divide the proceeds of lands does not create an estoppel. *Olipphant v. Burns*, 146 N. Y. 218, 40 N. E. 980.

¹³ In estoppel by deed, the word "deed" means any deed; that is, at common law, a valid sealed instrument. The term "deed," as used in conveying, is, of course, only one form of a deed.

¹⁴ See *Bigelow*, *Estoppel* (5th Ed.) 332.

who has acted in reliance upon them of the benefits or rights he has obtained.¹⁵

Estoppel by Deed

One who conveys by deed is estopped from asserting, in order to defeat the title of the grantee, that he had no interest in the land which he purported to convey by his deed, or that no title passed by the deed. He is also estopped from denying its full effect as a conveyance.¹⁶ The deed need not contain any covenants for title,¹⁷ but it must purport to convey an existing title in the grantor.¹⁸ Consequently, a mere quitclaim deed does not ordinarily operate as an estoppel against the grantor.¹⁹

A grantee, however, in the case of a deed poll, is not, as a rule, estopped to deny his grantor's title.²⁰ Nor does his acceptance of the deed operate as an estoppel against him,²¹ unless he claims under the deed,²² since one may desire to purchase an outstanding claim against land without admitting the validity of his grantor's title.²³ Where, however, a deed contains covenants to be performed by the vendee, his acceptance of the deed will estop him from denying them.²⁴

After-Acquired Title

Where a grantor having no title, or having a defective title, or an estate less than that which he purports to convey, makes a conveyance by a deed containing a covenant of warranty, or other

¹⁵ See Cyc. vol. 16, p. 722.

¹⁶ Hull v. Glover, 126 Ill. 122, 18 N. E. 198; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515; Ludlow v. Railroad Co., 4 Hun (N. Y.) 239; Logan v. Eaton, 66 N. H. 575, 31 Atl. 13; Bank of U. S. v. Benning, 4 Cranch, C. C. 81, Fed. Cas. No. 908; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

¹⁷ Thompson v. Thompson, 19 Me. 235, 36 Am. Dec. 751; Bayley v. McCoy, 8 Or. 259; Summerfield v. White, 54 W. Va. 311, 46 S. E. 154; Van Renssalaer v. Kearney, 11 How. (U. S.) 297, 13 L. Ed. 703.

¹⁸ Whitman v. Jones, 17 Nova Scotia, 443; Dodge v. Smith, 3 Ont. L. Rep. 305.

¹⁹ Traver v. Baker, 15 Fed. 186; Minaker v. Hawkins, 20 U. C. Q. B. 20.

²⁰ Great Falls Co. v. Worster, 15 N. H. 412; Sparrow v. Kingman, 1 N. Y. 242; Gardner v. Greene, 5 R. I. 104; Hunter v. Fry, 2 B. & Ald. 421.

²¹ Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696; Patterson v. Johnson, 113 Ill. 559; Small v. Procter, 15 Mass. 495; Bigelow v. Finch, 11 Barb. (N. Y.) 498.

²² Kelso v. Stigar, 75 Md. 376, 24 Atl. 18; Curlee v. Smith, 91 N. C. 172.

²³ Watkins v. Houck, 44 Kan. 502, 24 Pac. 361; Mattison v. Ausmuss, 50 Mo. 551; Osterhout v. Shoemaker, 3 Hill (N. Y.) 513; Coakley v. Perry, 3 Ohio St. 344; Lorain v. Hall, 33 Pa. 270.

²⁴ Hagerty v. Lee, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Vanmeter's Ex'rs v. Vanmeter, 3 Grat. (Va.) 148. And see Fort v. Allen, 110 N. C. 183, 14 S. E. 685; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Fitch v. Baldwin, 17 Johns. (N.

covenant implying a warranty, a title subsequently acquired by him will inure to the benefit of the grantee, by way of estoppel.²⁵ It is a species of estoppel by deed, the grantor being estopped from setting up his subsequently acquired title against his grantee.²⁶ While this form of estoppel is most frequently met with in connection with conveyances containing a covenant of warranty, and while, at common law, the deed must contain such a covenant in order to estop the grantor from claiming an after-acquired title for himself,²⁷ yet, in modern times, a covenant for quiet enjoyment,²⁸ or a covenant of seisin and right to convey,²⁹ or a covenant of nonclaim,³⁰ or a covenant of further assurance,³¹ may operate as an estoppel on an after-acquired title. A quitclaim deed does not estop, however, a grantor from setting up a title subsequently acquired by him,³² and deeds operating under the statute of uses cause no estoppels as to either present or subsequently acquired titles, unless they contain covenants which so operate.³³

Y.) 161. Acceptance of a devise may estop the devisee to set up a claim inconsistent with the will. *Hyde v. Baldwin*, 17 Pick. (Mass.) 303; *Watson v. Watson*, 128 Mass. 152.

²⁵ *Whitson v. Grosvenor*, 170 Ill. 271, 48 N. E. 1018; *Armstrong v. Building Co.*, 57 Kan. 62, 45 Pac. 67; *Altamus v. Nickell*, 115 Ky. 506, 74 S. W. 221, 103 Am. St. Rep. 333; *AYER v. BRICK CO.*, 159 Mass. 84, 34 S. E. 177, *Burdick Cas. Real Property*; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. 1113; *House v. McCormick*, 57 N. Y. 310; *Appeal of Borough of Easton*, 47 Pa. 255.

²⁶ *Wadhams v. Swan*, 109 Ill. 46; *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662; *Thomas v. Stickle*, 32 Iowa, 72. But see *Younts v. Starnes*, 42 S. C. 22, 19 S. E. 1011. Those claiming under the grantor are estopped. *White v. Patten*, 24 Pick. (Mass.) 324.

²⁷ *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Edridge v. Railroad Co.*, 54 Hun, 194, 7 N. Y. Supp. 439; *Boyd's Lessee v. Longworth*, 11 Ohio, 235.

²⁸ *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447.

²⁹ *Smith v. Williams*, *supra*; *Vanderheyden v. Crandall*, 2 Denio (N. Y.) 9; *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800.

³⁰ *Morrison v. Wilson*, 30 Cal. 344; *Read v. Whittemore*, 60 Me. 479; *Wight v. Shaw*, 5 Cush. (Mass.) 56.

³¹ *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112; *Bennett v. Waller*, 23 Ill. 97; *Norfeet v. Russell*, 64 Mo. 176.

³² *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Frost v. Society*, 56 Mich. 62, 22 N. W. 189; *Wight v. Shaw*, 5 Cush. (Mass.) 56; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331; *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426; *Kimmel v. Benna*, 70 Mo. 52; *Chauvin v. Wagner*, 18 Mo. 531; *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; *Cramer v. Benton*, 64 Barb. (N. Y.) 522.

³³ *Whitson v. Grosvenor*, 170 Ill. 271, 48 N. E. 1018; *Jackson ex dem. McCrackin v. Wright*, 14 Johns. (N. Y.) 193; *Sheffield v. Griffin*, 21 Kan. 417; *Brennan v. Eggeman*, 73 Mich. 658, 41 N. W. 840.

By the great weight of authority, an after-acquired title by a grantor who has conveyed with warranty of title is vested in the grantee by operation of law as of the time of the conveyance,³⁴ and, in some states, it is so provided by statute.³⁵ Other cases hold, however, that the title does not pass to the grantee, and that the effect of the estoppel merely prevents the grantor from setting it up against the grantee,³⁶ who may or may not accept it at his election. Accordingly, it is held that the grantor cannot compel the grantee to accept the after-acquired title in satisfaction of his right of action for the breach of warranty.

Recitals in Deeds

Estoppel by deed may also arise through recitals contained therein,³⁷ such, for example, as recitals as to the origin of the title,³⁸ or recitals relating to the description and boundaries of the land.³⁹ Some of the earlier cases held that the recital of the consideration in a deed was conclusive also,⁴⁰ but the prevailing view is that, while the recital of the consideration estops the grantor from denying the existence or the adequacy of the consideration,⁴¹ it does not estop him from showing that it was not paid as recited in the deed.⁴²

³⁴ PERKINS v. COLEMAN, 90 Ky. 611, 14 S. W. 640, Burdick Cas. Real Property; Tefft v. Munson, 63 Barb. (N. Y.) 31; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Ivy v. Yancey*, 129 Mo. 501, 31 S. W. 937; *Bush v. Marshall*, 6 How. (U. S.) 284, 12 L. Ed. 440. And see *Reese v. Smith*, 12 Mo. 344. But the title does not inure to the grantee without his consent, so as to defeat his right to maintain an action on the covenants of the deed. *Blanchard v. Ellis*, 1 Gray (Mass.) 195, 61 Am. Dec. 417.

³⁵ 1 Stim. Am. St. Law, § 1454 B.

³⁶ *Hannon v. Christopher*, 34 N. J. Eq. 459; *Rankin v. Busby* (Tex. Civ. App.) 25 S. W. 678; *Burtner v. Keran*, 24 Grat. (Va.) 42. See *Blanchard v. Ellis*, 1 Gray (Mass.) 195, 61 Am. Dec. 417, in note 34, *supra*.

³⁷ *Clamorgan v. Greene*, 32 Mo. 285; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209.

³⁸ *Stone v. Fitts*, 38 S. C. 393, 17 S. E. 136; *Mitchell v. Kinnard* (Ky.) 29 S. W. 309. And see *Lindauer v. Younglove*, 47 Minn. 62, 49 N. W. 384; *Goodwin v. Folsom*, 66 N. H. 626, 32 Atl. 159. But cf. *Frick v. Fiscus*, 164 Pa. 623, 30 Atl. 515.

³⁹ *Fairchild v. Furnace Co.*, 128 Pa. 485, 18 Atl. 444. But it may be shown that such a recital was inserted by mistake. *Long v. Cruger*, 9 Tex. Civ. App. 208, 28 S. W. 568.

⁴⁰ *Emery v. Chase*, 5 Greenl. (Me.) 232; *Maigley v. Hauer*, 7 Johns. (N. Y.) 341; *Spiers v. Clay's Adm'rs*, 11 N. C. 22.

⁴¹ *Leonard v. Springer*, 98 Ill. App. 530; *Winningham v. Pennock*, 36 Mo. App. 688; *Bolles v. Beach*, 22 N. J. Law, 680, 53 Am. Dec. 263; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260.

⁴² *Union Mut. L. Ins. Co. v. Kirchhoff*, 133 Ill. 368, 27 N. E. 91; *Goward v.*

Recitals pertaining to the subject-matter of the deed bind both parties,⁴³ and recitals of matter of fact also bind the grantee if he claims under the deed.⁴⁴ Recitals, however, to be effectual as estoppels, must be definite and certain.⁴⁵

No one can be estopped by deed who is incompetent to make a deed.⁴⁶ A deed must also be valid in order to raise an estoppel.⁴⁷ Where, moreover, a deed has been procured by fraud, estoppel does not apply.⁴⁸

Against Whom Estoppel Arises

Estoppels by deed affect only parties to the deed and their privies. They cannot be set up against strangers, or by them.⁴⁹ The same rule applies to estoppels to set up after-acquired titles.⁵⁰ Estoppel by deed applies generally only to the grantor, although a grantee may also be estopped under certain circumstances, as previously pointed out.⁵¹ All persons claiming under one who is estopped are also estopped, if they have notice of the facts constituting the estoppel.⁵² A grantor, however, in a deed which raises an estoppel against him, may acquire a new title against

Waters, 98 Mass. 596; *Arnot v. Railroad Co.*, 67 N. Y. 315; *Byers v. Mullen*, 9 Watts (Pa.) 266.

⁴³ *Byrne v. Morehouse*, 22 Ill. 602; *Taylor v. Riggs*, 8 Kan. App. 323, 57 Pac. 44; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

⁴⁴ *Sonoma County Water Co. v. Lynch*, 50 Cal. 503; *Baldwin v. Thompson*, 15 Iowa, 504; *Whyland v. Weaver*, 67 Barb. (N. Y.) 116.

⁴⁵ *Onward Building Soc. v. Smithson*, [1893] 1 Ch. 1; *Hubbard v. Norton*, 10 Conn. 422; *Hays v. Askew*, 50 N. C. 63.

⁴⁶ *Rice v. Dignowitty*, 4 Smedes & M. (Miss.) 57; *Bank of America v. Banks*, 101 U. S. 240, 247, 25 L. Ed. 850; *Jackson ex dem. Clowes v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378.

⁴⁷ *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428; *Pells v. Webquish*, 129 Mass. 469; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *McGeary's Appeal*, 72 Pa. 365.

⁴⁸ *Peddicord v. Hill*, 4 T. B. Mon. (Ky.) 370; *Jackson ex dem. Brown v. Ayers*, 14 Johns. (N. Y.) 224; *Alderson v. Miller*, 15 Grat. (Va.) 279.

⁴⁹ *Campbell v. Hall*, 16 N. Y. 575; *Bates v. Norcross*, 17 Pick. (Mass.) 14, 28 Am. Dec. 271; *Graves v. Colwell*, 90 Ill. 612; *Broadwell v. Merritt*, 87 Mo. 95; *Wolf v. Hahn*, 28 Kan. 588; *Gorton v. Roach*, 46 Mich. 294, 9 N. W. 422; *Right v. Bucknell*, 2 Barn. & Adol. 278; *Jackson ex dem. Thurman v. Bradford*, 4 Wend. (N. Y.) 619; *Sunderlin v. Struthers*, 47 Pa. 411; *Glasgow v. Baker*, 72 Mo. 441. Heirs and assigns may claim an estoppel. *Trull v. Eastman*, 3 Metc. (Mass.) 121, 37 Am. Dec. 126.

⁵⁰ *Jackson ex dem. Van Keuren v. Hoffman*, 9 Cow. (N. Y.) 271; *Langston v. McKinnie*, 6 N. C. 67; *Rushton v. Lippincott*, 119 Pa. 12, 12 Atl. 761. *Contra*, *PERKINS v. COLEMAN*, 90 Ky. 611, 14 S. W. 640, *Burdick Cas. Real Property*.

⁵¹ *Supra*.

⁵² *Shay v. McNamara*, 54 Cal. 169; *Kimball v. Blaisdell*, 5 N. H. 533, 22 Am. Dec. 476; *Doe v. Skirrow*, 2 Nev. & P. 123.

his grantee, providing such new title is not connected with his covenants of warranty. He may, for example, acquire a title under a sale for taxes levied after his conveyance.⁵³

The privies of a grantor⁵⁴ or grantee⁵⁵ are estopped in the same manner as are the original parties, and they may also invoke the estoppel in their own behalf.⁵⁶ In the case of a conveyance by cotenants of a joint estate, no estoppel is raised, however, against any one tenant as to the shares of the others.⁵⁷

As to married women, it is a general rule that a married woman is not estopped by her unauthorized or invalid deed, since she cannot be estopped by any conveyance she had no power to make.⁵⁸ If, however, she has fraudulently misled the grantee as to her capacity to give a valid deed, some courts hold that she is estopped.⁵⁹ In states where a deed by married woman is valid, she will be estopped to the same extent as if single.⁶⁰ A wife is not estopped, however, by joining in her husband's conveyance to release her right of dower, through any recitals or covenants in such deed. Nor is a husband estopped by joining in his wife's conveyance to release his right of curtesy.⁶¹

Estoppel in Pais

Estoppel in pais, or equitable estoppel, has already been defined.⁶² Such estoppels are called equitable because they were orig-

⁵³ *Ervin v. Morris*, 26 Kan. 664; *Foster v. Johnson*, 89 Tex. 640, 36 S. W. 67. Cf. *Hannah v. Collins*, 94 Ind. 201. Likewise, at a judicial sale. *Thielen v. Richardson*, 35 Minn. 509, 29 N. W. 677. The grantor may also acquire title by adverse possession against his grantee. *Garabaldi v. Shattuck*, 70 Cal. 511, 11 Pac. 778; *Sherman v. Kane*, 86 N. Y. 57.

⁵⁴ *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560; *White v. Patten*, 24 Pick. (Mass.) 324; *Union Dime Sav. Inst. v. Wilmot*, 94 N. Y. 221, 46 Am. Rep. 137; *Schwallback v. Railroad Co.*, 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

⁵⁵ *McBurney v. Cutler*, 18 Barb. (N. Y.) 203; *Sikes v. Basnight*, 19 N. C. 157; *Cowton v. Wickersham*, 54 Pa. 302.

⁵⁶ *Dennison v. Ely*, 1 Barb. (N. Y.) 610.

⁵⁷ *Weiser v. Weiser*, 5 Watts (Pa.) 279, 30 Am. Dec. 313; *Walker v. Hall*, 15 Ohio St. 355, 86 Am. Dec. 482. But see *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518.

⁵⁸ *Miller v. Miller*, 140 Ind. 174, 39 N. E. 547; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 Am. Dec. 448; *Naylor v. Minock*, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595; *Rumfelt v. Clemens*, 46 Pa. 455.

⁵⁹ *Norton v. Nichols*, 35 Mich. 148. See, also, *Hand v. Hand*, 68 Cal. 135, 8 Pac. 705, 58 Am. Rep. 5.

⁶⁰ *Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645; *Simmons v. Reinhardt*, 78 S. W. 890, 25 Ky. Law Rep. 1804; *Krauth v. Thiele*, 45 N. J. Eq. 407, 18 Atl. 351.

⁶¹ *Raymond v. Holden*, 2 Cush. (Mass.) 270; *Strawn v. Strawn*, 50 Ill. 33; *O'Neil v. Vanderburg*, 25 Iowa, 104.

⁶² *Supra*.

inally recognized only in courts of equity,⁶³ but they are generally enforced, in modern times, in courts of law as well as in courts of equity.⁶⁴ In some states, however, where the title to land is involved, it is held that an estoppel in pais is not available in a court of law, since, at law, land can be conveyed only by deed. In such states, therefore, the estoppel can be set up only in a court of equity.⁶⁵

An estoppel in pais may arise either by positive acts, or by an omission to perform certain acts, as where one fails to give notice of his title or rights in land when it is his duty to do so. Thus one may claim title by an estoppel in pais when he can show that representations have been made to him for the purpose of influencing his conduct, that he has relied on these representations, and that he would be injured by permitting the other party to deny their truth.⁶⁶ This may be illustrated by an owner of land, with full knowledge of the facts, permitting or inducing another to make improvements on the land under the latter's mistaken belief of ownership. In a proper case the owner of the land will be held estopped to set up his title to the injury of the one who had been induced or permitted by him to make the improvements.⁶⁷ On the other hand, an estoppel in pais may arise when an owner fails to assert his rights. For example, an owner of property, who stands by and voluntarily permits it to be sold or mortgaged by some third person claiming it as his own, the purchaser or mortgagee having no previous notice of the real owner's title, and who receives from the owner no notice at the time, will

⁶³ West Winsted Sav. Bank & Bldg. Ass'n v. Ford, 27 Conn. 282, 71 Am. Dec. 66; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111.

⁶⁴ Barnard v. Seminary, 49 Mich. 444, 13 N. W. 811; Moore v. Frazer, 15 Or. 635, 16 Pac. 869; Jones v. Fox, 20 W. Va. 370.

⁶⁵ Winslow v. Cooper, 104 Ill. 235; De Mill v. Moffat, 49 Mich. 125, 13 N. W. 387; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536.

⁶⁶ Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Anderson v. Coburn, 27 Wis. 566; Little v. Giles, 25 Neb. 313, 41 N. W. 186; Hill v. Epley, 31 Pa. 334; Stuart v. Lowry, 42 Minn. 473, 44 N. W. 532; Parker v. Barker, 2 Metc. (Mass.) 423; Huntley v. Hole, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111.

⁶⁷ Parker v. Atchison, 58 Kan. 29, 48 Pac. 631; Bragg v. Railroad Corporation, 9 Allen (Mass.) 54; Redmond v. Loan Ass'n, 194 Pa. 643, 45 Atl. 422, 75 Am. St. Rep. 714; Niven v. Belknap, 2 Johns. (N. Y.) 573; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344; Des Moines & Ft. D. R. Co. v. Lynd, 94 Iowa, 368, 62 N. W. 806; Phillips v. Clark, 4 Metc. (Ky.) 348, 83 Am. Dec. 471; Muse v. Hotel Co., 68 Fed. 637; Union Pac. Ry. Co. v. U. S., 15 C. C. A. 123, 67 Fed. 975; Wehrmann v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. Where lots are sold as abutting on a street, the vendor is estopped to deny the dedication of the street by him. McLemore v. McNeley, 56 Mo. App. 556.

be estopped, as against such purchaser or mortgagee, from afterwards asserting his title.⁶⁸ If, however, the owner has his title on record, the record is notice to such purchaser or mortgagee, and no estoppel can arise.⁶⁹ Estoppels in pais operate against the parties themselves and also against those who are in privity with them.⁷⁰ They do not operate, however, against strangers.⁷¹ As to infants and married women who are under common-law disabilities, the cases are conflicting whether they may be bound by estoppel in pais. Some courts hold that the doctrine of estoppel in pais to divest their title in realty does not apply to married women at all.⁷² Others hold that they may be so bound if the one claiming title by estoppel can show fraudulent acts on the part of the infant or married woman without setting up any contract entered into by such person, because, although infants and married women would have no power to contract in relation to their lands, yet they would be bound by their fraudulent acts.⁷³ Under statutes, however, removing the common-law disabilities of married women, and conferring upon them the right to control

⁶⁸ *Gray v. Crockett*, 35 Kan. 686, 12 Pac. 129; *Burt v. Mason*, 97 Mich. 127, 56 N. W. 365; *Cochran v. Harrow*, 22 Ill. 345; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Swift v. Stovall*, 105 Ala. 571, 17 South. 186. But see *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436.

⁶⁹ *Lathrop v. Bank*, 31 N. J. Eq. 273; *Viele v. Judson*, 82 N. Y. 32; *Porter v. Wheeler*, 105 Ala. 451, 17 South. 221. But see *Neal v. Gregory*, 19 Fla. 356. The record of the forged deed raises no estoppel against the owner of the land. *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279.

⁷⁰ *Richards v. Cline*, 176 Ill. 431, 52 N. E. 907; *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568; *Cowing v. Greene*, 45 Barb. (N. Y.) 585.

⁷¹ *Davenport & R. I. Bridge, Ry. & Terminal Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497; *De La Vergne Refrigerating Mach. Co. v. Brewing Co.*, 175 Mass. 419, 56 N. E. 584; *Duryea v. Mackey*, 151 N. Y. 204, 45 N. E. 458; *Pontius v. Walls*, 197 Pa. 223, 47 Atl. 203.

⁷² *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; *Suman v. Springate*, 67 Ind. 115; *Innis v. Templeton*, 95 Pa. 262, 40 Am. Rep. 643.

⁷³ For cases holding infants and married women estopped, see *Blakeslee v. Sincepaugh*, 71 Hun, 412, 24 N. Y. Supp. 947; *Knight v. Thayer*, 125 Mass. 25; *Howell v. Hale*, 5 Lea (Tenn.) 405; *Appeal of Grim*, 105 Pa. 375; *Guer-tin v. Mombteau*, 144 Ill. 32, 33 N. E. 49; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Berry v. Seawall*, 13 O. C. A. 101, 65 Fed. 742 (a parol partition); *Hart v. Church*, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; *Chaffe v. Watts*, 37 La. Ann. 324. For cases holding infants and married women not estopped, see *Innis v. Templeton*, 95 Pa. 262, 40 Am. Rep. 643; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *McBeth v. Tra-bue*, 69 Mo. 642; *Hilburn v. Harris* (Tex. Civ. App.) 29 S. W. 923. A married woman is not estopped by an invalid power of attorney. *Brown v. Rouse*, 104 Cal. 672, 38 Pac. 507.

their property, and to make contracts, the doctrine of equitable estoppel applies to them.⁷⁴

To authorize the finding of an estoppel in pais in a matter affecting the title to land, there must be shown either actual fraud, by the owner of the land, or fault or negligence, equivalent to fraud on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak.⁷⁵ There is much controversy in the cases whether fraud is a necessary element of estoppel in pais.⁷⁶ With reference to the doctrine in general, the prevailing view is that it is not necessary.⁷⁷ With reference, however, to matters involving the title to land, it is held by a number of cases that an estoppel in pais must possess an element of fraud.⁷⁸

No estoppel arises, however, where the representations or conduct in issue arose from honest mistake. This is illustrated, for example, in mistakes as to boundary lines. Thus, if parties, in locating a boundary line, merely agree to put a fence or building on a certain line, without any reference to the actual boundary, or if the fence or building is located otherwise than on the true line through mistake, no estoppel arises, and either party may claim to the true line when it is discovered.⁷⁹ On the other hand, if the true line is unknown through loss of monuments, and the parties agree upon a division line, either themselves or through arbitrators, the parties are estopped to claim that such line is not the true line.⁸⁰

⁷⁴ *Wilder v. Wilder*, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97, 18 Am. St. Rep. 130; *Hockett v. Bailey*, 86 Ill. 74; *Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362.

⁷⁵ *Trenton Banking Co. v. Duncan*, 86 N. Y. 221. And see *Boggs v. Mining Co.*, 14 Cal. 279; *Ludwig v. Highley*, 5 Pa. 132.

⁷⁶ That fraud is a necessary element of estoppel, see *Henshaw v. Bissell*, 18 Wall. (U. S.) 271, 21 L. Ed. 835; *Davidson v. Young*, 38 Ill. 145; *Boggs v. Mining Co.*, 14 Cal. 279; *Jewett v. Miller*, 10 N. Y. 402, 65 Am. Dec. 751; *Andrews v. Lyons*, 11 Allen (Mass.) 349. Contra, *Maple v. Kussart*, 53 Pa. 348, 91 Am. Dec. 214.

⁷⁷ *Eaton, Equity*, 169; *Bigelow, Estoppel*, 629; *Pomeroy, Eq. Jur.* §§ 805, 806.

⁷⁸ *Pomeroy, Eq. Jur.* § 807. *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Huyck v. Bailey*, 100 Mich. 223, 58 N. W. 1002. And see cases cited under note 75, *supra*.

⁷⁹ *Proctor v. Machine Co.*, 137 Mass. 159; *Proprietors of Liverpool Wharf v. Prescott*, 7 Allen (Mass.) 494; *Thayer v. Bacon*, 3 Allen (Mass.) 163, 80 Am. Dec. 59. But not after acquiescence for the period of the statute of limitations. *Chew v. Morton*, 10 Watts (Pa.) 321.

⁸⁰ *Reed v. Farr*, 35 N. Y. 113; *Jackson v. Ogden*, 7 Johns. (N. Y.) 238; *Joyce v. Williams*, 26 Mich. 332; *Knowles v. Toothaker*, 58 Me. 174.

SAME—ADVERSE POSSESSION

229. Adverse possession, or disseisin, of the land of another under certain circumstances may ripen into a perfect title by virtue of the statutes of limitation. In order, however, that a disseisor may acquire title by adverse possession, the following general conditions must be fulfilled:

- (a) The possession must be actual.
- (b) It must be visible or notorious.
- (c) It must be hostile or adverse.
- (d) It must be exclusive.
- (e) It must be continuous by one person or by persons in privity.
- (f) It must be continued for the whole period required by the statute of limitations.

Seisin and Disseisin

Seisin, as applied to the possession of land, has been previously discussed.⁸¹ It is impossible for two persons, unless they are joint owners, to have lawful seisin of the same land at the same time. If, however, two persons are in possession, the one who has title to the land will have the seisin also.⁸² One who takes possession of land against the claims of the rightful owner is said to disseise the latter, and is called a disseisor. When an owner of land has been disseised, his interest in the land is reduced thereby to a mere right of entry; that is, the owner must make an actual entry on the land in order to regain his seisin, although for this purpose a physical ouster of the disseisor is not essential.⁸³ It is simply necessary that the disseisee enter on the land with the intention of regaining his seisin, and perform acts showing such intention.⁸⁴ At common law, if, before the right of entry is exercised, there be a descent cast, that is, if the disseisor die, and his rights acquired by the disseisin are transferred to his heirs, the disseisee's right of entry is changed to a mere right of action. This rule obtains, however, in only a few of our states.⁸⁵

⁸¹ Ante, chapter IV.

⁸² *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *Farrar v. Heinrich*, 86 Mo. 521.

⁸³ *Shearman v. Irvine's Lessee*, 4 Cranch (U. S.) 367, 2 L. Ed. 649; *Jackson ex dem. Beekman v. Haviland*, 13 Johns. (N. Y.) 229; *Altemus v. Campbell*, 9 Watts (Pa.) 28, 34 Am. Dec. 494. But see *Jackson v. Cairns*, 20 Johns. (N. Y.) 301; *Hall's Lessee v. Vandegrift*, 3 Bin. (Pa.) 374.

⁸⁴ *Altemus v. Campbell*, 9 Watts (Pa.) 28, 34 Am. Dec. 494.

⁸⁵ 3 Washb. Real Prop. (5th Ed.) 140.

Adverse Possession

Adverse possession has been defined as the possession of the land of another which, when accompanied by certain acts and circumstances, will vest title in the possessor.⁸⁶ When one takes adverse possession of land belonging to another, he acquires rights therein which may ripen into a title, either through the doctrine of estoppel, by which the true owner may be prevented from setting up his title against the one in possession, or through the statutes of limitations, which provide, in effect, that if one holds adverse possession of land for the period provided by the statutes of the various states, the owner of the land shall have no power to dispossess him. There are two theories as to the manner in which statutes of limitations operate. One is that they merely destroy the remedy of the true owner, and thus cut off his rights against the one in possession, who has title by that possession against all other persons, by the mere fact of having possession.⁸⁷ The other theory is that they operate to transfer the title of the real owner to the one in adverse possession of the land, and that the latter acquires a title which he can himself sue on.⁸⁸ He may, consequently, maintain ejectment,⁸⁹ even against the former owner,⁹⁰ or may bring suit to quiet title.⁹¹ Under the original English statute,⁹² the decisions were conflicting.⁹³ By the terms, however, of the later English statute,⁹⁴ the estate is transferred to the adverse possessor.⁹⁵ In this country, it is almost universally held

⁸⁶ Black, L. Dict.; Bouvier, L. Dict.

⁸⁷ 2 Dembitz, Land Tit. 1345.

⁸⁸ Keppel v. Dreier, 187 Ill. 298, 58 N. E. 386; Pederick v. Searle, 5 Serg. & R. (Pa.) 236; Radican v. Radican, 22 R. I. 405, 48 Atl. 143.

⁸⁹ Doe ex dem. Farmers' Heirs v. Eslava, 11 Ala. 1028; Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18; Paullin v. Hale, 40 Ill. 274. Compare Deering v. Riley, 38 App. Div. 164, 56 N. Y. Supp. 704; Huey v. Smith, 3 Pa. 353.

⁹⁰ Wickes v. Wickes, 98 Md. 307, 56 Atl. 1017; McDuffee v. Sinnott, 119 Ill. 449, 10 N. E. 385; Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Stellwagen v. Tucker, 144 U. S. 548, 12 Sup. Ct. 724, 36 L. Ed. 537.

⁹¹ Mickey v. Barton, 194 Ill. 446, 62 N. E. 802; Woodward v. Faris, 109 Cal. 12, 41 Pac. 781; Axmear v. Richards, 112 Iowa, 657, 84 N. W. 686; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532.

⁹² 21 Jac. I, c. 16, § 1.

⁹³ The earlier decisions held that the claimant acquired a perfect title. See Taylor v. Horde, 1 Burr. 60; Stokes v. Berry, 2 Salk. 421. The later decisions held that the remedy was merely barred. Davenport v. Tyrrel, 1 W. Bl. 675; Beckford v. Wade, 17 Ves. Jr. 87.

⁹⁴ 3 & 4 Wm. IV, c. 27, § 34.

⁹⁵ Incorporated Soc. v. Richards, 1 Drury & Warr. 258; Scott v. Nixon, 3 Drury & Warr. 388.

that an adverse holding for the statutory period vests the title in the adverse occupant.⁹⁶

Who may Acquire Title by Adverse Possession

As a rule, any person, natural or artificial, may acquire title by adverse possession.⁹⁷ This applies to infants,⁹⁸ married women,⁹⁹ and corporations, both private¹ and public.² It has also been held that a foreign corporation may acquire title in this way.³ The statute of limitations also runs in favor of the state,⁴ although it does not run against it.⁵ Title by adverse possession may, likewise, be acquired by an alien.⁶

Requisites for Title by Adverse Possession

All the cases agree that in order to perfect title by adverse possession the possession must be actual, for a part of the land at least; that it must be visible or notorious; that it must be hostile or adverse; that it must be exclusive; and that it must be continued for the whole period required to bar an action for recovery under the statute of limitations.⁷

⁹⁶ *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983; *Wilder v. Traction Co.*, 216 Ill. 493, 75 N. E. 194; *Hatch v. Lusignan*, 117 Wis. 428, 94 N. W. 332; *H. B. Claffin Co. v. Banking Co.*, 113 Fed. 958; *ANDERSON v. BURNHAM*, 52 Kan. 454, 34 Pac. 1056, *Burdick Cas. Real Property*.

TENNESSEE.—In Tennessee, it is provided by statute that possession for the statutory period merely bars the remedy. *Crutsinger v. Catron*, 10 Humph. 462.

⁹⁷ *Giddens v. Mobley*, 37 La. Ann. 900; *Chevrier v. Reg.*, 4 Can. S. Ct. 1.

⁹⁸ *Killebrew v. Mauldin*, 145 Ala. 654, 39 South. 575; *Woodruff v. Roysden*, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. Rep. 905; *Lackman v. Wood*, 25 Cal. 147.

⁹⁹ *Clark v. Gilbert*, 39 Conn. 94; *Steel v. Johnson*, 4 Allen (Mass.) 425; *Collins v. Lynch*, 157 Pa. 246, 27 Atl. 721, 37 Am. St. Rep. 723; *Ramsey v. Quillen*, 5 Lea (Tenn.) 184.

¹ *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Covert v. Railroad Co.*, 204 Pa. 341, 54 Atl. 170; *Inhabitants of Second Precinct in Rehoboth v. Carpenter*, 23 Pick. (Mass.) 131; *Hanlon v. Railroad Co.*, 40 Neb. 52, 58 N. W. 590.

² *City of Victoria v. Victoria County* (Tex. Civ. App.) 94 S. W. 368; *Murphy v. Commonwealth*, 187 Mass. 361, 73 N. E. 524; *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Sherman v. Kane*, 86 N. Y. 57.

³ *St. Paul v. Railroad Co.*, 45 Minn. 387, 48 N. W. 17. See *Barstow v. Mining Co.*, 10 Nev. 386; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541.

⁴ *Eldridge v. Binghamton*, 120 N. Y. 309, 24 N. E. 462; *Rhode Island v. Massachusetts*, 4 How. (U. S.) 591, 11 L. Ed. 1116.

⁵ *Infra*.

⁶ *Overing v. Russell*, 32 Barb. (N. Y.) 263. But see *Leary v. Leary*, 50 How. Prac. (N. Y.) 122.

⁷ See *infra*.

In some states, it is also necessary, by statute, that the adverse possessor should hold under color of title,⁸ and some statutes require that he must pay the taxes during the running of the statute of limitations.⁹ Some states also hold that title by adverse possession cannot be acquired unless the occupant enters and holds possession in good faith.¹⁰ These questions will be considered in turn in the following paragraphs.

Actual Possession

In order that title may be gained by adverse possession, it is necessary that there be an actual disseisin of the owner, and this can only be by the disseisor being in actual possession of the land in question.¹¹ No particular acts are necessary to show such possession, and it may be shown in many ways.¹² Among these may be mentioned residence on the land,¹³ the erection of buildings and other structures,¹⁴ or the actual inclosure of the land with a fence.¹⁵ None of these acts, however, is absolutely necessary,¹⁶ and in some cases they might be impossible, from the character of the property.¹⁷ The statutes, in some states, may control the question of

⁸ *Infra*.

⁹ *Infra*.

¹⁰ *Infra*.

¹¹ *Zirngibl v. Dock Co.*, 157 Ill. 430, 42 N. E. 431; *Attorney General v. Ellis*, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120; *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413; *Geneva v. Henson*, 195 N. Y. 447, 88 N. E. 1104; *State v. Bank*, 106 Ind. 435, 7 N. E. 379; *WARD v. COCHRAN*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, *Burdick Cas. Real Property*; *Ewing v. Elcorn*, 40 Pa. 493.

¹² *Eastern R. Co. v. Allen*, 135 Mass. 13; *Collett v. Vanderburgh County*, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321.

¹³ *Bennett v. Kovarick*, 23 Misc. Rep. 73, 51 N. Y. Supp. 752; *Hughs v. Pickering*, 14 Pa. 297; *Cunningham v. Brumback*, 23 Ark. 336; *Bell v. Denson*, 56 Ala. 444. Cultivation is not always adverse possession. *State v. Suttle*, 115 N. C. 784, 20 S. E. 725.

¹⁴ *Congdon v. Morgan*, 14 S. C. 587; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475; *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *Moss v. Scott*, 2 Dana (Ky.) 271; *Hubbard v. Kiddo*, 87 Ill. 578.

¹⁵ *Zeilin v. Rogers*, 21 Fed. 103; *Palmer v. Safft*, 3 N. Y. Supp. 250; *Doolittle v. Tice*, 41 Barb. (N. Y.) 181; *Millar v. Humphries*, 2 A. K. Marsh. (Ky.) 446. See *ILLINOIS CENT. R. CO. v. HOUGHTON*, 126 Ill. 69, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581, *Burdick Cas. Real Property*. As to what is a sufficient inclosure, see *Yates v. Van De Vogert*, 56 N. Y. 526; *Pope v. Hanmer*, 74 N. Y. 240.

¹⁶ *Coleman v. Billings*, 89 Ill. 183; *Henry v. Henry*, 122 Mich. 6, 80 N. W. 800; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475. Residence not necessary to actual possession. *ANDERSON v. BURNHAM*, 52 Kan. 454, 34 Pac. 1056, *Burdick Cas. Real Property*.

¹⁷ *People v. Van Rensselaer*, 9 N. Y. 291; *De Lancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Hubbard v. Kiddo*, 87 Ill. 578.

actual possession by requiring actual residence,¹⁸ or by requiring an inclosure or cultivation of the land.¹⁹

In general, however, all the circumstances must be taken into consideration in order to determine the fact of actual possession.²⁰ There must be acts of dominion over the land, and they must be of such a character and of such a continuity as reasonably to acquaint the owner that a claim of ownership is being asserted.²¹ Consequently, the occasional cutting of timber or grass on the land which is claimed to be held by adverse possession has been held insufficient to show disseisin.²² In all cases, moreover, the disseisor must do the acts which constitute the disseisin with the intention to produce that effect.²³ A mere intention to disseise is not effectual unless accompanied by positive acts.²⁴ For instance, the owner of the surface of land cannot disseise another who owns the mines under the soil by merely claiming such mines, but must work them, or do other acts indicative of ownership.²⁵ So, too, taking a deed to lands from one not the owner, and recording it, does not constitute a disseisin, unless there is an entry under the deed.²⁶ Nor would an entry upon lands claimed under a deed be a disseisin if the entry was made by mistake,

¹⁸ *Stumpf v. Osterhage*, 94 Ill. 115.

¹⁹ *McFarlane v. Kerr*, 10 Bosw. (N. Y.) 249.

²⁰ *Houghton v. Wilhelmy*, 157 Mass. 521, 32 N. E. 861; *Morrison v. Kelly*, 22 Ill. 619, 74 Am. Dec. 169.

²¹ *ANDERSON v. BURNHAM*, 52 Kan. 454, 34 Pac. 1056, *Burdick Cas. Real Property*; *Whitaker v. Shooting Club*, 102 Mich. 454, 60 N. W. 983.

²² *Lackawanna Lumber Co. v. Kelley*, 221 Pa. 238, 70 Atl. 724; *Mission of Immaculate Virgin v. Cronin*, 143 N. Y. 524, 38 N. E. 964; *Price v. Brown*, 101 N. Y. 669, 5 N. E. 434. Adverse possession is not shown by building a shanty which is never occupied, *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 253; or by gathering seaweed, *Trustees of East Hampton v. Kirk*, 68 N. Y. 460; or by hauling sand at intervals for 20 years, *Strange v. Spaulding* (Ky.) 29 S. W. 137. But cutting timber in a well-settled district may be an actual disseisin. *Murray v. Hudson*, 65 Mich. 670, 32 N. W. 889; *Hörner v. Reuter*, 152 Ill. 106, 38 N. E. 747; *Scott v. Delany*, 87 Ill. 146. And cutting hay for 20 years has been held sufficient. *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482. And see *Whitaker v. Shooting Club*, 102 Mich. 454, 60 N. W. 983.

²³ *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. (U. S.) 402, 439, 8 L. Ed. 170; *Ewing v. Burnet*, 11 Pet. (U. S.) 41, 9 L. Ed. 624; *Clarke v. McClure*, 10 Grat. (Va.) 305.

²⁴ *Lynde v. Williams*, 68 Mo. 360.

²⁵ *Algonquin Coal Co. v. Iron Co.*, 162 Pa. 114, 29 Atl. 402. And see *Armstrong v. Caldwell*, 53 Pa. 284.

²⁶ *Trustees of Putnam Free School v. Fisher*, 38 Me. 324; *Lipscomb v. McClellan*, 72 Ala. 151; *Eagle & Phenix Mfg. Co. v. Bank*, 55 Ga. 44. And see *Jones v. Wilson*, 69 Ala. 400.

with no intention to disseise.²⁷ An entry, however, under a deed, though the deed be absolutely void, will be an ouster of the owner.²⁸

Constructive Possession—Color of Title

Where an adverse occupant holds land without any color of title,²⁹ he can obtain title only to so much of the land as is in his actual possession.³⁰ However, by the doctrine of constructive possession under color of title there may be a disseisin and adverse holding of more land than is actually occupied. Color of title is not required, however, in order to obtain title to land by adverse possession,³¹ unless there are special statutory provisions to the contrary;³² but when one enters upon land, under color of title, his possession is not limited to the land actually occupied by him, but extends, constructively, to the entire area described or defined by the instrument or right under which he claims.³³

The reason for these different rules is that an entry without color of title can give the disseisee no notice of adverse occupancy, except as to the land actually possessed;³⁴ while, on the other hand, if one enters with color of title, he is presumed to be in possession of the whole of his claim.³⁵ Moreover, if the deed or other instrument, which gives rise to the color of title, is recorded, or otherwise brought to the notice of the true owner of the land, the disseisor is held to be in constructive possession of all the land purported to be conveyed by the instrument.³⁶

²⁷ *Skinner v. Crawford*, 54 Iowa, 119, 6 N. W. 144. But see *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402.

²⁸ *Northrop v. Wright*, 7 Hill (N. Y.) 476; *North v. Hammer*, 34 Wis. 425; *McMillan v. Wehle*, 55 Wis. 685, 13 N. W. 694; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210.

²⁹ *Infra*.

³⁰ *Coburn v. Hollis*, 3 Metc. (Mass.) 125; *Barr v. Gratz*, 4 Wheat. (U. S.) 213, 4 L. Ed. 553.

³¹ *Noyes v. Heffernan*, 153 Ill. 339, 38 N. E. 571; *ANDERSON v. BURNHAM*, 52 Kan. 454, 34 Pac. 1056, *Burdick Cas. Real Property*; *Kent v. Harcourt*, 33 Barb. (N. Y.) 491; *Harpending v. Protestant Dutch Church*, 16 Pet. (U. S.) 455, 10 L. Ed. 1029.

³² See *infra*.

³³ *Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227; *Clark v. Campan*, 92 Mich. 573, 52 N. W. 1026; *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848; *ANDERSON v. BURNHAM*, *supra*.

³⁴ *Barber v. Robinson*, 78 Minn. 193, 80 N. W. 968.

³⁵ *Hornblower v. Banton*, 103 Me. 375, 377, 69 Atl. 568, 125 Am. St. Rep. 300.

³⁶ *Jackson ex dem. Hasbrouck v. Vermilyea*, 6 Cow. (N. Y.) 677; *Peoria & P. U. Ry. Co. v. Tamplin*, 156 Ill. 285, 40 N. E. 960; *Cooper v. Cotton Mills Co.*, 94 Tenn. 588, 30 S. W. 353; *Bon Air Coal, Land & Lumber Co. v. Parks*, 94 Tenn. 263, 29 S. W. 130; *Baker v. Swan's Lessee*, 32 Md. 355; *Whitehead*

In connection with the law of adverse possession, color of title may be defined as that which has the appearance or semblance of title, but which, in fact, is not title.³⁷ Color of title may be given by descent cast,³⁸ by a deed,³⁹ an execution sale,⁴⁰ a decree of court,⁴¹ a will,⁴² a tax deed,⁴³ a quitclaim deed,⁴⁴ or any instrument in writing which serves to define the extent of the disseisor's claim.⁴⁵ There are also many decisions which hold that color of title need not necessarily be in writing, but that it may be created by acts and circumstances which of themselves show the character and extent of the adverse possessor's entry and claim.⁴⁶ In all cases, however, it is not necessary that the title under which the disseisor claims should be a valid one.⁴⁷ In order, however, to acquire adverse title by constructive possession, claim of title must in all cases be brought to the notice of the owner of the land, either

v. Foley, 28 Tex. 1. But see, as to wild lands, Jackson ex dem. Gilliland v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

³⁷ Wright v. Mattison, 18 How. (U. S.) 50, 15 L. Ed. 280; 2 Dembitz, Land Tit. 1414; 2 Pingree, Real Prop. § 1168; East Tennessee Iron & Coal Co. v. Wiggin, 15 C. C. A. 510, 68 Fed. 446; Bissing v. Smith, 85 Hun, 564, 33 N. Y. Supp. 123; Millett v. Lagomarsino, 107 Cal. 102, 40 Pac. 25; Studstill v. Willcox, 94 Ga. 690, 20 S. E. 120; Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045. For facts insufficient to establish color of title, see Dubuque v. Coman, 64 Conn. 475, 30 Atl. 777.

³⁸ Peadro v. Carriker, 168 Ill. 570, 48 N. E. 102; Miller v. Davis, 106 Mich. 300, 64 N. W. 338.

³⁹ Welborn v. Anderson, 37 Miss. 155; Chickering v. Failes, 26 Ill. 508. But see Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853. A defective tax deed gives color of title. Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Lennig's Ex'rs v. White (Va.) 20 S. E. 831. But see Nye v. Alfter, 127 Mo. 529, 30 S. W. 186.

⁴⁰ Falls of Neuse Mfg. Co. v. Brooks, 106 N. C. 107, 11 S. E. 456; Kendrick v. Latham, 25 Fla. 819, 6 South. 871.

⁴¹ Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Huls v. Buntin, 47 Ill. 396. That a void judgment is not sufficient under a short statute of limitations, see Lafimer v. Logwood (Tex. Civ. App.) 27 S. W. 960.

⁴² Baldwin v. Ratcliff, 125 Ill. 376, 17 N. E. 794; Holloway v. Jones, 143 Pa. 564, 22 Atl. 710.

⁴³ Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; McIntyre v. Thompson, 4 Hughes (U. S.) 562, 10 Fed. 531. See Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327.

⁴⁴ Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; Swift v. Mulkey, 14 Or. 59, 12 Pac. 76.

⁴⁵ Cook v. Norton, 43 Ill. 391; Thompson v. Burhans, 79 N. Y. 93.

⁴⁶ Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259; Hollinshead v. Nauman, 45 Pa. 140.

⁴⁷ Jackson ex dem. Vanderlyn v. Newton, 18 Johns. (N. Y.) 355; Hecock v. Van Dusen, 80 Mich. 359, 45 N. W. 343; Hall v. Law, 102 U. S. 461, 26 L. Ed. 217.

by actual knowledge or through notice implied by law.⁴⁸ The doctrine of constructive possession, moreover, does not apply to any land which is actually held by the owner.⁴⁹ When a deed conveys land to which the grantor has title, and also purports to convey land to which he has no title, if the grantee takes possession of the land rightfully conveyed, he is not in constructive possession of the other tract.⁵⁰ Also, if two separate tracts of land are attempted to be conveyed by a void deed, and possession is taken of only one, adverse possession will not extend to the other tract under color of title.⁵¹ The doctrine of color of title makes no difference as to the actual possession required for a part of the land of which there must be a disseisin in fact.⁵²

Visible or Notorious Possession

In order that title may be acquired by adverse possession, it is further necessary that the owner have either actual knowledge of the adverse possession,⁵³ or else the possession of the disseisor must be so visible or notorious that the owner will be presumed to have notice of the hostile claim.⁵⁴ It is not necessary in any case that the true owner have actual knowledge of such claim,⁵⁵ but if he does have actual knowledge, a visible or notorious posses-

⁴⁸ *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475; *Ewing v. Burnet*, 11 Pet. (U. S.) 41, 9 L. Ed. 624; *Jackson ex dem. Gilliland v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; *Little v. Downing*, 37 N. H. 355.

⁴⁹ *St. Louis, A. & T. H. R. Co. v. Nugent*, 152 Ill. 119, 39 N. E. 263; *Word v. Box*, 66 Tex. 596, 3 S. W. 93; *Trimble v. Smith*, 4 Bibb (Ky.) 257. And see *Fox v. Hinton*, 4 Bibb (Ky.) 559. When land is owned by several, possession of part under a deed to the whole does not disseise all. *Turner v. Moore*, 81 Tex. 206, 16 S. W. 929.

⁵⁰ *Word v. Box*, 66 Tex. 596, 3 S. W. 93; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190.

⁵¹ *Grimes v. Ragland*, 28 Ga. 123; *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238.

⁵² *Humes v. Bernstein*, 72 Ala. 546.

⁵³ *Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59; *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131; *Henry v. Huff*, 143 Pa. 548, 22 Atl. 1046.

⁵⁴ *Heughes v. Stove Co.*, 133 App. Div. 814, 118 N. Y. Supp. 109; *Llewellyn v. Buechly*, 198 Pa. 642, 48 Atl. 864; *Van Matre v. Swank*, 147 Wis. 93, 131 N. W. 982, 132 N. W. 904; *Musick v. Barney*, 49 Mo. 458; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Ponder v. Cheeves*, 104 Ala. 307, 16 South. 145; *Wilson v. Henry*, 35 Wis. 241; *Ewing v. Burnet*, 11 Pet. (U. S.) 53, 9 L. Ed. 624; *Florida S. R. Co. v. Loring*, 2 C. C. A. 546, 51 Fed. 932; *Huntington v. Allen*, 44 Miss. 654; *King v. Carmichael*, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; *WARD v. COCHRAN*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, *Burdick Cas. Real Property*.

⁵⁵ *Samuels v. Borrowscale*, 104 Mass. 207; *Bird v. Stark*, 66 Mich. 654, 33 N. W. 754.

sion is not required.⁵⁶ The acts that constitute visible or notorious possession must depend upon the circumstances of each case, the nature and uses of the land being necessarily considered.⁵⁷ Fencing or occupying lands,⁵⁸ cultivation of a farm,⁵⁹ and the erection of buildings upon the land,⁶⁰ have been held sufficient; while the survey of lands,⁶¹ the mere payment of taxes,⁶² and the building of a fence on wild land,⁶³ have been held insufficient. A clandestine entry or possession is not visible and notorious,⁶⁴ and a mere entry on the lands under a void deed is not sufficient, unless it is brought to the notice of the owner by the deed being recorded, or in some other way.⁶⁵ If a tenant, however, attorns to one claiming adversely, and gives that as a reason for refusing to pay rent to the true owner, the latter has notice of the adverse claim.⁶⁶ In general, "If the owner visit his land, the indications of adverse possession and claim should be so patent that he could not be deceived."⁶⁷

Hostile Possession

The possession of a disseisor, in order to lay the foundation of a new title, must be hostile or adverse to the true owner, and not subordinate to him.⁶⁸ The word "hostile," when used in this connection, has, of course, no meaning of ill will or enmity, but means that an occupant is in possession as an owner, and in op-

⁵⁶ Jones v. Porter, 3 Pen. & W. (Pa.) 132. Actual knowledge is always sufficient. Dausch v. Crane, 109 Mo. 323, 19 S. W. 61; Brown v. Cockerell, 33 Ala. 38.

⁵⁷ Lake Shore & M. S. R. Co. v. Johnson, 157 Mich. 115, 121 N. W. 267; Alexander v. Polk, 39 Miss. 737.

⁵⁸ Cutter v. Cambridge, 6 Allen (Mass.) 20; Allen v. Allen, 58 Wis. 205, 16 N. W. 610. And see Leeper v. Baker, 68 Mo. 400. Living in a shanty on wild land while cutting timber has been held insufficient. McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014.

⁵⁹ Wolf v. Ament's Ex'r, 1 Grant, Cas. (Pa.) 150.

⁶⁰ Foulke v. Bond, 41 N. J. Law, 527.

⁶¹ Thompson v. Burhans, 61 N. Y. 52; Beatty v. Mason, 30 Md. 409.

⁶² Brown v. Rose, 48 Iowa, 231; Scott v. Mills, 49 Ark. 266, 4 S. W. 908.

⁶³ Coburn v. Hollis, 3 Metc. (Mass.) 125.

⁶⁴ Edmondson v. Land Co., 128 Ala. 589, 29 South. 596; Pierce v. Barney, 209 Pa. 132, 58 Atl. 152.

⁶⁵ Bracken v. Jones, 63 Tex. 184.

⁶⁶ 2 Dembitz, Land Tit. 1391.

⁶⁷ Pike v. Robinson, 79 Mo. 615.

⁶⁸ Toney v. Knapp, 142 Mich. 652, 106 N. W. 552; Miller v. Warren, 94 App. Div. 192, 87 N. Y. Supp. 1011; AYERS v. REIDEL, 84 Wis. 276, 54 N. W. 588, Burdick Cas. Real Property; Chloupek v. Perotka, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858; Cook v. Babcock, 11 Cush. (Mass.) 206; Jackson v. Berner, 48 Ill. 203; Sparrow v. Hovey, 44 Mich. 63, 6 N. W. 93; Washburn v. Cutter, 17 Minn. 361 (Gil. 335).

position to all other claimants.⁶⁹ If one enters upon land without right or claim of right, he is a mere trespasser,⁷⁰ and if no claim of right ever exists he can never acquire title by adverse possession.⁷¹ In other words, a claim of title or right is always necessary in the acquisition of title by adverse possession.⁷² There need not be, however, a distinct claim of right or title by the disseisor,⁷³ and whether or not possession has been adverse is a question of fact in each case.⁷⁴ It is held that, if one in possession of land sues another for trespass, this is evidence of an adverse holding against the owner of the land,⁷⁵ and declarations by the disseisor that his holding is adverse to the owner are admissible.⁷⁶ When an entry has been made with the permission or license of the owner, possession so acquired is not adverse.⁷⁷ To make possession adverse, when originally obtained under the owner's consent, there must be a subsequent disclaimer of the owner's title, and the

⁶⁹ *Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295; *McCracken v. San Francisco*, 16 Cal. 591; *Northern Pac. R. Co. v. Kranich*, 52 Fed. 911.

⁷⁰ *Mylar v. Hughes*, 60 Mo. 105.

⁷¹ *Kingston v. Guck*, 155 Mich. 264, 118 N. W. 967; *Jackson v. Porter*, 1 Paine, 457, Fed. Cas. No. 7,143. But see *Wood v. Railway Co.*, 11 Kan. 324, holding that a trespasser who is in possession under claim of title may acquire ownership by virtue of the statute of limitations.

⁷² *Alsup v. Stewart*, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265; *Gilchrist v. McLaughlin*, 29 N. C. 310; *Brown v. Gay*, 3 Greenl. (Me.) 126; *Brown v. Cockerell*, 33 Ala. 38; *Grube v. Wells*, 34 Iowa, 148; *St. Louis University v. McCune*, 28 Mo. 481; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138. And see *Crary v. Goodman*, 22 N. Y. 170. But the title under which the land is claimed need not be even prima facie good. *Sumner v. Stevens*, 6 Metc. (Mass.) 337. But possession held under mistake may be adverse. *Beckman v. Davidson*, 162 Mass. 347, 39 N. E. 38; *Wilson v. Hunter*, 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 63.

⁷³ *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360. But there must be, at least, a general claim of ownership. *Kirkman v. Brown*, 93 Tenn. 476, 27 S. W. 709; *Wade v. Johnson*, 94 Ga. 348, 21 S. E. 569.

⁷⁴ *Cummings v. Wyman*, 10 Mass. 465; *Blackmore v. Gregg*, 2 Watts & S. (Pa.) 182; *Highstone v. Burdette*, 54 Mich. 329, 20 N. W. 64. That adverse possession is a question of law, see *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. (U. S.) 402, 8 L. Ed. 170.

⁷⁵ *Hollister v. Young*, 42 Vt. 403.

⁷⁶ *Youngs v. Cunningham*, 57 Mich. 153, 23 N. W. 626; *Lamoreux v. Huntley*, 68 Wis. 24, 31 N. W. 331. But see *Lynde v. Williams*, 68 Mo. 360.

⁷⁷ *Gray v. Bartlett*, 20 Pick. (Mass.) 186, 32 Am. Dec. 208; *St. Joseph v. Seel*, 122 Mich. 70, 80 N. W. 987; *Hoban v. Cable*, 102 Mich. 206, 60 N. W. 466; *Coleman v. Pickett*, 82 Hun, 287, 31 N. Y. Supp. 480; *Whiting v. Edmunds*, 94 N. Y. 309; *Campbell v. Shipley*, 41 Md. 81; *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614. But see *Sands v. Hughes*, 53 N. Y. 287.

disclaimer must be made known to the owner.⁷⁸ Moreover, whenever one having a right to land enters, his entry is presumed to be made under the existing right, and not as a disseisor.⁷⁹

Questions of adverse or hostile possession arise at times in connection with boundary lines. For example, when adjoining owners agree upon a certain line as the boundary between their respective lands, their continued possession up to such a line will be adverse to each other, and will ripen into a title at the end of the statutory period,⁸⁰ regardless of whether the line agreed upon was the true line.⁸¹ If, on the other hand, a boundary line is agreed upon merely for convenience, and not as the true line, possession by the adjoining owners up to the line so established will not be treated as adverse, and no disseisin will occur.⁸² Likewise, if one occupies land up to a certain line by mistake, supposing such line to be the true line, and having no intention to occupy more than is rightfully his own, the occupation of the land in excess of his own is not adverse.⁸³ Some cases, however, contrary to this rule, hold that title by adverse possession may be obtained in this way.⁸⁴

It has already been stated that there can be no hostile or adverse possession when the occupant holds subordinate to the true owner.⁸⁵ Thus, where a grantor remains in possession after the delivery of a deed to his grantee, his possession is not, as a rule, adverse.⁸⁶ Also, if one enters land under a contract of purchase,

⁷⁸ *VANDIVEER v. STICKNEY*, 75 Ala. 225, Burdick Cas. Real Property; *Smith v. Stevens*, 82 Ill. 554; *Harvey v. Tyler*, 2 Wall. (U. S.) 328, 17 L. Ed. 871; *Hall v. Stevens*, 9 Metc. (Mass.) 418; *Long v. Mast*, 11 Pa. 189; *Clarke v. McClure*, 10 Grat. (Va.) 305; *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610; *Griswold v. Little*, 13 Misc. Rep. 281, 34 N. Y. Supp. 703.

⁷⁹ *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238; *Mhoon v. Cain*, 77 Tex. 317, 14 S. W. 24.

⁸⁰ *Boston & W. R. Corp. v. Sparhawk*, 5 Metc. (Mass.) 469; *Reed v. Farr*, 35 N. Y. 113; *Reiter v. McJunkin*, 173 Pa. 82, 33 Atl. 1012.

⁸¹ *Baldwin v. Brown*, 16 N. Y. 359; *Wells v. Bentley*, 87 Ark. 625, 113 S. W. 639.

⁸² *Burrell v. Burrell*, 11 Mass. 294; *Bird v. Stark*, 66 Mich. 654, 33 N. W. 754; *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *Grube v. Wells*, 34 Iowa, 148.

⁸³ *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 Ann. Cas. 140; *Crary v. Goodman*, 22 N. Y. 170; *Comegys v. Carley*, 3 Watts (Pa.) 280, 27 Am. Dec. 356.

⁸⁴ *Booksh v. Sugar Co.*, 115 La. 516, 39 South. 545; *Weeks v. Upton*, 99 Minn. 410, 109 N. W. 828; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *ERCK v. CHURCH*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641, Burdick Cas. Real Property.

⁸⁵ *Supra*.

⁸⁶ *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; *Sherman v. Kane*, 46 N. Y. Super. Ct. 310; *Connor v. Bell*, 152 Pa. 444, 25 Atl. 802.

or a bond for a deed, no adverse possession will be acquired while the purchase price remains unpaid.⁸⁷ The possession of a guardian is not adverse to his ward,⁸⁸ nor a widow's possession before dower assigned adverse to the heirs.⁸⁹ An agent's possession during the continuancy of the agency is not adverse to his principal,⁹⁰ and a tenant cannot set up an adverse claim against his landlord.⁹¹ The possession of a trustee of an express trust is, likewise, the possession of the cestui que trust,⁹² and where a mortgagee is in possession his occupancy is not adverse to the mortgagor during the continuance of their relation.⁹³ We have already seen that possession by a cotenant is not adverse to the other owners,⁹⁴ although it may be made so by an actual ouster to the cotenants and a denial of their title.⁹⁵ A deed, however, of the whole premises, given by a joint owner to a stranger, is not a disseisin, unless there is an entry under the deed.⁹⁶

⁸⁷ *Davis v. Howard*, 172 Ill. 340, 50 N. E. 258; *Burke v. Douglass*, 115 Mich. 197, 73 N. W. 133; *Taylor v. Dugger*, 66 Ala. 444; *Knox v. Hook*, 12 Mass. 329; *Brown v. King*, 5 Metc. (Mass.) 173; *Harris v. Richey*, 56 Pa. 395; *Rigor v. Frye*, 62 Ill. 507. But see *Jackson ex dem. Bonnel v. Foster*, 12 Johns. (N. Y.) 488.

⁸⁸ *Halliburton v. Fletcher*, 22 Ark. 453; *Brown v. McKay*, 125 Cal. 291, 57 Pac. 1001.

⁸⁹ *Dewitt v. Shea*, 203 Ill. 393, 67 N. E. 761, 96 Am. St. Rep. 311; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576.

⁹⁰ *Peabody v. Leach*, 18 Wis. 657; *Huzzard v. Trego*, 35 Pa. 9.

⁹¹ *Miller v. Warren*, 94 App. Div. 192, 87 N. Y. Supp. 1011; *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. 449. See *Van Deventer v. Lott*, 172 Fed. 574. See, also, *VANDIVEER v. STICKNEY*, 75 Ala. 225, *Burdick Cas. Real Property*.

⁹² *Dresser v. Travis*, 39 Misc. Rep. 358, 79 N. Y. Supp. 924; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239.

⁹³ *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Norris v. Ile*, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

⁹⁴ Ante, chapter XII. And see the following cases: *Brumback v. Brumback*, 198 Ill. 66, 64 N. E. 741; *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167.

⁹⁵ *Cole v. Lester*, 48 Misc. Rep. 13, 96 N. Y. Supp. 67; *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232; *Cramton v. Rutledge*, 163 Ala. 649, 50 South. 900, 136 Am. St. Rep. 94; *Campau v. Dubois*, 39 Mich. 274; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Jackson ex dem. Bratt v. Tibbits*, 9 Cow. (N. Y.) 246.

⁹⁶ *Murray v. Quigley*, 119 Iowa, 6, 92 N. W. 869, 97 Am. St. Rep. 276; *Hamerslag v. Duryea*, 58 App. Div. 288, 68 N. Y. Supp. 1081; *Id.*, 172 N. Y. 622, 65 N. E. 1117; *Jackson ex dem. Preston v. Smith*, 13 Johns. (N. Y.) 411; *King v. Carmichael*, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303. Contra, *Hardee v. Weathington*, 130 N. C. 91, 40 S. E. 855.

Exclusive Possession

Possession under claim of adverse right must also be exclusive, in order to ripen into a title.⁹⁷ This can never be the case when the possession is joined with that of the owner, for when two persons are thus in possession the seisin is in the one who holds the title.⁹⁸ Likewise the doctrine of constructive possession under color of title does not apply if the lands which are so claimed are in the actual possession of the owner.⁹⁹ We have also seen that possession of a joint owner against his cotenants must be exclusive and adverse in order to cut off their rights.¹ It is stated in a number of cases that possession must be exclusive of all persons.² It is said, however, in other cases, that one may admit title in the United States, or a state, and yet hold adversely, if exclusive of all others.³ Occupation in common with the public generally is not, however, exclusive possession.⁴

Continuous Possession

No title can be acquired by adverse possession, unless such possession is continued for the whole period prescribed by the statute of limitations. In other words, the rights gained by disseisin will in all cases be lost if the possession is interrupted or abandoned before the statutory period has elapsed.⁵ It is not necessary that during the whole time the disseisor be in actual occupancy of the land,⁶ or have his residence on it,⁷ since it is sufficient if the facts

⁹⁷ Boltz v. Colsch, 134 Iowa, 480, 109 N. W. 1106; Attorney General v. Ellis, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 N. W. 1019; Foulke v. Bond, 41 N. J. Law, 527; WARD v. COCHRAN, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, Burdick Cas. Real Property.

⁹⁸ Bellis v. Bellis, 122 Mass. 414; Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; Farrar v. Heinrich, 86 Mo. 521; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113.

⁹⁹ Supra.

¹ Supra.

² Cass Farm Co. v. Detroit, 139 Mich. 318, 102 N. W. 848; WARD v. COCHRAN, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, Burdick Cas. Real Property.

³ Lord v. Sawyer, 57 Cal. 65; Gibson v. Chouteau, 39 Mo. 536.

⁴ Boulo v. Railroad Co., 55 Ala. 480; Hittinger v. Eames, 121 Mass. 539.

⁵ Bean v. Bean, 163 Mich. 379, 128 N. W. 413; Meiggs v. Hoagland, 68 App. Div. 182, 74 N. Y. Supp. 234; Mead v. Railroad Co., 112 Iowa, 291, 83 N. W. 979; GORDON v. SIMMONS, 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 305, Burdick Cas. Real Property; Brickett v. Spofford, 14 Gray (Mass.) 514; Bliss v. Johnson, 94 N. Y. 235; Moore v. Collishaw, 10 Pa. 224; Groft v. Weakland, 34 Pa. 308. Possession once established will be presumed to have continued, in the absence of a contrary showing. Marston v. Rowe, 43 Ala. 271.

⁶ Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376.

⁷ ANDERSON v. BURNHAM, 52 Kan. 454, 34 Pac. 1056, Burdick Cas. Real

are such as to show actual possession in any way.⁸ Occasional acts of dominion over the land, although extended over the statutory period, will not, however, constitute continuous possession.⁹ Where the disseisin has been by two or more persons jointly, the abandonment of possession by one causes his rights to pass to his codisseisor.¹⁰ When possession is interrupted, the running of the statute of limitations is stopped, and a subsequent return to possession will not avail. The running of the statute will only begin from the date of the return.¹¹ By the common-law rule, an entry upon the land by the owner before the statutory period has expired will prevent the acquisition of an adverse title.¹² This rule has been changed, however, by statute in some states, and it is provided that such an entry will not arrest the running of the statute, unless an action in ejectment is brought against the disseisor.¹³

Whether or not possession was abandoned by the occupant is a question of fact, and depends upon the circumstances of each case. For this reason, no general rule as to what constitutes abandonment can be laid down.¹⁴

Tacking Possessions

While the adverse possession must be continuous for the entire statutory period, yet it is not necessary that one and the same per-

Property; *GORDON v. SIMMONS*, 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 305, *Burdick Cas. Real Property*. Possession may be held for him by a tenant. *Hunton v. Nichols*, 55 Tex. 217. The fact that the buildings on the land are vacant from time to time for want of tenants will not necessarily interrupt the adverse holding. *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620; *Costello v. Edson*, 44 Minn. 135, 46 N. W. 299; *Gary v. Woodham*, 103 Ala. 421, 15 South. 840.

⁸ *Rieman v. Wagner*, 74 Md. 478, 22 Atl. 72; *Hughes v. Pickering*, 14 Pa. 297.

⁹ *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 South. 561.

¹⁰ *Congdon v. Morgan*, 14 S. C. 587.

¹¹ *Boltz v. Colsch*, 134 Iowa, 480, 109 N. W. 1106; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68, 90 N. W. 1019; *Byrne v. Lowry*, 19 Ga. 27; *Susquehanna & W. V. R. & Coal Co. v. Quick*, 68 Pa. 189; *Core v. Faupell*, 24 W. Va. 238; *Overand v. Mencer*, 83 Tex. 122, 18 S. W. 301.

¹² *Lawless v. Wright*, 39 Tex. Civ. App. 26, 86 S. W. 1039; *Brickett v. Spofford*, 14 Gray (Mass.) 514; *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186. But see *Bowen v. Guild*, 130 Mass. 121. Bringing an action is not necessary to stop the running of the statute. *Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737.

¹³ So, for example, as to Pennsylvania, *Douglas v. Irvine*, 126 Pa. 643, 17 Atl. 802. And see, also, the statutes of other states.

¹⁴ See the following cases: *Perry v. Lawson*, 112 Ala. 480, 20 South. 611; *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896; *Susquehanna & W. V. R. & Coal Co. v. Quick*, 68 Pa. 189.

son should be the continuous occupant. The possession must, however, be continuous either as to one person or as to persons in privity.¹⁵ By the doctrine of "tacking," successive periods of possession may be added, or tacked, to each other, provided the successive occupants are in privity either of contract, estate, or blood,¹⁶ and the combined length of such adverse holdings will avail to make up the statutory period.¹⁷ Where, however, there is no privity between successive occupants, a subsequent occupant cannot count the time of his predecessor's possession.¹⁸

Privity for the purpose of tacking possessions exists between vendor and vendee;¹⁹ between a purchaser at a judicial sale and the occupant of the land;²⁰ between ancestor and heir;²¹ landlord and tenant;²² and testator and devisee.²³ It does not exist, however, at common law between a deceased husband and his widow,²⁴

¹⁵ *Bird v. Whetstone*, 71 Kan. 430, 80 Pac. 942; *ERCK v. CHURCH*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641, *Burdick Cas. Real Property*; *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550.

¹⁶ *Illinois Cent. R. Co. v. Hatter*, 207 Ill. 88, 69 N. E. 751; *Doswell v. De La Lanzo*, 20 How. (U. S.) 29, 32, 15 L. Ed. 824; *City and County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Crispen v. Hannavan*, 50 Mo. 536; *Allis v. Field*, 89 Wis. 327, 62 N. W. 85; *Smith v. Reich*, 80 Hun, 287, 30 N. Y. Supp. 167; *Hughes v. Pickering*, 14 Pa. 297; *Cooper v. Cotton-Mills Co.*, 94 Tenn. 588, 30 S. W. 353; *Tucker v. Price*, 29 S. W. 857, 17 Ky. Law Rep. 11. The existence of privity may be shown by parol evidence. *Weber v. Anderson*, 73 Ill. 439.

¹⁷ *McNeely v. Langan*, 22 Ohio St. 32; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173; *Smith v. Chapin*, 31 Conn. 530; *Shannon v. Kinney*, 1 A. K. Marsh. (Ky.) 3, 10 Am. Dec. 705; *Davis v. McArthur*, 78 N. C. 357; *Scales v. Cockrill*, 3 Head (Tenn.) 432.

¹⁸ *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173; *ERCK v. CHURCH*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641, *Burdick Cas. Real Property*.

¹⁹ *Merritt v. Westerman*, 165 Mich. 535, 131 N. W. 66; *Baker v. Duff*, 136 App. Div. 13, 120 N. Y. Supp. 184; *ERCK v. CHURCH*, supra. Contra, *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3.

²⁰ *Peele v. Chever*, 8 Allen (Mass.) 89; *Scheetz v. Fitzwater*, 5 Pa. 126; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871.

²¹ *Montague v. Marunda*, 71 Neb. 805, 99 N. W. 653; *Frost v. Courtis*, 172 Mass. 401, 52 N. E. 515; *ERCK v. CHURCH*, supra.

²² *Schneider v. Botsch*, 90 Ill. 577; *Melvin v. Locks & Canals on Merrimack River*, 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

²³ *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551; *Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199; *Haynes v. Boardman*, 119 Mass. 414.

²⁴ *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Collins v. Lynch*, 7 Kulp (Pa.) 15. See *ERCK v. CHURCH*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641, *Burdick Cas. Real Property*.

or between an intestate and his administrator.²⁵ These common-law rules may be changed, however, by force of statutory provisions.²⁶

With reference to a vendor and vendee, the effect of the doctrine is to give a disseisor the right to convey the imperfect title which he has acquired by his disseisin and adverse holding.²⁷ Moreover, not only a grantee has a right to add his possession to that of his grantor in making up the statutory period, but an heir or a devisee may count the time during which the land was held by his ancestor or testator.²⁸ Possession held under a contract of sale may also be added to that of the vendor.²⁹ In the same way the possession of several persons as tenants of the disseisor may be sufficient to give an adverse title to the landlord.³⁰ In all cases, however, there must be no gap in any case between the holdings which are to be tacked,³¹ although a brief vacancy between changing tenants does not prevent tacking in favor of a landlord.³²

Length of Time Required

The time requisite to acquire title by adverse possession varies greatly under the statutes of the several states. Moreover, these statutes have been changed from time to time, and the local statute

²⁵ *Bullen v. Arnold*, 31 Me. 583; *East Tennessee Iron & Coal Co. v. Broyles*, 95 Tenn. 612, 32 S. W. 761; *East Tennessee Iron & Coal Co. v. Walton* (Tenn. Ch. App.) 35 S. W. 459; *ERCK v. CHURCH*, supra.

²⁶ As to the wife, see *McEntire v. Brown*, 28 Ind. 347; *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600. As to an administrator, see *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402.

²⁷ *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1028, 86 Am. St. Rep. 486; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *City of St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. 17; *Cooper v. Ord*, 60 Mo. 420. But, where the conveyance is void on its face, there can be no tacking, *Simpson v. Downing*, 23 Wend. (N. Y.) 316; *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347; nor where the second claims adversely to the first, *Jackson ex dem. Baldwin v. Leonard*, 9 Cow. (N. Y.) 653.

²⁸ Supra. And see *Williams v. McAliley*, Cheeves (S. C.) 200; *City of St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. 17. So a dowress may add her husband's possession to her own. *Doe v. Carter*, 9 Q. B. 863. Contra, *Sawyer v. Kendall*, 10 Cush. (Mass.) 241. And see *Doe v. Barnard*, 13 Q. B. 945.

²⁹ *Brown v. Brown*, 106 N. C. 451, 11 S. E. 647; *Mabary v. Dollarhide*, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

³⁰ *Johnson v. McMillan*, 1 Strobb. (S. C.) 143; *Fanning v. Willcox*, 3 Day (Conn.) 258.

³¹ *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 South. 837; *Warren v. Fredericks*, 76 Tex. 647, 13 S. W. 643.

³² *Thompson v. Kauffelt*, 110 Pa. 209, 1 Atl. 267.

should be consulted in each case.³³ Many of the states provide that the statute shall not run against persons under disabilities, and fix a time within which actions for the recovery of land may be maintained by them after the disability is removed. In a few states an absolute limit has been fixed, beyond which mental unsoundness in a disseisee will not prevent the acquisition of title.³⁴ Likewise a few states have an ultimate limit, beyond which neither exceptions nor disabilities can save the right of action.³⁵ In a number of states a possession based either on color of title, or upon a title which is defective only in some named particular, or on a mode of conveyance which it is the policy of the law to favor, is protected against the entry or suit of the dispossessed owner after a much shorter period than that which bars the right against a possession not included within these particular provisions.³⁶

Other Statutory Requirements

Under the provisions of the statutes of limitations in some states, color of title is held to be an essential element in order to acquire title by adverse possession.³⁷ Some states also provide by statute that, concurrently with the common-law requisites for the acquisition of title by adverse possession, the claimant must have paid the taxes upon the land for the period prescribed by the statute of limitations.³⁸ In the absence of such a statute, however, the payment of taxes is not an essential element.³⁹

It is further held in some states that by the wording of the statute of limitations good faith is required to make valid a claim of title by adverse possession.⁴⁰ This is, however, a question which does not seem to depend upon statutory requirement, since there are decisions which hold without such statutes that good faith is a

³³ See 1 Cent. Dig. tit. Adverse Possession, §§ 148-206, for cases referring to the statutory period in the various states.

³⁴ 2 Dembitz, Land Tit. 1359.

³⁵ 2 Dembitz, Land Tit. 1369.

³⁶ Stoltz v. Doering, 112 Ill. 234; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Latta v. Clifford, 47 Fed. 614; Hunter v. Ayres, 15 B. Mon. (Ky.) 210. And see the statutes of the various states.

³⁷ Page v. Bellamy, 222 Ill. 556, 78 N. E. 938; Fortier v. Railroad Co., 93 App. Div. 24, 86 N. Y. Supp. 896; Bell v. Coke Co., 155 Fed. 712, 84 C. C. A. 60.

³⁸ Price v. Greer, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009; Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 N. E. 371.

³⁹ Anderson v. Canter, 10 Kan. App. 167, 63 Pac. 285.

⁴⁰ See Lampman v. Van Alstyne, 94 Wis. 417, 426, 69 N. W. 171.

necessary element.⁴¹ In the absence of a controlling statute, however, the general rule is that title by adverse possession can be acquired by actual possession without the existence of good faith on the part of the claimant.⁴²

230. AGAINST WHOM THE POSSESSION IS ADVERSE—

As a rule, possession is adverse to all who have an immediate right to the possession and who are not under disability.

With but few exceptions,⁴³ the statute of limitations runs against all persons, natural or artificial, who have an immediate right to the possession, providing they are not under disabilities.

Title by adverse possession cannot, however, be acquired against the United States,⁴⁴ or against a state.⁴⁵ Also, no title by adverse possession can be acquired in lands allotted to Indians by the United States, when such lands cannot be alienated without the consent of the federal government.⁴⁶ The rule is otherwise, however, when full power of alienation is given to an Indian allottee.⁴⁷

Title by adverse possession may be acquired against a municipal corporation when the land in question is held by such corporations as private owners.⁴⁸ The decisions are conflicting, however, with reference to lands held by such corporations for public purposes.⁴⁹ The weight of authority is to the effect that they cannot be acquired by adverse possession.⁵⁰ Against private corporations the

⁴¹ *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353; *Lindt v. Uihlein*, 116 Iowa, 48, 89 N. W. 214.

⁴² *Attorney General v. Ellis*, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120; *Dawson v. Boat Club*, 136 Mich. 259, 99 N. W. 17, 112 Am. St. Rep. 363.

⁴³ *Infra*.

⁴⁴ *Knight v. Leary*, 54 Wis. 459, 11 N. W. 600; *United States v. Dastervignes*, 118 Fed. 199. See *ANDERSON v. BURNHAM*, 52 Kan. 454, 34 Pac. 1056, *Burdick Cas. Real Property*.

⁴⁵ *Eble v. State*, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412; *Harvey v. Holles*, 160 Fed. 531. A statute may, however, make the state subject to the statute of limitations. See *O'Neil v. St. Louis*, 8 Mo. App. 416; *St. Paul & D. R. Co. v. Hinckley*, 53 Minn. 398, 55 N. W. 560.

⁴⁶ *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428; *Bates v. Aven*, 60 Miss. 955.

⁴⁷ *Schrimpher v. Stockton*, 183 U. S. 290, 22 Sup. Ct. 107, 46 L. Ed. 203.

⁴⁸ *Cass Farm Co. v. Detroit*, 139 Mich. 318, 102 N. W. 848; *Timpson v. New York*, 5 App. Div. 424, 39 N. Y. Supp. 248.

⁴⁹ That they *may* be acquired by adverse possession, see *Canton Co. v. Baltimore*, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129; *Schneider v. Detroit*, 135 Mich. 570, 93 N. W. 258.

⁵⁰ That they *cannot* be so acquired, see *De Land v. Lighting Co.*, 225 Ill. 212, 80 N. E. 125; *La Barre v. Bent*, 154 Mich. 520, 118 N. W. 6.

statute runs, unless there is some express statutory provision to the contrary.⁵¹

Since disseisin and adverse possession are effectual only against those who are entitled to the possession of land, the disseisin of the tenant of a particular estate is not a disseisin of the reversioner or remainderman.⁵² Where, however, persons hold by the same title, a disseisin of one will act as a disseisin of the other. For instance, the disseisin of a tenant is a disseisin of his landlord, and the disseisin of a mortgagor or of a mortgagee is effectual against the other party.⁵³ Likewise, a cestui que trust may be disseised by the ouster of his trustee.⁵⁴ In most states the statute of limitations does not begin to run against persons who are under disabilities, such as married women,⁵⁵ infants,⁵⁶ and insane persons,⁵⁷ until the disability is removed. The disability, however, must exist at the time the statute begins to run. Disability occurring after the statute begins to run will not suspend its operation.⁵⁸ It is usually provided by statute, as previously pointed out, that a short period shall be given to persons who have been under disability for bringing their actions after the disability is removed.

⁵¹ Illinois Cent. R. Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563. See Maney v. Railroad Co., 161 Mass. 283, 37 N. E. 164.

⁵² Watkins v. Green, 101 Mich. 493, 60 N. W. 44; Doe v. Hull, 2 Dowl. & R. 38; Wells v. Prince, 9 Mass. 508. Cf. Taylor v. Horde, 1 Burrows, 60. The possession of the homestead, to which a dowress was entitled until her dower was assigned, by her assignee, is not adverse to the other heirs. Goselin v. Smith, 154 Ill. 74, 39 N. E. 980; Fischer v. Siekmann, 125 Mo. 165, 28 S. W. 435.

⁵³ Poignard v. Smith, 8 Pick. (Mass.) 272.

⁵⁴ Meeks v. Olpherts, 100 U. S. 564, 25 L. Ed. 735; Walton v. Ketchum, 147 Mo. 209, 48 S. W. 924; Crook v. Glenn, 30 Md. 55.

⁵⁵ State ex rel. Lippard v. Troutman, 72 N. C. 551; Little v. Downing, 37 N. H. 355; Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843. But in many states married women are no longer regarded as under disability. See 2 Dembitz, Land Tit. 1358.

⁵⁶ Jackson ex dem. Colden v. Moore, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; Swearingen v. Robertson, 39 Wis. 462. The infancy of one cotenant will not prevent the statute running against the others. Peters v. Jones, 35 Iowa, 512.

⁵⁷ Edson v. Munsell, 10 Allen (Mass.) 557. To prevent the running of the statute, greater disability is necessary than to avoid a deed. Rugan v. Sabin, 3 C. C. A. 578, 53 Fed. 415; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467.

⁵⁸ Bunce v. Wolcott, 2 Conn. 27; Fleming v. Griswold, 3 Hill (N. Y.) 85; Thorp v. Raymond, 16 How. (U. S.) 247, 14 L. Ed. 923; Cunningham v. Snow, 82 Mo. 587; Lynch v. Cannon, 7 Houst. (Del.) 386, 32 Atl. 391; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467. The rule is otherwise as to infant heirs in some states. Machir v. May, 4 Bibb (Ky.) 43; Rose v. Daniel, 3 Brev. (S. C.) 438.

231. INTEREST OR ESTATE ACQUIRED—As a rule, all titles acquired by adverse possession are for estates in fee simple.

As a general rule, the title acquired by adverse possession is a title in fee simple, and is as perfect a title as if granted by deed of the former owner, or by a patent from the government.⁵⁹ A judgment at law is not necessary to perfect a title by disseisin any more than a title by deed.⁶⁰

It may be, however, that an estate less than a fee simple will be gained, as in a case where a tenant for life is disseised, and the statute of limitation has run against him. The disseisor has an estate only for the life of the person whom he has disseised, because the owners of the remainders dependent on that estate do not lose their right to recover the land until the expiration of the statutory period after their right to the possession of land accrues, which is not until the death of the life tenant.⁶¹

232. ABANDONMENT AFTER TITLE IS ACQUIRED—Abandonment by the disseisor after the acquisition of title by adverse possession does not divest his title.

When title by adverse possession has been acquired, it continues, as any other title, until disposed of by conveyance, or lost by a subsequent adverse possession.⁶² The imperfect title which a disseisor has before the expiration of the full statutory period

⁵⁹ *Sherman v. Kane*, 86 N. Y. 57; *Allen v. Mansfield*, 82 Mo. 688. The statute may provide that a fee simple shall be acquired. See *East Tennessee Iron & Coal Co. v. Wiggin*, 15 C. C. A. 510, 68 Fed. 446.

⁶⁰ *Inhabitants of School Dist. No. 4 in Winthrop v. Benson*, 31 Me. 381, 52 Am. Dec. 618.

⁶¹ *Pluche v. Jones*, 4 C. C. A. 622, 54 Fed. 860; *Pinckney v. Burrage*, 31 N. J. Law, 21; *Merritt v. Hughes*, 36 W. Va. 357, 15 S. E. 56; *Bagley v. Kennedy*, 81 Ga. 721, 8 S. E. 742. So, where possession is taken as life tenant under a void will and title gained by lapse of time, the disseisor will have only a life estate as against the remainderman in the will. *Board v. Board*, L. R. 9 Q. B. 48. But where husband and wife are disseised of the wife's lands, her right of entry accrues at once. *Melvin v. Proprietors*, 16 Pick. (Mass.) 161. Contra, *Foster v. Marshall*, 22 N. H. 491. If the estate in reversion or remainder is created after the disseisin, the reversioner or remainderman is barred at the same time as the tenant of the particular estate. *Doe v. Jones*, 4 Term R. 308.

⁶² A legislative act passed after the bar of the statute has become complete, with the view of removing the bar, is void as depriving the party of his property without due process of law. *Campbell v. Holt*, 115 U. S. 620, 623, 6 Sup. Ct. 209, 29 L. Ed. 483.

is, of course, lost if he abandons possession before such time has expired;⁶³ but after his title has become perfected it cannot be conveyed by a parol agreement or relinquishment, or by an abandonment of the premises.⁶⁴ Moreover, it is not lost by an admission on the disseisor's part that the possession was not adverse.⁶⁵

⁶³ *Bennett v. Railroad Co.*, 126 Ga. 411, 55 S. E. 177; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61.

⁶⁴ *Sage v. Rudnick*, 67 Minn. 362, 69 N. W. 1096; *Inhabitants of School Dist. No. 4 in Winthrop v. Benson*, 31 Me. 381, 52 Am. Dec. 618; *Schall v. Railroad Co.*, 35 Pa. 191. A subsequent parol agreement will not divest the disseisor's title. *Brown v. Cockerell*, 33 Ala. 38. Nor does a re-entry by the disseisee after the bar is complete revest the title in him. *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835.

⁶⁵ *Illinois Cent. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633.

CHAPTER XXIII

TITLE BY DEVISE AND DESCENT

- 233. Title by Devise.
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- 235. Operative Words.
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TITLE BY DEVISE

233. The title to real property may be acquired by will. This is technically known as title by devise.

SAME—WHAT MAY BE DEVISED

234. Any interest in real property, legal or equitable, which at the decease of an intestate would pass to his heirs, may be disposed of by will. At common law, a testator, in order to give title to realty by will, must be seised of the same at the time the will is executed. This rule has been generally changed, however, by statute.

SAME—OPERATIVE WORDS

235. The will must be a valid instrument, and must contain operative words which show an intention on the part of the testator to pass title to the devisee.

SAME—NATURE OF TITLE

236. A devisee under a valid devise takes title to the land as a purchaser, and immediately upon the testator's death, in absence of a statute or of some provision in the will to the contrary.

SAME—EXTENT OF TITLE

237. Generally, under modern statutes, a devise of land passes all the testator's interest therein, in absence of an expressed intention to the contrary. At common law, however, only a life estate passes unless the will shows a clear intention to give a greater estate.

SAME—REVOCATION OF DEVISE

238. If, after the execution of the will, a testator alienates real property previously devised by his will, a revocation of the devise results.

SAME—LAPSED DEVISES.

239. At common law, if a devisee dies prior to the death of the testator, the devise lapses. This rule has, however, been modified by statute in most jurisdictions.

SAME—WHAT LAW GOVERNS

240. As far as real property is concerned, the capacity to make a will, its requisites, and its validity are governed by the law of the jurisdiction in which the land is situated.

Title by Devise

A "devise"¹ meant originally the giving of personal property by will. In later times it was applied to the giving by will of either personal or real property. It is now, however, technically used only in connection with real property,² the word "bequest" being appropriately applied to personal property passing under a will.³

¹ From Old French, *devise*, a "devision," a will.

² See Webster's New Internat. Dict.

STATUTE OF WILLS.—Prior to the statute of 33 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. *U. S. v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *U. S. v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Magoun v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.

³ It is not essential, however, that these words should be used in a will in order to pass the particular kind of property to which they refer. The words

Title by devise is the title which is acquired by a person who is given land under a will. Questions often arise whether certain instruments are, in fact, deeds or wills; the controlling principle of construction being the intention of the maker.⁴ "The essential difference between a deed and a will is that a deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time, while an instrument which passes no interest until the maker's death is a will."⁵

For the various forms of wills, the essentials of their execution, the procedure of their probate, and the principles governing their construction, the reader is referred to special texts on the law of wills. Only a few matters relating to land title acquired by wills are here considered.

What may be Devised

Any interest in real property, legal or equitable,⁶ which at the decease of a person would pass to his heirs, if no will were made, may be devised.⁷ This rule includes executory interests, and even a possibility, if the person who is to take is ascertained.⁸ Rights of entry are not devisable, however, at common law, although they may be by statute.⁹ It is also the common-law rule that real property acquired subsequent to the execution of the will cannot be devised, since it is essential that a testator should be seised of the

may, as far as their legal effect is concerned, be used interchangeably. Gardner, Wills, p. 4.

⁴ Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Robinson v. Schly, 6 Ga. 526; Comer v. Comer, 120 Ill. 420, 11 N. E. 848; Lacy v. Comstock, 55 Kan. 86, 39 Pac. 1024; Bromley v. Mitchell, 155 Mass. 509, 30 N. E. 83; Patterson v. English, 71 Pa. 458; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731.

⁵ See Gardner, Wills, p. 24; Harper v. Reaves, 132 Ala. 625, 32 South. 721; Smith v. Baxter, 62 N. J. Eq. 209, 49 Atl. 1130; Turner v. Scott, 51 Pa. 126; Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159; Coffman v. Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69.

⁶ Dodge v. Gallatin, 130 N. Y. 117, 29 N. E. 107; Broome v. Monch, 10 Ves. 605; Marston v. Fox, 8 Ad. & E. 14.

⁷ 1 Jar. Wills, 48.

⁸ Pond v. Bergh, 10 Paige (N. Y.) 140; Thompson's Lessee v. Hoop, 6 Ohio St. 480. If, however, the person who would take is not known, a possibility cannot be devised. Loring v. Arnold, 15 R. I. 428, 8 Atl. 335; 4 Kent, Comm. 262.

⁹ Goodright v. Forrester, 8 East, 564; Upington v. Corrigan, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794; 1 Redf. Wills, 392.

land at the time the will is made.¹⁰ This rule, however, has been generally changed by statute.¹¹

Operative Words

While a will, in order to pass title to property, must be a valid instrument, duly executed in accordance with the law, yet no particular words are necessary to pass a testator's interest in real property. The words usually employed in disposing of realty are "give and devise," but any other words which show such intention of the testator are sufficient.¹² The will must contain a sufficient description to identify the property intended to be devised,¹³ although by construction, in order to carry out the intention of testator, terms used in wills in describing property are often given a broader meaning than they would be in other instruments. For example, the words "all I am worth" have been held to include land.¹⁴ The word "house" has been held to be equivalent to "messuage," and to include not only the building itself, but the land appurtenant thereto within the curtilage, and other buildings upon the land.¹⁵ So the word "barn" has been held to carry with it the land on which it stood.¹⁶ Likewise, the term "homestead" is held sufficient in a devise to transfer the property occupied as such.¹⁷ More-

¹⁰ For example, a devise "of all real property of which I may die seised" did not include real property acquired after the making of the will. Such property descended to the heir. *Carroll v. Carroll*, 16 How. (U. S.) 275, 14 L. Ed. 936. See *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Girard v. Philadelphia*, 4 Rawle (Pa.) 323, 26 Am. Dec. 145; *Parker v. Cole*, 2 J. J. Marsh. (Ky.) 503. For devises held insufficient to pass after acquired realty, see *Price's Appeal*, 169 Pa. 294, 32 Atl. 455; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; *McAlee v. Schneider*, 2 App. D. C. 461.

¹¹ *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Bourke v. Boone*, 94 Md. 472, 51 Atl. 396; *In re Lorillard*, 16 R. I. 254, 14 Atl. 920; *Webb v. Archibald* (Mo.) 28 S. W. 80; *Briggs v. Briggs*, 69 Iowa, 617, 29 N. W. 632; *Morey v. Sohler*, 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538. And see *Stim. Am. St. Law*, § 2634.

¹² *Jackson ex dem. Livingston v. De Lancey*, 11 Johns. (N. Y.) 365; *Rosseter v. Simmons*, 6 Serg. & R. (Pa.) 452. But see *Stump v. Deneale*, 2 Cranch, C. C. 640, Fed. Cas. No. 13,560. And see *supra* as to "devise" and "bequest."

¹³ *Swift v. Lee*, 65 Ill. 336; *Kilburn v. Dodd* (N. J. Ch.) 30 Atl. 868; *McAlee v. Schneider*, 2 App. D. C. 461; *Asten v. Astin*, [1894] 3 Ch. 260. A mistake in the number of the township has been held not to vitiate. *Priest v. Lackey*, 140 Ind. 399, 39 N. E. 54.

¹⁴ *Huxtep v. Brooman*, 1 B. C. C. 437.

¹⁵ 1 Jar. Wills, 735; *Rogers v. Smith*, 4 Pa. 93; *Otis v. Smith*, 9 Pick. (Mass.) 293; *Bridge v. Bridge*, 146 Mass. 373, 15 N. E. 899; *McKeough's Estate v. McKeough*, 69 Vt. 34, 37 Atl. 275.

¹⁶ But not more than necessary for its complete enjoyment. *Bennet v. Bittle*, 4 Rawle (Pa.) 339.

¹⁷ *Smith v. Dennis*, 163 Ill. 631, 45 N. E. 267; *Moore v. Powell*, 95 Va. 258,

over, a devise of the income, or of the rents and profits, has been held to pass the title to the land itself, where the will showed no contrary intention.¹⁸

Nature and Extent of Title

One who takes title to land by devise takes it, not as heir of the testator, but "by purchase."¹⁹ The word "heir" means one who inherits or takes from another by descent,²⁰ as distinguished from a devisee, who takes under a will.²¹ A devise, as a rule, takes effect immediately upon the death of the testator,²² although the will may provide that title shall not vest until some time after the testator's death,²³ and, in some states, it is provided by statute that title to realty shall, for the purposes of administration, vest temporarily in the executor of the will.²⁴ One cannot, however, be made to take land by devise against his will, although an acceptance is presumed, in the absence of any showing to the contrary.²⁵ Renunciation, however, of title by devise can probably be made only by deed, because title under the will vests at once, and no entry by the devisee is necessary to perfect it.²⁶ A devisee of land takes it subject to all the liens and incumbrances which may exist on it, and subject also to the right of the testator's creditors to enforce their claims against it.²⁷

28 S. E. 172; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; *Hopkins v. Grimes*, 14 Iowa, 73.

¹⁸ *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; *Mayes v. Karn*, 115 Ky. 264, 72 S. W. 1111; *Reed v. Reed*, 9 Mass. 372; *Fox v. Phelps*, 17 Wend. (N. Y.) 402; *Sammis v. Sammis*, 14 R. I. 123.

¹⁹ *Bear's Case*, 1 Leon. 112; *Scott v. Scott*, Amb. 383. Cf. *Davis v. Kirk*, 2 Kay & J. 391. But not when land is devised to one to whom it would descend. *Clerk v. Smith*, 1 Salk. 241; *Allen v. Heber*, 1 W. Bl. 22; *Hurst v. Winchelsea*, Id. 187; *Chaplin v. Leroux*, 5 Maule & S. 14; *Doe v. Timins*, 1 Barn. & Ald. 530. But see *Biederman v. Seymour*, 3 Beav. 368. Contra, *Ellis v. Page*, 7 Cush. (Mass.) 161.

²⁰ *Mason v. Baily*, 6 Del. Ch. 129, 14 Atl. 309; *Richards v. Miller*, 62 Ill. 417, 422; *Lyon v. Lyon*, 88 Me. 395, 405, 34 Atl. 180; *Johes v. Morgan*, 1 Bro. Ch. 206, 28 Eng. Reprint, 1086.

²¹ See cases in preceding note.

²² *Simmons v. Spratt*, 26 Fla. 449, 8 South. 123, 9 L. R. A. 343; *Flemister v. Flemister*, 83 Ga. 79, 9 S. E. 724; *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3; *Hall v. Hall*, 98 Wis. 193, 73 N. W. 1000.

²³ *Henry v. Henderson*, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616.

²⁴ *Banks v. Speers*, 97 Ala. 560, 11 South. 841; *Dexter v. Hayes*, 88 Iowa, 493, 55 N. W. 491; *Grady v. Warrell*, 105 Mich. 310, 63 N. W. 204; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222.

²⁵ *Perry v. Hale*, 44 N. H. 363.

²⁶ *Webster v. Gilman*, 1 Story, 499, Fed. Cas. No. 17,335; *Graves v. Mitchell*, 90 Wis. 306, 63 N. W. 271. Cf. *Hamilton v. Ritchie*, [1894] App. Cas. 310.

²⁷ *Hattersley v. Bissett*, 52 N. J. Eq. 693, 30 Atl. 86; *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.

At common law, a devise without words of inheritance, or other words showing an intention to create an estate of inheritance, carries only a life estate to the devisee.²⁸ Under this rule, a will reading, for example, "I give and devise blackacre to B.," passes only a life estate to B. In order to create a fee, the word "heirs" is the proper and usual term,²⁹ yet this word is not essential, as in the case of a deed. For example, a devise "in fee simple," or to one "forever," or to one "absolutely," will be sufficient to pass the fee.³⁰ Moreover, a fee may pass without any words of limitation, if such an intention is clearly shown by the whole will.³¹

The common-law rule has, however, been changed, in most states, by statutes which provide that all the testator's interest passes under a devise unless the will express an intention to the contrary.³²

It has previously been shown, in connection with executory devises,³³ that after the creation of a qualified or conditional fee in a will there may be a limitation over to another person.³⁴

Revocation of Devises by Subsequent Conveyances

At common law, and under the statutes, the absolute conveyance of land, after the execution of the will, operates as a revocation of the devise.³⁵ Also, a contract to sell, which is enforced by an action for specific performance after the testator's death, has the same effect.³⁶ If part only of the land is sold, it operates as a rev-

²⁸ Little v. Giles, 25 Neb. 313, 41 N. W. 186.

²⁹ Reddick v. Lord, 131 Ind. 336, 30 N. E. 1085; Young v. Kinkead's Adm'rs, 101 Ky. 252, 40 S. W. 776; Smith v. Rice, 183 Mass. 251, 66 N. E. 806; Passman v. Safe Deposit Co., 57 N. J. Eq. 273, 41 Atl. 953; Stigers v. Dinsmore, 193 Pa. 482, 44 Atl. 550, 74 Am. St. Rep. 702.

³⁰ Baker v. Raimond, 2 Jar. Wills, 253; Idle v. Cook, 2 Ld. Ray. 1144, 1152.

³¹ Bromley v. Gardner, 79 Me. 246, 9 Atl. 621.

³² Mills v. Franklin, 128 Ind. 444, 28 N. E. 60; Boston Safe Deposit & Trust Co. v. Stich, 61 Kan. 474, 59 Pac. 1062; Pennington v. Pennington, 70 Md. 418, 17 Atl. 329, 3 L. R. A. 816; Steward v. Knight, 62 N. J. Eq. 232, 49 Atl. 535; Sayles v. Best, 140 N. Y. 368, 35 N. E. 636; MacConnell v. Wright, 150 Pa. 275, 24 Atl. 517.

³³ Ante.

³⁴ And see Koeffler v. Koeffler, 185 Ill. 261, 56 N. E. 1094; Jordan v. Hinkle, 111 Iowa, 43, 82 N. W. 426; Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699; Morehouse v. Morehouse, 161 N. Y. 654, 57 N. E. 1118; Stoner v. Wunderlich, 198 Pa. 158, 47 Atl. 945.

³⁵ In re Sprague's Estate, 125 Mich. 357, 84 N. W. 293; In re Forney's Estate, 161 Pa. 209, 28 Atl. 1086; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; Adams v. Winne, 7 Paige (N. Y.) 97; Bosley v. Wyatt, 14 How. (U. S.) 390, 14 L. Ed. 468.

³⁶ Brush v. Brush, 11 Ohio, 287; Wells v. Wells, 35 Miss. 638; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456. See Chadwick v. Tatem, 9 Mont. 354, 23 Pac. 729; Slaughter v. Stephens, 81 Ala. 418, 2 South. 145.

ocation pro tanto.³⁷ A mortgage, however, of the land devised, is not a revocation of the devise,³⁸ although the devisee takes, of course, the land subject to the mortgage.³⁹

A partition of land held in joint ownership does not, moreover, work a revocation.⁴⁰ It is the common-law rule that if, after conveying land which has been devised, the testator subsequently buys back the same property, the devise is not thereby made operative again.⁴¹ The rule is now otherwise, however, in a number of states. In some states, also by statute, a change in the estate of the testator does not revoke a devise, unless the estate of the testator is wholly divested.⁴² The deed which is to revoke a devise must be lawful and valid.⁴³ If it is obtained by fraud, or if at the time of its execution the grantor is incompetent, it does not affect a previous devise.⁴⁴ A general devise, as of "my land," is defeated if the testator parts with all his land, but revives when he acquires other land in states where after-acquired property passes by a general devise.⁴⁵ An intention to revoke a devise by an alteration in the testator's estate may be shown by evidence within, or extrinsic to, the conveyance.⁴⁶

Lapsed Devises

At common law, if a devisee dies before the testator, the devise lapses, and cannot be claimed by the devisee's heirs. It goes to the heir of the testator, and not to the residuary devisee.⁴⁷ This rule is changed, however, in some states, by statute, and the residuary devisee takes to the exclusion of the heir.⁴⁸ In many states, also,

³⁷ 4 Kent, Comm. 528, 529.

³⁸ Tucker v. Thurstan, 17 Ves. 131.

³⁹ Supra.

⁴⁰ Walton v. Walton, 7 Johns. Ch. (N. Y.) 267, 11 Am. Dec. 456; Attorney General v. Vigor, 8 Ves. 256, 261; Brydges v. Duchess of Chandos, 2 Ves. Jr. 417; Barton v. Croxall, Tam. 164. Nor is a lease a revocation. Hodgkinson v. Wood, Cro. Car. 23.

⁴¹ 1 Jar. Wills, 128; Marwood v. Turner, 3 P. Wms. 163; Goodtitle v. Otway, 2 H. Bl. 516; Cave v. Holford, 3 Ves. 650.

⁴² 1 Stim. Am. St. Law, § 2810.

⁴³ The deed must also be delivered. Leach v. Burr, 17 App. D. C. 128.

⁴⁴ Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339; Rich v. Gilkey, 73 Me. 595; Hawes v. Wyatt, 3 Brown, Ch. 156.

⁴⁵ See McNaughton v. McNaughton, 34 N. Y. 201.

⁴⁶ Hocker v. Gentry, 3 Metc. (Ky.) 463; Wickliffe's Ex'rs v. Preston, 4 Metc. (Ky.) 178.

⁴⁷ Van Beuren v. Dash, 30 N. Y. 393; Moore v. Dimond, 5 R. I. 121. A devise to a charity will lapse if the institution ceases to exist before the testator's death. See Rymer v. Stanfield, [1895] 1 Ch. 19; Merrill v. Hayden, 86 Me. 133, 29 Atl. 949.

⁴⁸ 1 Stim. Am. St. Law, § 2822. See St. Paul's Church v. Attorney General, 104 Mass. 188, 41 N. E. 231.

the statutes provide that, when a devise is to a child or a descendant of the testator, the devise shall not lapse if such child or descendant dies leaving issue who survive the testator, and in other states there is no lapse in any case.⁴⁹ Even at common law, a devise of an estate to be held in joint tenancy does not lapse on the death of one of the joint tenants, even as to his share, because the rule of survivorship vests such share in the cotenant.⁵⁰ If, however, the estate be a tenancy in common, there will be a lapse of the share of any cotenant on his death.⁵¹ When a devise is to a class, as to "children" of the testator, there is no lapse, but the survivors take the share of the one deceased.⁵² The lapse of a particular estate does not destroy remainders which depend thereon, if they can take effect immediately, at the death of the testator.⁵³

What Law Governs .

To the extent that it affects real property, the capacity to make a will,⁵⁴ and its requisites and validity,⁵⁵ are, at common law, governed by the law of the jurisdiction where the land is situated, and not by the law of the testator's domicile.⁵⁶ The same rule applies to chattel interests in real property, although such interests are for most purposes treated as personal, and go to the personal representative on the death of an intestate.⁵⁷ In many states, however, statutes have been enacted allowing the probate of wills executed in conformity with the law of other states, or admitting to record such foreign wills. Such statutes make effective foreign wills, if valid by the law of the state where executed, even though

⁴⁹ 1 Stim. Am. St. Law, § 2823.

⁵⁰ *Dow v. Doyle*, 103 Mass. 489; *Jackson v. Roberts*, 14 Gray (Mass.) 546; *Putnam v. Putnam*, 4 Bradf. Sur. (N. Y.) 308; *Anderson v. Parsons*, 4 Greenl. (Me.) 486; *Luke v. Marshall*, 5 J. J. Marsh. (Ky.) 353.

⁵¹ *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135; *Morse v. Mason*, 11 Allen (Mass.) 36; *Van Beuren v. Dash*, 30 N. Y. 393.

⁵² *Magaw v. Field*, 48 N. Y. 668; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Schaffer v. Kettell*, 14 Allen (Mass.) 528; *Yeates v. Gill*, 9 B. Mon. (Ky.) 203.

⁵³ *Lawrence v. Hebbard*, 1 Bradf. Sur. (N. Y.) 252; *Goodall v. McLean*, 2 Bradf. Sur. (N. Y.) 306.

⁵⁴ *Varner v. Bevil*, 17 Ala. 286; *In re Stewart*, 11 Paige (N. Y.) 398.

⁵⁵ *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317, 44 Atl. 877; *White v. Howard*, 46 N. Y. 144; *Kessler v. Kessler*, 3 Pa. Co. Ct. R. 522.

⁵⁶ *White v. Howard*, 46 N. Y. 159; *Richards v. Miller*, 62 Ill. 417; *Kerr v. Moon*, 9 Wheat. (U. S.) 565, 6 L. Ed. 161.

⁵⁷ *Freke v. Carbery*, L. R. 16 Eq. 461.

the property is in another state, and the will does not conform to the law of such latter state.⁵⁸

In construing wills, the testator's meaning and intention is, by the weight of authority, interpreted by the law of his domicile.⁵⁹ Some states, however, hold that the law of the place where the land is situated governs.⁶⁰

With reference to the operative effect of a will, and the rights of parties under it, the *lex loci* governs in cases of real property.⁶¹

Whether the law in force at the time of the execution of a will,⁶² or the law in force at the time of the testator's death, shall govern the validity of a will, is a question upon which the cases are conflicting.⁶³ In jurisdictions holding that the law at the time of the testator's death governs, a will valid at the time of its execution may be made invalid by a subsequent change in the law.⁶⁴

⁵⁸ *Amrine v. Hamer*, 240 Ill. 572, 88 N. E. 1036; *Lindsay v. Wilson*, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408; *Bayley v. Bailey*, 5 Cush. (Mass.) 245; *Palmer v. Bradley*, 142 Fed. 193. Such was the law in Missouri from 1807 to 1845, when the statute was changed so as to require wills devising lands in Missouri to be executed with the formalities prescribed by the Missouri statute. *Schulenberg v. Campbell*, 14 Mo. 491.

⁵⁹ *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271; *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; *Ford v. Ford*, 80 Mich. 42, 41 N. W. 1057; *Ball v. Phelan*, 94 Miss. 293, 49 South. 956, 23 L. R. A. (N. S.) 895.

⁶⁰ *McCartney v. Osburn*, 118 Ill. 409, 9 N. E. 210; *Applegate v. Smith*, 31 Mo. 166; *Wynne v. Wynne*, 23 Miss. 251, 57 Am. Dec. 139; *Ives v. McNicoll*, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780.

⁶¹ *Clarke's Appeal*, 70 Conn. 195, 39 Atl. 155; *McCartney v. Osburn*, supra; *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; *Minot v. Minot*, 17 App. Div. 521, 45 N. Y. Supp. 554; *Jennings v. Jennings*, 21 Ohio St. 56.

⁶² *Taylor v. Mitchell*, 57 Pa. 209; *Mullen v. McKelvy*, 5 Watts (Pa.) 399; *Mullock v. Souder*, 5 Watts & S. (Pa.) 198. A will void at the time it is executed will not become effectual by a subsequent change in the law. *Lane's Appeal*, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94.

⁶³ Holding that time of execution governs: *Lane's Appeal*, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94; *American Baptist Missionary Union v. Peck*, 10 Mich. 341; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Packer v. Packer*, 179 Pa. 580, 36 Atl. 344, 57 Am. St. Rep. 615. Holding that time of executor's death governs: *Learned's Estate*, 70 Cal. 140, 11 Pac. 587; *Crawford's Heirs v. Thomas*, 114 Ky. 484, 54 S. W. 197, 55 S. W. 12, 21 Ky. Law Rep. 1100, 1178, 1382; *Jones v. Robinson*, 17 Ohio St. 171; *Langley v. Langley*, 18 R. I. 618, 30 Atl. 465.

⁶⁴ See last four cases cited under note 63.

TITLE BY DESCENT

241. Title by descent is a title acquired by the inheritance of real property. When one dies intestate, the law casts his estates of inheritance upon persons known as the heirs at law.

SAME—CANONS OF DESCENT AT COMMON LAW

242. Rights of inheritance are governed by statutes in all jurisdictions, the statutes differing more or less in detail in the various states. The common-law rules of descent are based upon the ancient customs of England. These rules have been formulated in what are known as "the canons of descent." Most of these rules have been changed by statute, yet where cases do not come within the terms of the statutes they are determined by the rules of the common law.

SAME—PREVAILING MODERN RULES

243. Generally, in this country, the lands of an intestate descend to his lawful descendants in direct lineal descent to the remotest degree. A posthumous child has the same right of inheritance as a child born during the life of the intestate. The statutes of many states provide that illegitimate children may also inherit in certain cases.

At common law, parents and all other lineal ancestors were excluded from the inheritance. This rule has been changed, however, by the statutes.

A surviving husband or wife is not, at common law, an "heir." Their rights in a deceased spouse's realty are measured by the estates of curtesy and dower. Under modern statutes, however, a surviving spouse is usually entitled to a certain share of the real property of the deceased.

Where there are no lineal descendants or parents, the inheritance generally goes to the brothers and sisters of the deceased, and upon failure of such heirs and of their descendants, it goes to the more remote collaterals.

Where the heirs of an intestate are of different degrees of consanguinity, the more remote heirs usually take by representation or per stirpes, and not per capita.

If an intestate leaves no heirs at all, his lands escheat to the state.

"A descent is a means whereby one doth derive his title to certain lands as heir to some of his ancestors."⁶⁵ In its technical meaning, descent applies to real property only,⁶⁶ and the term "distribution" applies to the division of the personal property of an intestate, after administration, among the persons entitled as heirs, or next of kin.⁶⁷ In some of the statutes, however, the word "descent" is used in its popular sense, synonymously with distribution, and applies to both real and personal property.⁶⁸

In order that property may descend, it must be of such a nature that could have been disposed of by will, but of which the deceased owner made no testamentary disposition.⁶⁹ Intestacy, however, may be total or partial, and, consequently, the rules of descent may apply to but a part of the estate of a deceased person.

An "heir," speaking technically, is, at common law, one upon whom the law casts the estates in lands, tenements, and hereditaments immediately upon the death of the ancestor.⁷⁰ Title by descent is governed in each state by the local statutes,⁷¹ and the statutes in force at the time of the death of the intestate determine the rights of heirs.⁷² Moreover, like title by devise, real property

⁶⁵ Co. Litt. 13b.

⁶⁶ *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985; *Roundtree v. Pursell*, 11 Ind. App. 522, 39 N. E. 747; *Horner v. Webster*, 33 N. J. Law, 387, 400; *Brower v. Hunt*, 18 Ohio St. 311.

⁶⁷ *Beard v. Lofton*, 102 Ind. 408, 2 N. E. 129; *Thomson v. Tracy*, 60 N. Y. 174; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *In re Donahue's Estate*, 36 Cal. 329; *Swaine v. Burton*, 15 Ves. 365. In some states the distinction between descent and distribution no longer exists. See 1 Dembitz, *Land Tit.* 204.

⁶⁸ *Hudnall v. Ham*, 172 Ill. 76, 84, 49 N. E. 985.

⁶⁹ See *infra*.

⁷⁰ *Bouv. L. Dict.*; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *In re Weir's Will*, 9 Dana (Ky.) 434, 442; *Delashmutt v. Parrent*, 40 Kan. 641, 643, 20 Pac. 504. Persons who take under a will are not heirs. *In re Donahue's Estate*, 36 Cal. 329. And see *Title by Devise*. An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor; for instance, under rules of primogeniture, the eldest son or his issue, who must be the heir to the father whenever he happens to die. An heir presumptive is one who, if the ancestor should die immediately, would, under present circumstances, be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; for example, a brother or nephew, whose presumptive succession may be destroyed by the birth of a child. 2 Blk. Comm. 208. Heirs do not take as purchasers. *Godolphin v. Abingdon*, 2 Atk. 57.

⁷¹ *Hale's Appeal*, 69 Conn. 611, 38 Atl. 392; *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706; *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885; *Brown v. Baraboo*, 90 Wis. 151, 62 N. W. 921, 30 L. R. A. 320.

⁷² *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *Messer v. Jones*, 88 Me. 349, 34 Atl. 177; *Holcomb v. Lake*, 24 N. J. Law, 686;

is regulated in its descent by the *lex loci*.⁷³ The statutes applying to any particular jurisdiction must be consulted, since the laws of the various states differ more or less in details.

Canons of Descent

The ancient English rules of descent, which are still applicable, in England, in tracing the inheritances of persons who died before the 1st of January, 1834,⁷⁴ were based partly upon the common law, or general custom of the realm, which became fixed and generally recognized about the end of the thirteenth century, and partly on the special customs of different localities, known as gavelkind, borough English, and the like.⁷⁵ The common-law rules were based upon feudal policy,⁷⁶ and although they have been radically changed by statute in this country, our statutes of descent following, in fact, the civil law rather than the canons of the common law,⁷⁷ yet they have to be resorted to, at times, in construing our statutes. Moreover, if the statutes do not cover a particular case, the heir at common law is entitled to the inheritance.⁷⁸

The common law governing descent was formulated, at an early date, in certain rules, or canons, known as "the canons of descent."

Matter of Kiernan, 38 Misc. Rep. 394, 77 N. Y. Supp. 924; Wood's Appeal, 18 Pa. 478.

⁷³ Cooper v. Ives, 62 Kan. 395, 63 Pac. 434; Pratt v. Douglas, 38 N. J. Eq. 516; Bonati v. Welsch, 24 N. Y. 157; Darby v. Mayer, 10 Wheat. 465, 6 L. Ed. 367; Williams v. Kimball, 35 Fla. 49, 16 South. 783, 26 L. R. A. 746, 48 Am. St. Rep. 238; Kessler v. Kessler, 3 Pa. Co. Ct. R. 522.

⁷⁴ Laws of England, Descent & Distribution, vol. 11, p. 7. This is the date when the present English Inheritance Act (3 & 4 Will. IV, c. 106) came into force. By the English act of 1897, known as the Land Transfer Act (60 & 61 Vict. c. 65), the real estate of a deceased intestate, which does not pass by survivorship to any other person, vests in his personal representatives, in trust for the persons beneficially entitled thereto. Laws of Eng. Descent & Distribution, vol. 11, p. 4.

⁷⁵ Stephen's Comm. (15th Ed.) I, 259. The custom of gavelkind, still obtaining in Kent and other parts of England, provides, among other things, that not the eldest son only succeeds to his father's inheritance, but all the sons alike. In certain ancient boroughs, the youngest son inherits the estate, in preference to all his older brothers. This custom is known as borough English. Stephen's Comm. (15th Ed.) vol. I, pp. 25, 26; Litt. 210; Co. Litt. 140a; Re Chenoweth, [1902] 2 Ch. 488; Re Smart, [1881] 18 Ch. Div. 165.

⁷⁶ 2 Blk. Comm. 220; Co. Litt. § 4; 2 Tiffany, Real Property, § 432. And see Cutter v. Waddingham, 22 Mo. 206, 259; BATES v. BROWN, 5 Wall. (U. S.) 710, 18 L. Ed. 535, Burdick Cas. Real Property.

⁷⁷ Hays v. Thomas, Breese (Ill.) 180; Bruce v. Bissell, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; Smith v. Gaines, 36 N. J. Eq. 297; Clayton v. Drake, 17 Ohio St. 367.

⁷⁸ Johnson v. Haines' Lessee, 4 Dall. (Pa.) 64, 1 L. Ed. 743; Packer v. Nixon, 9 Pet. (U. S.) 793, Append., 9 L. Ed. 314, Append., Fed. Cas. No. 10,653.

They are seven in number, as enumerated by Blackstone,⁷⁹ and are as follows:

Canon I—Descent from Person Last Seised

"Inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum, but shall never lineally ascend."⁸⁰

Under this rule, the ancestor must have been actually seised.⁸¹ The present English law discards the necessity of technical seisin, and provides that descent in every case shall be traced from the last purchaser.⁸² In this country, the statutes generally make it necessary that there should be actual seisin in the ancestor.⁸³

This canon also excludes parents and all lineal ancestors from the inheritance.⁸⁴ Many states, however, by statute, permit parents to inherit, where the intestate leaves no issue.⁸⁵ In some states, grandparents may be heirs,⁸⁶ although, in other states, grandparents are excluded by the common-law rule.⁸⁷ In England, under the present law, the nearest lineal ancestor inherits on failure of lineal descendants.⁸⁸

Generally, in this country, the estate of an intestate descends to his lawful descendants in direct lineal descent to the remotest degree. Posthumous children have the same rights of inheritance as children born during the lifetime of the intestate.⁸⁹ The statutes of some states provide also that illegitimate children may inherit under certain circumstances.⁹⁰

Canon II—Preference of Males

"A second general rule or canon is that the male issue shall be admitted before the female."⁹¹

⁷⁹ 2 Blk. Comm. 207 et seq.

⁸⁰ 2 Blk. Comm. 208. *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, Burdick Cas. Real Property.

⁸¹ *R. v. Sutton*, 5 Nev. & M. 353; *BATES v. BROWN*, supra.

⁸² Inheritance Act (1833) § 2.

⁸³ *Thompson v. Sandford*, 13 Ga. 238; *Parks v. Kimes*, 100 Ind. 148; *Sears v. McBride*, 70 N. C. 152; *McCune v. Essig*, 122 Fed. 588, 59 C. C. A. 429.

⁸⁴ 4 Kent, Comm. 395. And see *Blankenkaker v. Blankenkaker*, 6 Munf. (Va.) 427.

⁸⁵ 4 Kent, Comm. 392. See *Magness v. Arnold*, 31 Ark. 103; *Leonard v. Lining*, 57 Iowa, 648, 11 N. W. 623; *Gardner v. Collins*, 2 Pet. (U. S.) 58, 7 L. Ed. 347.

⁸⁶ *Albee v. Vose*, 76 Me. 448; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Hill v. Nye*, 17 Hun (N. Y.) 457; *McDowell v. Adams*, 45 Pa. 430.

⁸⁷ *Bray v. Taylor*, 36 N. J. Law, 415.

⁸⁸ Inheritance Act, § 6.

⁸⁹ See *infra*.

⁹⁰ *Infra*.

⁹¹ 2 Blk. Comm. 212; *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, Burdick Cas. Real Property.

This canon as to issue has not been adopted in the United States.⁹² In some states, however, the paternal kin in the ascending line are preferred to the maternal kin in the same degree.⁹³ For example, under some of the statutes, the father is given preference over the mother.⁹⁴ The priority of the male issue over the female issue is still, however, the law of England.⁹⁵ This rule originated in feudal times, under which system females could never succeed to a proper feud, being incapable of performing the military service upon which the system was based.⁹⁶

Canon III—Primogeniture

"A third rule or canon of descent is this: That where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together."⁹⁷

This rule of male primogeniture has been changed by statute in the United States.⁹⁸ In this country, if there is more than one descendant, all of equal degree of consanguinity to the ancestor, the realty descends in equal parts to them all as tenants in common.⁹⁹ Thus, in the case of children, the property descends to them in equal shares, regardless of sex.¹ The ancient common-law rule still obtains in England, however, and in that country the elder male is preferred to the younger.² This rule is another illustration of the feudal influence. In order to prevent the splitting of estates, and to preserve the military service from being divided, the oldest male succeeded to the whole of the lands.³ Females, however, if there are no males, inherit equally, if of equal degree.

⁹² 1 Stim. Am. St. Law, § 3132. As to the preference of males in collateral lines, see canon VII, *infra*.

⁹³ 1 Stim. Am. St. Law, §§ 3107, 3117, 3121.

⁹⁴ *Kountz v. Davis*, 34 Ark. 590; *Magee v. Doe*, 9 Fla. 382; *Matter of Kane's Estate*, 38 Misc. Rep. 276, 77 N. Y. Supp. 874; *Robinson v. Martin*, 2 Yeates (Pa.) 525; *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672.

⁹⁵ *Laws of Eng. Descent & Distribution*, vol. 11, p. 9.

⁹⁶ *Stephen's Comm.* (15th Ed.) I, 268.

⁹⁷ 2 Blk. Comm. 214; *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, *Burdick Cas. Real Property*.

⁹⁸ 1 Stim. Am. St. Law, § 3132. See 1 *Dembitz, Land Tit.* 225.

⁹⁹ *Jewell v. Jewell*, 28 Cal. 232; *Waldron v. Taylor*, 52 W. Va. 284, 45 S. E. 336.

¹ *Joslin v. Joslin* (Iowa) 75 N. W. 487; *Dodge v. Beeler*, 12 Kan. 524; *Benson v. Swan*, 60 Me. 160; *Benedict v. Beurmann*, 90 Mich. 396, 51 N. W. 461.

² *Laws of Eng. Descents & Distribution*, vol. 11, p. 10.

³ 2 Blk. Comm. 214, 215. It is of historical interest to note that, in Hebrew law, the oldest son, by right, received a double portion of the inheritance. *Deut. xxi, 17*.

They are known as coparceners.⁴ On the death of a coparcener intestate, her share descends to her heirs.⁵

Canon IV—Per Stirpes

"A fourth rule or canon of descent is this: That the lineal descendants in infinitum of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living."⁶

This is called taking per stirpes; that is, by stock or stem. In other words, all the branches inherit the same share that their stem (stirps), whom they represent, would have inherited.⁷ For example, in England, if A. dies intestate, leaving a grandson, B., the child of an older predeceased son, and also leaving a younger son, C., the grandson, B., takes the entire inheritance to the exclusion of C.⁸ The general rule in this country is that, when all the heirs are in the same degree, they take per capita; that is, equally.⁹ If, however, the heirs are of different degrees of consanguinity, then the more remote take per stirpes.¹⁰ In some of our states, however, all the heirs take per capita.¹¹ For example, when the heirs take per capita, the descendants of a deceased heir take the same shares as those who stand in the same degree of relationship as the person deceased; that is, if there were two sons living, and three children of a deceased son, if they take per capita, each would have one-fifth of the intestate's real property. If, however, the inheritance is per stirpes, the sons would take one-third each, and the grandchildren would have each one-third of their father's third. Under some of our American statutes, the right to take by representation does not apply to collaterals beyond the children of brothers and sisters.¹²

⁴ Litt. §§ 241, 254; Co. Litt. 163 b.

⁵ James v. Dickinson, 2 Ch. 509 (1897).

⁶ 2 Blk. Comm. 216; BATES v. BROWN, 5 Wall. (U. S.) 710, 18 L. Ed. 535, Burdick Cas. Real Property.

⁷ Stephen's Comm. (15 Ed.) I, 269.

⁸ Laws of Eng. Descents & Distribution, vol. 11, p. 10, n.

⁹ Baker v. Bourne, 127 Ind. 466, 26 N. E. 1078; Snow v. Snow, 111 Mass. 389; Staubitz v. Lambert, 71 Minn. 11, 73 N. W. 511; Fisk v. Fisk, 60 N. J. Eq. 195, 46 Atl. 538; Barber v. Brundage, 50 App. Div. 123, 63 N. Y. Supp. 347; In re Cremer's Estate, 156 Pa. 40, 26 Atl. 782; BATES v. BROWN, supra.

¹⁰ Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56; Ernst v. Freeman, 129 Mich. 271, 88 N. W. 636; Pond v. Bergh, 10 Paige (N. Y.) 140; Person's Appeal, 74 Pa. 121.

¹¹ 1 Stim. Am. St. Law, § 3137.

¹² Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. R. A. 667; McComas v. Amos, 29 Md. 132; Conant v. Kent, 130 Mass. 178; In re Davenport, 172 N. Y. 454, 65 N. E. 275; Rogers' Estate, 131 Pa. 382, 18 Atl. 871.

Canon V—Collateral Heirs

"A fifth rule is that, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relation, being of the blood of the first purchaser, subject to the three preceding rules."¹³

Lineal relations¹⁴ are those in the ascending or descending line, such as father, mother, grandfather, grandmother, son, daughter, grandson, and granddaughter. Collateral relatives are those who are neither in the direct ascending or descending series. Examples of collateral relatives are brothers, sisters, uncles, aunts, nephews, and nieces.¹⁵ The degrees of relationship are in most states calculated according to the civil law.¹⁶ Under this rule, the degree of relationship is ascertained between two collaterals by counting the generations up from one collateral to the common ancestor, and continuing the count down to the other collateral in question.¹⁷ For example, brothers and sisters are, by this rule, in the second degree of relationship, an uncle and nephew in the third, and first cousins in the fourth. By the canon-law rule, which is also known as the common-law rule, the degree is determined by counting separately the generations from the common ancestor to both collaterals, and taking the higher number if any.¹⁸ For example, two brothers are each one generation from the common ancestor. Their degree of relationship, by this rule, is the first, while an uncle and nephew are in the second degree, as are also first cousins.¹⁹

Generally, in this country, when there are no lineal descendants or parents, the inheritance goes to the brothers and sisters of the deceased,²⁰ and upon the failure of such heirs and of their descend-

¹³ 2 Blk. Comm. 220; *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, *Byrdick Cas. Real Property*.

¹⁴ Relationship is of two kinds—by consanguinity and by affinity. The former is relationship by blood, as that of father and son. Relationship by affinity is that which arises by marriage. By the common law, inheritance was only by consanguinity, never by affinity. In most of our states, however, a husband or wife inherits, by statute, all or part of the real estate of a decedent when there is no issue to take, in addition to curtesy or dower. See 14 Cyc. 62.

¹⁵ 2 Blk. Comm. 202.

¹⁶ 1 Stim. Am. St. Law, § 3139.

¹⁷ *Barger v. Hobbs*, 67 Ill. 592; *Bruce v. Baker*, Wils. (Ind.) 462; *Martindale v. Kendrick*, 4 G. Greene (Iowa) 307; *Ranck's Appeal*, 113 Pa. 98, 4 Atl. 924.

¹⁸ *Wetter v. Habersham*, 60 Ga. 193; *State, to Use of Charlotte Hall School, v. Greenwell*, 4 Gill & J. (Md.) 407; *McDowell v. Addams*, 45 Pa. 430.

¹⁹ 2 Blk. Comm. 206.

²⁰ *Blackman v. Wadsworth*, 65 Iowa, 80, 21 N. W. 190; *Couch v. Wright*, 20 Kan. 103; *Minot v. Harris*, 132 Mass. 528; *Philadelphia Trust, Safe Deposit & Ins. Co. v. Isaac*, 167 Pa. 270, 31 Atl. 651.

ants, it goes to the more remote collaterals. In many states, a distinction is made in the descent of lands between lands which the intestate acquires by descent, or by gift or devise from an ancestor,²¹ and lands which the intestate acquires by purchase, including devise or gift from a stranger. The lands embraced in the former class are called "ancestral." In the states where this distinction is recognized, the inheritance of ancestral lands is restricted to those who are of the blood of the "first purchaser," as he is called; that is, to those who can trace a relationship by consanguinity to the one who acquired the lands by purchase.²² In some of these states, persons who are not of the blood of the first purchaser cannot inherit at all; in others, they are merely postponed.²³ Where, however, the statutes make no distinction as to ancestral lands, the source of the intestate's title is immaterial.²⁴

Canon VI—Whole Blood

"A sixth rule or canon * * * is that the collateral heir of the person last seised must be the next collateral kinsman of the whole blood."²⁵

"Whole blood" means that the heir and the intestate are descendants from the same pair of ancestors. Relationship by the half blood would be when there was only one ancestor in common, as where the two persons were descendants of the same father, but of different mothers. The common law absolutely excluded the half blood from the inheritance.²⁶ For example, if upon the death of a father his lands descended to his oldest son, A., who died seised without issue, a younger son of the same father by another wife could not have been heir to these lands, because he was only of the half blood to A., the person last seised. The land would have escheated to the lord rather than have descended to any kinsman of the half blood.²⁷ This rule has, however, been changed in Eng-

²¹ *Oliver v. Vance*, 34 Ark. 564; *Galloway v. Robinson*, 19 Ark. 396; *Felton v. Billups*, 19 N. C. 308. Cf. *Godbold v. Freestone*, 3 Lev. 406.

²² *Garner v. Wood*, 71 Md. 37, 17 Atl. 1031; *Runey v. Edmands*, 15 Mass. 291; *Henderson v. Sherman*, 47 Mich. 267, 11 N. W. 153; *McWilliams v. Ross*, 46 Pa. 369.

²³ 1 Stim. Am. St. Law, § 3134.

²⁴ *In re Pearson's Estate*, 110 Cal. 524, 42 Pac. 960; *Peacock v. Smart*, 17 Mo. 402; *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652; *Penniman v. Francisco*, 1 Heisk. (Tenn.) 511.

²⁵ 2 Blk. Comm. 224; *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, *Burdick Cas. Real Property*. Cf. *Doed v. Whichelo*, 8 Term R. 211.

²⁶ 2 Blk. Comm. 227; *Ravenscroft v. Shelby*, 1 Mo. 694; *Ham v. Martin*, 8 N. C. 423; *Bowlin v. Pollock*, 7 T. B. Mon. (Ky.) 26. See, also, *Brown v. Brown*, 1 D. Chip. (Vt.) 360.

²⁷ *Stephen's Comm.* (15th Ed.) vol. I, 274.

land,²⁸ and in all states in this country.²⁹ In some states, kindred of the half blood have the same rights as those of the whole blood.³⁰ In some jurisdictions, they are postponed to the whole blood.³¹ In other states, the half blood take a smaller share than the whole blood.³² Where the distinction between ancestral and other lands obtains, collaterals of the half blood take only in the case they are of the blood of the ancestor from whom the inheritance comes,³³ and they are also, in most cases, postponed to the collaterals of the whole blood.³⁴

Canon VII—Preference of Males in Collateral Lines

"The seventh and last rule or canon is that in collateral inheritance male stock shall be preferred to the female (that is, kindred derived from the blood of male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female."³⁵

This rule is not the law in the United States.³⁶ Where, as was seen in discussing the second canon, there is a postponement of the maternal to the paternal kin in the ascending line, the issue of such kin, who are collateral heirs of the intestate, take without any distinction between males and females.³⁷ In New York, however, in cases of remote collateral relationship, the common-law rule as to the preferences of males does obtain. For example, it is held that a great-uncle will inherit to the exclusion of a great-aunt.³⁸

Property Subject to Descent

All the estates of inheritance of one who had died intestate descend to his heirs, unless disposed of during his life. The heirs, of

²⁸ Inheritance Act, 1833, § 9.

²⁹ 1 Stim. Am. St. Law, § 3133.

³⁰ *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Larrabee v. Tucker*, 116 Mass. 562; *In re Bell's Estate* (Sur.) 34 N. Y. Supp. 191; *Hatch v. Hatch*, 21 Vt. 450.

³¹ *Keller v. Harper*, 64 Md. 74, 1 Atl. 65; *Stark v. Stark*, 55 Pa. 62; *Chirac v. Reinecker*, 2 Pet. (U. S.) 613, 7 L. Ed. 538.

³² 1 Stim. Am. St. Law, § 3133; *Petty v. Malier*, 15 B. Mon. (Ky.) 591; *Milner v. Calvert*, 1 Metc. (Ky.) 472; *Marlow v. King*, 17 Tex. 177; *Hulme v. Montgomery*, 31 Miss. 105.

³³ *In re Smith's Estate*, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358; *Ryan v. Andrews*, 21 Mich. 229; *Cutter v. Waddingham*, 22 Mo. 206; *Valentine v. Weatherill*, 31 Barb. (N. Y.) 655; *Simpson v. Hall*, 4 Serg. & R. (Pa.) 337.

³⁴ *Den ex dem. Delaplaine v. Jones*, 8 N. J. Law, 340; *Childress v. Cutter*, 16 Mo. 24.

³⁵ 2 Blk. Comm. 234; *BATES v. BROWN*, 5 Wall. (U. S.) 710, 18 L. Ed. 535, *Burdick Cas. Real Property*.

³⁶ See canon II, *supra*.

³⁷ 1 Stim. Am. St. Law, § 3121.

³⁸ *Hunt v. Kingston*, 3 Misc. Rep. 309, 23 N. Y. Supp. 352, 19 L. R. A. 377.

course, take no rights in life estates held by the ancestor unless they be estates *per autre vie*, so limited that the heirs take the remainder of such estates. Equities in lands, or the right to redeem, pass, however, to the heirs by descent.³⁹ Chattels real do not descend to the heirs, but go to the personal representatives.⁴⁰ When the land of the decedent is subject to a right of curtesy, dower, or homestead, in states where these are only life interests, the land descends to the heir subject to these rights. The heir takes the land subject also to any claims which the creditors of the intestate may have for the satisfaction of their demands.⁴¹

Posthumous Children

Posthumous children are those who are born after the death of their father. Such children take as heirs, being considered, for the purposes of inheritance, in *esse* from the time of conception.⁴² A posthumous child takes the estate immediately upon his birth; the title, between the death of the father and the birth of the child, remaining, it is said, in abeyance.⁴³ In England, it is held that, prior to the birth of the child, "the qualified heir"—that is, the person who would be heir if no subsequent child were born—is entitled to go into the possession of the property and receive the profits of the same, pending the birth of the child.⁴⁴

In English and American law no positive time is fixed for the possible duration of pregnancy after the death of the father. Some states provide by statute, however, that the child must be born

³⁹ *Smith v. Smith*, 55 Ill. 204; *Bowery Nat. Bank v. Duncan*, 12 Hun (N. Y.) 405; *Avery's Lessee v. Dufrees*, 9 Ohio, 145; *Aldrich v. Bailey*, 71 Pa. 246.

⁴⁰ The heir, however, at common law, took the estate as special occupant when it was limited to the grantee and his heirs. *Moore v. Moore*, 2 Ch. 87, 96 (1892).

⁴¹ *Belton v. Summer*, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; *Merritt v. Daffin*, 24 Fla. 320, 4 South. 806; *Bushby v. Dixon*, 3 Barn. & C. 298; *Stainback v. Harris*, 115 N. C. 100, 20 S. E. 277; *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa, 360, 73 N. W. 875; *New Hampshire Sav. Bank v. Barrows*, 77 Minn. 138, 79 N. W. 660; *Felts v. Martin*, 20 App. Div. 60, 46 N. Y. Supp. 741.

⁴² By the early common law, such children were not considered capable of inheritance. The rule is otherwise, however, now in England. *Goodale v. Gawthorne*, 2 Smale & G. 375; *Richards v. Richards*, Johns. Eng. Ch. 754.

⁴³ *McConnel v. Smith*, 23 Hl. 611; *Sansberry v. McElroy*, 6 Bush (Ky.) 440.

⁴⁴ *In re Mowlen*, L. R. 18 Eq. 9 (1874). And see *Moore v. Wingfield*, 1 Ch. 874, 888 (1903). Where a widow was suspected of feigning pregnancy, in order to produce a supposititious heir to the estate, the heir presumptive could sue out the writ of *de ventre inspiciendo*. It was addressed to the sheriff, commanding him to impanel a jury of twelve knights and twelve matrons to examine the widow. Co. Litt. (9th Ed.) 5b; *Ex parte Bellet* (1786) 1 Cox, Eq. Cas. 297; *Ex parte Wallop* (1792) 4 Bro. C. C. 90. This writ is pre-

within ten months after the death of the intestate in order to inherit.⁴⁵

Since the rights of posthumous children are vested rights, they cannot be deprived of them except by due process of law.⁴⁶ In some states, however, inheritance rights do not apply to the posthumous children of collateral heirs.⁴⁷

Illegitimate Children

At common law, illegitimate children are incapable of inheriting, either from the putative father or from the mother.⁴⁸ Such a child can, in fact, inherit from no one, and can have no heirs save those of his own body.⁴⁹ This harsh rule has been mitigated, however, by statute, in many jurisdictions, and in most states an illegitimate child now inherits from the mother equally with legitimate children,⁵⁰ and may take through the mother. In some states, also, illegitimate children inherit from the father, if they have been acknowledged by him.⁵¹ In some they take from the father and mother when there are no other heirs; that is, they take only to prevent escheat. In a few states illegitimate children inherit from

sumably, still available, as said in *Laws of England* (1910) vol. 11, p. 11, note. Under modern practice, however, the fact of pregnancy would be determined by medical examiners. The absurdity of committing such a question to persons having no expert knowledge is apparent.

⁴⁵ 1 *Stim. Am. St. Law*, § 3136. In Scotland, France, and Italy, if the pregnancy exceeds 300 days, legitimacy is denied. In Germany, 302 days is permitted. *Peterson & Haines*, vol. II, 69. This arbitrary period of 302 days is, however, not satisfactory to many of the German authorities, many of whom would name 320 days as the limit. *Whart. & St. Med Juris*, III, § 53. A child born must be viable, that is, capable of living, in order to inherit. A premature birth at so early a stage of gestation that continued life is impossible is not sufficient for descent. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

⁴⁶ *Botsford v. O'Conner*, 57 Ill. 72. But see *Massie v. Hiatt's Adm'r*, 82 Ky. 314.

⁴⁷ 1 *Dembitz*, Land Tit. 228. See *Shriver v. State*, 65 Md. 278, 4 Atl. 679.

⁴⁸ *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Killam v. Killam*, 39 Pa. 120; *McCool v. Smith*, 1 Black (U. S.) 459, 17 L. Ed. 218.

⁴⁹ *Cooley v. Dewey*, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; *Bent's Adm'r v. St. Vrain*, 30 Mo. 268; *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153; *Stover v. Boswell's Heir*, 3 Dana (Ky.) 233. The issue of void marriages are in some states legitimate. *Green v. Green*, 126 Mo. 17, 28 S. W. 752, 1008. As to the legitimacy of children born after separation of the parents, see *McNeely v. McNeely*, 47 La. Ann. 1321, 17 South. 928.

⁵⁰ *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 553; *Miller v. Williams*, 66 Ill. 91; *Bunce v. Bunce* (Sup.) 14 N. Y. Supp. 659. See *In re Waesch's Estate*, 166 Pa. 204, 30 Atl. 1124.

⁵¹ *Harvey v. Ball*, 32 Ind. 98; *Brewer v. Hamor*, 83 Me. 251, 22 Atl. 161; *Ross v. Ross*, supra; *McGunnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428.

brothers and sisters, and in most states the mother inherits from an illegitimate child. In some states, a subsequent marriage of the parents legitimizes the children, and makes them capable of inheriting like children born in lawful wedlock.⁵² The law of the state where the land is situated governs, however, the legal capacity of heirs,⁵³ and a child legitimated in one state may not be recognized as legitimate in another state. It is still the law in England, for example, that a child born in Scotland before the marriage of its parents, but legitimated by their subsequent marriage, cannot take land in England as the heir of his father.⁵⁴

Advancements

An advancement may be defined as an irrevocable gift in presenti by way of anticipating, in whole or in part, an heir's share in the inheritance.⁵⁵ The doctrine of advancement applies only where the donor dies intestate, either as to all or as to a part of his estate.⁵⁶ The subject of advancement is governed by the statutes of the different states, and, in some states, no gift or grant is deemed an advancement unless so expressed in the instrument of transfer, or other writing by the donor, or acknowledged as such in writing by the donee.⁵⁷

Any kind of property which the donor has the right to convey may be made the subject of an advancement,⁵⁸ but the statutes vary as to the classes of property that may be charged with advancements; some states authorizing advances of personal prop-

⁵² 1 Stim. Am. St. Law, §§ 3150-3155; Dembitz, Land Tit. 279. But see *Hatch v. Ferguson*, 15 C. C. A. 201, 68 Fed. 43, 33 L. R. A. 759. Some statutes provide that children born to persons living together as man and wife shall be legitimate. In *re Matthias' Estate*, 63 Fed. 523. As to evidence of legitimacy, see In *re Pickens' Estate*, 163 Pa. 14, 29 Atl. 875, 25 L. R. A. 477; *Lavelle v. Corrignio*, 86 Hun. 135, 33 N. Y. Supp. 376; *Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752. Legitimation by the subsequent marriage of the parents is the rule of the Roman and the modern civil law, but it has not been adopted in England. See *Stephen's Comm.* (15th Ed.) vol. I, p. 283.

⁵³ *Supra*.

⁵⁴ In *re Don's Estate*, 4 Drew, 194; *Birtwhistle v. Vardill*, 7 Cl. & Fin. 895; *Laws of Eng.* (1910) vol. 11, p. 10.

⁵⁵ *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267; *Herkimer v. McGregor*, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44; *Osgood v. Breed's Heirs*, 17 Mass. 356; *Messmann v. Egenberger*, 46 App. Div. 46, 61 N. Y. Supp. 556; *Porter's Appeal*, 94 Pa. 332.

⁵⁶ *Pole v. Simmons*, 45 Md. 246; *Christy's Appeal*, 1 Grant, Cas. (Pa.) 369.

⁵⁷ *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267; *Bulkeley v. Noble*, 2 Pick. (Mass.) 337; *Pomeroy v. Pomeroy*, 93 Wis. 262, 67 N. W. 430; 1 Stim. Am. St. Law, § 3162. And see *Murphy v. Murphy*, 95 Iowa, 271, 63 N. W. 697; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

⁵⁸ *Edwards v. Freeman*, 2 P. Wms. 435, 24 Eng. Reprint, 803.

erty to be charged only against personalty, and realty against realty.⁵⁹ In the absence, however, of such statutory provisions, the property advanced may be charged against the same or a different class of property, as realty against personalty, or personalty against realty.⁶⁰ The doctrine of advancements applies only when the gift comes in the direct line, and not when it comes from a collateral.⁶¹ The statutes generally speak of gifts by "parents," and they include advancements made from a mother's estate as well as from a father's.⁶² The term "children," as used in the statutes, is held to include grandchildren and all descendants of the donor.⁶³ In order that a gift shall operate as an advancement, the donor must have intended it as such.⁶⁴ Small presents, expenditures for maintenance and education, are not presumed to be advancements, in absence of proof to the contrary.⁶⁵ Large gifts of property,⁶⁶ or establishing a child in business,⁶⁷ will, however, be generally presumed to be advancements.

When a lineal heir receives a gift or grant intended as an advancement, the amount so received is deducted from the share which that heir would otherwise receive from the ancestor.⁶⁸ The ad-

⁵⁹ *Stone's Adm'rs v. Halley*, 1 Dana (Ky.) 197; *Bemis v. Sterns*, 16 Mass. 200; *Havens v. Thompson*, 23 N. J. Eq. 321; *Lawrence v. Rayner*, 44 N. C. 113.

⁶⁰ *Pigg v. Carroll*, 89 Ill. 205; *Bemis v. Sterns*, *supra*; *In re Elliott's Estate*, 98 Mo. 379, 11 S. W. 739; *Fleming's Appeal*, 5 Phila. (Pa.) 351.

⁶¹ A wife is not chargeable with advances made to her by her husband. The statutes governing advancements do not apply to her. *Barnes v. Allen*, 25 Ind. 222; *In re Morgan*, 104 N. Y. 74, 9 N. E. 861.

⁶² *Kintz v. Friday*, 4 Dem. Sur. (N. Y.) 540; *Rees v. Rees*, 11 Rich. Eq. (S. C.) 86. *Contra*, *Holt v. Frederick*, 2 Eq. Rep. 446, 24 Eng. Reprint, 763.

⁶³ *In re Williams' Estate*, 62 Mo. App. 339; *Beebe v. Estabrook*, 79 N. Y. 246; *Simpson v. Simpson*, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287; *Parsons v. Parsons*, 52 Ohio St. 470, 40 N. E. 165. An advancement may exclude from participation in the real estate and not in the personalty. *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. 199.

⁶⁴ *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Bailey's Adm'rs v. Barclay*, 109 Ky. 636, 60 S. W. 377; *Fitts v. Morse*, 103 Mass. 164; *In re Morgan*, 104 N. Y. 74, 9 N. E. 861; *Frey v. Heydt*, 116 Pa. 601, 11 Atl. 535.

⁶⁵ *Bissell v. Bissell*, 120 Iowa, 127, 94 N. W. 465; *King v. King*, 107 La. 437, 31 South. 894; *Bradsher v. Cannady*, 76 N. C. 445; *Miller's Appeal*, 40 Pa. 57, 80 Am. Dec. 555.

⁶⁶ *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Culp v. Wilson*, 133 Ind. 294, 32 N. E. 928; *Ellis v. Newell*, 120 Iowa, 71, 94 N. W. 463; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293; *Miller's Appeal*, 107 Pa. 221.

⁶⁷ *Fellows v. Little*, 46 N. H. 27; *Pearson v. Cuthbert*, 58 App. Div. 395, 68 N. Y. Supp. 1031; *Storey's Appeal*, 83 Pa. 89.

⁶⁸ 1 Stim. Am. St. Law, §§ 3160-3168. Money expended in education is not an advancement. *Brannock v. Hamilton*, 9 Bush (Ky.) 446. But see *Kent v. Hopkins*, 86 Hun, 611, 33 N. Y. Supp. 767.

vancement is ordinarily valued at the time it is given.⁶⁹ If the value equals or exceeds the share which the donee would otherwise receive as heir, he takes nothing as heir.⁷⁰ If it is less than that, it operates as a payment pro tanto of his share of the estate.⁷¹ Generally, a donee has his election between keeping the advancement merely as a proportionate part of his share, or of turning it into hotchpot,⁷² as it is called, for the purpose of having the entire estate divided as if no advancement had been made, and of obtaining, with the other heirs, his portion.⁷³ A donee who claims no further share as heir cannot, however, be compelled to bring his advancement into hotchpot.

Escheat

"Escheat,"⁷⁴ says Coke,⁷⁵ "signifyeth property when by accident the lands fall to the lord of whom they are holden." Escheat was an incident of feudal tenure, and when there was no longer any tenant, the lord was in by his own right.⁷⁶

Escheat in the feudal sense has not been known in this country since the Revolution,⁷⁷ and the term means, in modern times, the

⁶⁹ *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. 199; *Moore v. Burrow*, 89 Tenn. 101, 17 S. W. 1035; *Clark v. Willson*, 27 Md. 693; *Shiver v. Brock*, 55 N. C. 137; *Oyster v. Oyster*, 1 Serg. & R. (Pa.) 422. In some states it is valued as at the time of the donor's death. *Dixon v. Marston*, 64 N. H. 433, 14 Atl. 728; *Miller's Appeal*, 31 Pa. 337.

⁷⁰ *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Nicholson v. Caress*, 59 Ind. 39; *Parker v. McCluer*, 3 Abb. Dec. (N. Y.) 454; *Scroggs v. Stevenson*, 100 N. C. 354, 6 S. E. 111.

⁷¹ *McClave v. McClave*, 60 Neb. 464, 83 N. W. 668; *Nesmith v. Dinsmore*, 17 N. H. 515; *Norwood v. Cobb*, 37 Tex. 141; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

⁷² "Hotchpot," in the old common law, meant that "land given in frank marriage and descending in fee simple should be mixed and divided in proportion among all the daughters." In *re Williams' Estate*, 62 Mo. App. 339. To bring into hotchpot does not mean that the property must in specie be thrown in with the other property of the estate, but that the advancement shall be charged against the donee according to its value. *Grattan v. Grattan*, 18 Ill. 167. To bring the property into hotchpot, to ascertain whether it exceeds or falls short of the donee's share, does not divest the donee of his title thereto. *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114.

⁷³ *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176; *Simpson v. Simpson*, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287; *Clark v. Hedden*, 109 La. 147, 33 South. 116; *Marston v. Lord*, 65 N. H. 4, 17 Atl. 980; *Beebe v. Estabrook*, 11 Hun (N. Y.) 523.

⁷⁴ From Old French *escheate*, chance, accident.

⁷⁵ Co. Litt. 13a.

⁷⁶ *A. G. of Ontario v. Mercer* (1883) 8 App. Cas. 767, P. C.

⁷⁷ 3 Washb. Real Prop. (6th Ed.) 61. See, also, *Matthews v. Ward*, 10 Gill & J. (Md.) 443.

passing of an intestate decedent's property to the state upon the failure of all heirs.⁷⁸ The question of escheat is generally regulated by statute.⁷⁹ In some states, property goes by escheat to the town or county in which it is situated.⁸⁰ In most jurisdictions, however, it goes directly to the state,⁸¹ and the state takes the intestate's interest in the property, subject to whatever liens and incumbrances there may be upon it.⁸² In some states, the statutes provide that escheated lands shall be sold, and the proceeds given to the public schools,⁸³ or state university.⁸⁴ In most jurisdictions, no proceedings are necessary in order to establish the state's title.⁸⁵ In some states, however, a judicial proceeding is required by statute, in the nature of an inquest of office,⁸⁶ the attorney general usually instituting the proceedings in behalf of the state.⁸⁷ The statutes, also, in some states, provide that proceedings by the state cannot be commenced until after a certain time has expired, in order that an opportunity may be given to any heir to come forward and claim his rights.⁸⁸ In general, moreover, even where title passes directly to the state without judicial inquiry, the statutes usually

⁷⁸ *Wallahan v. Angersoll*, 117 Ill. 123, 7 N. E. 519; *Sewall v. Lee*, 9 Mass. 363; *Den ex dem. Van Kleek v. O'Hanlon*, 21 N. J. Law, 582; *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753; *In re Bousquet's Estate*, 206 Pa. 534, 56 Atl. 60.

⁷⁹ *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Johnston v. Spicer*, *supra*; *Commonwealth v. Naile*, 88 Pa. 429.

⁸⁰ *Meadowcroft v. Winnebago County*, *supra*; *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522; *Haigh v. Haigh*, 9 R. I. 26.

⁸¹ *State ex rel. Roberts v. Reeder*, 5 Neb. 203; *Hinkle's Lessee v. Shadden*, 2 Swan (Tenn.) 46; *Hughes v. State*, 41 Tex. 10; *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

⁸² *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; 4 Kent, Comm. 427; 3 Washb. Real Prop. (6th Ed.) 64.

⁸³ *Gresham v. Rickenbacher*, 28 Ga. 227; *State ex rel. Attorney General v. Meyer*, 63 Ind. 33; *Harvey v. Harvey*, 25 S. C. 283; *Parchman v. Charlton*, 1 Cold. (Tenn.) 381.

⁸⁴ *University of North Carolina v. Harrison*, 90 N. C. 385.

⁸⁵ *State v. Stevenson*, 6 Idaho, 367, 55 Pac. 886; *White v. White*, 2 Metc. (Ky.) 185; *Guyer v. Smith*, 22 Md. 239, 84 Am. Dec. 650; *Montgomery v. Dorion*, 7 N. H. 475.

⁸⁶ *Wallahan v. Ingersoll*, 117 Ill. 123, 7 N. E. 519; *Ramsey's Appeal*, 2 Watts (Pa.) 228, 27 Am. Dec. 301; *In re Desilver's Estate*, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

⁸⁷ See *Wallahan v. Ingersoll*, *supra*; *State ex rel. Attorney General v. Meyer*, 63 Ind. 33; *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *O'Hanlin v. Den*, 20 N. J. Law, 31; *Jackson ex dem. Smith v. Adams*, 7 Wend. (N. Y.) 367; *Croner v. Cowdrey*, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716.

⁸⁸ *People ex rel. Attorney General v. Roach*, 76 Cal. 294, 18 Pac. 407; *State v. Smith*, 70 Cal. 153, 12 Pac. 121.

provide that heirs may establish their claims within a certain period,⁸⁹ and, in some jurisdictions, there is no limitation on the time in which such claims may be brought forward.⁹⁰

⁸⁹ State v. Smith, *supra*; State v. Stevenson, 6 Idaho, 367, 55 Pac. 886; Young v. State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548; Treasurer v. Wygall, 46 Tex. 447.

⁹⁰ 1 Stim. Am. St. Law, § 1154.

CHAPTER XXIV

TITLE BY OFFICIAL GRANT

- 244. Meaning of "Official Grant."
- 245. Execution Sales.
- 246. Conveyances under Judicial Orders or Decrees.
- 247. Conveyances by Statutory or Judicial Permission.
- 248. Tax Titles.
- 249. Right of Redemption.
- 250. Estate or Interest Acquired.
- 251. Eminent Domain.

MEANING OF "OFFICIAL GRANT"

244. In some cases, land may be transferred without the owner's co-operation, and even without his consent, as, for example, in the case of execution and judicial sales of land. Such transfers are here designated "official grants."

In addition to transfers of realty by public and private grants, which are purely voluntary acts,¹ title to land may be conveyed, under some circumstances, without the co-operation of the owner, and even against his consent and wish. Such transfers are illustrated by execution sales; conveyances by guardians, executors, and administrators under statutory or judicial permission; tax sales; conveyances, in general, under judicial orders or decrees; and the acquisition of title by the right of eminent domain.

Various general terms have been applied to such transfers. They have been called judicial sales, sales by judicial process, transfers in invitum, or involuntary transfers. This latter term is, in some cases, an accurate enough designation, but the mental attitude of the owner is immaterial. The validity of this sort of titles depends on whether the proper notices to the parties in interest have been given and the requirements of procedure complied with in other respects. In other words, by constitutional safeguard, a man's property cannot be taken from him without due process of law.

The general terms, however, usually applied to the transfers under discussion are not, in many particular cases, fitting. They are

¹ The term "voluntary conveyance" is often used to mean a transfer without valuable consideration. The word "voluntary" is here used, however, to mean in accordance with one's own free will, as opposed to involuntary.

not all properly classed as "judicial sales," since there is a recognized distinction between a judicial sale and an execution sale.² They are not all properly called "involuntary," since they may or may not be accompanied with the mental assent of the owner. In fact, there seems to be no one ideal term under which these transfers can be grouped. They are here designated as "official grants," in distinction from public and private grants, and by reason of the fact that such transfers are usually effected either by judicial process or by ministerial agencies of the law. In either case they may be said, therefore, to be official.

EXECUTION SALES

245. Execution sales are sales made by an officer by virtue of statutory authority. Such sales are based on money judgments and writs of execution. They are not judicial sales, but ministerial. They are complete as soon as made.

There is a well-defined distinction between an execution sale and a judicial sale. In an execution sale, the sheriff, or his deputy, or other authorized officer, sells by the mere authority of his writ, and if the sale is not void, the title passes at once by the sheriff's deed.³ In some states, a judicial confirmation of an execution sale may be required by statute,⁴ but it is not so at common law.⁵ At common law, confirmation is required only in judicial sales.⁶

An execution sale is based on a general judgment for money; a judicial sale is based on an order to sell specific property. An execution sale is made by an officer of the law; a judicial sale is made by an agent of the court.⁷ An execution sale is, in other words, a ministerial act.⁸

At common law, as previously stated, a man's lands were not liable to be sold for his debts. Now, however, in all of our states, lands may be sold for debts. Before this can be done, however,

² See *infra*.

³ *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 694, 43 Am. St. Rep. 572.

⁴ *Johnson v. Lindsay*, 27 Kan. 514; *Moore v. Boyer*, 52 Neb. 446, 72 N. W. 586; *McBain v. McBain*, 15 Ohio St. 337, 86 Am. Dec. 478; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572.

⁵ *Hershy v. Latham*, 42 Ark. 305; *Preston v. Breckenridge*, 86 Ky. 619, 6 S. W. 641.

⁶ *Norton v. Reardon*, 87 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

⁷ *Id.*

⁸ See *Norton v. Reardon*, *supra*.

a judgment must be obtained,⁹ and a writ of execution must be issued. The sheriff or his deputy thereupon makes the sale and executes the deed.¹⁰ The purchaser is said to take an estate on execution,¹¹ acquiring by the purchase only the interest of the judgment debtor.¹² The statutes usually provide that the debtor may redeem the land from the sale within a certain specified time.¹³

Reversal or Vacation of Judgment

Where land is sold on execution sale, and the judgment is subsequently reversed or vacated, a third person, who has purchased the premises in good faith, will not be disturbed in his title by such fact.¹⁴ If, however, the execution creditor had been the purchaser, the reversal or vacation of the judgment would deprive him of his rights under the sale.¹⁵

CONVEYANCES UNDER JUDICIAL ORDERS OR DECREES

246. Judicial sales, or sales of land under an order or decree, are sales made under the process of a court having competent authority to make such orders or decrees, by officers legally appointed and commissioned to sell.

The distinction between an execution, or ministerial, sale and a judicial sale was pointed out in the preceding section. A judi-

* As previously shown, a judgment usually becomes a lien on the judgment debtor's real estate as soon as it is rendered or docketed. See chap. XXI, ante.

¹⁰ *Finch v. Turner*, 21 Colo. 287, 40 Pac. 565; *Higgins v. Bordages* (Tex. Civ. App.) 28 S. W. 350; *Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379.

¹¹ 2 Washb. Real Prop. (5th Ed.) 31.

¹² *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Bramlett v. Wettin*, 71 Miss. 902, 15 South. 934; *Butler v. Fitzgerald*, 43 Neb. 192, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. Rep. 741; *Greenleaf v. Grounder*, 86 Me. 298, 29 Atl. 1082.

¹³ *Howard v. Kelly*, 137 Iowa, 76, 114 N. W. 544, 126 Am. St. Rep. 274. And see *McIlwain v. Karstens*, 152 Ill. 135, 38 N. E. 555; *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020; *Southern California Lumber Co. v. McDowell*, 105 Cal. 99, 38 Pac. 627; *Smith v. Bank*, 102 Mich. 5, 60 N. W. 438; *Wenham v. Schmitt*, 219 Ill. 195, 76 N. E. 375.

¹⁴ *Di Nola v. Allison*, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; *Whiting v. Bank*, 13 Pet. (U. S.) 6, 10 L. Ed. 33; *Feger v. Keefer*, 6 Watts (Pa.) 297; *Shultz v. Sanders*, 38 N. J. Eq. 154; *Eisberg v. Shultz*, 38 N. J. Eq. 293.

¹⁵ *Wood v. Ogden*, 124 Mo. App. 42, 101 S. W. 615; *Jackson ex dem. Saunders v. Cadwell*, 1 Cow. (N. Y.) 622; *Reynolds v. Harris*, 14 Cal. 677, 76 Am. Dec. 459. The same is true of a purchase by the plaintiff's attorney. *Hays v. Cassell*, 70 Ill. 669; or by his wife, *Ivle v. Stringfellow's Adm'r*, 82 Ala. 545, 2 South. 22.

cial sale is made in pursuance of an order, or decree,¹⁶ of a court and is confirmed by the court.¹⁷ In an execution sale, the sale is made by the sheriff; in a judicial sale, the sale is made by the court.¹⁸

There are various causes which may give rise to orders or decrees of sale, and some of these have already been considered, as, for example, foreclosure sales in mortgages;¹⁹ partition sales when lands held in joint ownership are apportioned in severalty but when the land itself cannot be divided;²⁰ and sales to enforce liens in general.²¹ The sale of land for delinquent taxes can be made, in some states, only by a judicial sale,²² and further illustrations of transfer of title by judicial order or decree may be seen in decrees for specific performance, for the sale of land to pay debts,²³ for the conversion of realty in personalty in connection with equitable conversion, and for the retransfer of property fraudulently conveyed.²⁴ As to specific performance, when an owner of land has made a binding contract to convey real property, and then refuses to execute a conveyance, a court of equity may compel him to do so by a decree.²⁵ There may be also a valid contract, founded on a sufficient consideration,²⁶ to give lands by will, and such a contract may be enforced by compelling the persons holding the title to the lands to convey to the one to whom they should have been devised.²⁷

In some jurisdictions, a decree for specific performance may be enforced by a court order directing a master, commissioner, or other officer of the court to execute a deed.²⁸ The form of the

¹⁶ *Chew v. Hyman*, 7 Fed. 7.

¹⁷ *Rowland v. McGuire*, 67 Ark. 320, 55 S. W. 16; *Harrison v. Harrison*, 1 Md. Ch. 331; *Christie v. Gage*, 71 N. Y. 189; *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. Ed. 1170.

¹⁸ *Dawson v. Litsey*, 10 Bush (Ky.) 408; *Bolgiano v. Cook*, 19 Md. 375; *Parrat v. Neligh*, 7 Neb. 456; *Armor v. Cochrane*, 66 Pa. 308.

¹⁹ Ante, chapter XX.

²⁰ Ante, chapter XII.

²¹ Ante, chapter XXI.

²² *Infra*.

²³ *Cain v. Jennings*, 2 Tenn. Cas. 209.

²⁴ *Infra*.

²⁵ *Engle v. White*, 104 Mich. 15, 62 N. W. 154; *Roberts v. Cambridge*, 164 Mass. 176, 41 N. E. 230; *Prospect Park & C. I. R. Co. v. Railroad Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Haydon v. Haydon* (Ky.) 27 S. W. 975; *Wright v. Brown*, 116 N. C. 26, 22 S. E. 313; *Hoover v. Buck* (Va.) 21 S. E. 474.

²⁶ *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Fuchs v. Fuchs*, 48 Mo. App. 18.

²⁷ *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715.

²⁸ *Rush v. Truby*, 11 Ind. 462; *Sproule v. Winant*, 7 T. B. Mon. (Ky.) 195, 18 Am. Dec. 164.

deed is governed by the contract, but if the contract does not specify the form, some cases hold that a warranty deed must be executed,²⁹ although other decisions hold a quitclaim deed sufficient.³⁰ In many states, however, by force of statute, a decree operates of itself for the purpose of transferring title, no deed being necessary.³¹ In the absence of such a statute, however, a court of equity has no jurisdiction to create or transfer title, the title passing only by the conveyance executed in accordance with the decree, and not by the decree itself.³²

SAME—CONVEYANCES BY STATUTORY OR JUDICIAL PERMISSION

247. Permission to convey lands may be given by order of court, under statutory authority:

- (a) To guardians, for the purpose of conveying the land of persons under disability;
- (b) To executors and administrators, for the purpose of conveying the land of decedents.

Conveyances by Guardians

A guardian, unless acting, under a power in a will, has no authority to sell the land of his ward without an order from a court of competent jurisdiction. Any such conveyance made without such judicial authority is void. However, under the provisions of a will,³³ or by order of court,³⁴ or by special statutory authority,³⁵ the guardian of a person under disability may convey such ward's real property. It is often necessary for the interest and benefit of

²⁹ Linn v. Barkey, 7 Ind. 69; Henry v. Liles, 37 N. C. 407; Stanley v. Bedinger, 2 Ohio Cir. Ct. R. 344, 1 O. C. D. 522.

³⁰ Dodd v. Seymour, 21 Conn. 476; Davis v. Harrison, 4 Litt. (Ky.) 261; Lounsberg v. Locander, 25 N. J. Eq. 554; Hall v. Layton, 10 Tex. 55.

³¹ Kelly v. Bramblett, 81 S. W. 249, 26 Ky. Law Rep. 167; Simmons v. Conklin, 129 Mich. 190, 88 N. W. 625; Goldstein v. Curtis, 65 N. J. Eq. 382, 59 Atl. 639; Nanny v. Fancher, 60 Hun, 586, 15 N. Y. Supp. 628.

³² Prewitt v. Ashford, 90 Ala. 294, 7 South. 831; Wallis' Heirs v. Wilson's Heirs, 34 Miss. 357; Tardy v. Morgan, 23 Fed. Cas. No. 13,752.

³³ Thurmond v. Faith, 69 Ga. 832; Smith v. Hulse, 62 Ga. 341.

³⁴ Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92, 84 N. E. 1104; Jenness v. Smith, 58 Mich. 280, 25 N. W. 191; Jackson v. Todd, 25 N. J. Law, 121; Meiggs v. Hoagland, 68 App. Div. 182, 74 N. Y. Supp. 234; Johns v. Tiers, 114 Pa. 611, 7 Atl. 923.

³⁵ Mason v. Wait, 4 Scam. (Ill.) 127; Exendine v. Morris, 76 Mo. 416; Snowhill v. Snowhill's Ex'r, 2 N. J. Eq. 30; Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585.

persons under guardianship, such as infants or insane persons, that their lands should be sold to provide for their support. Some cases hold, however, that courts of equity have no inherent jurisdiction to order the sale of a ward's lands, and that such jurisdiction is conferred upon the court only by statute.³⁶ While the weight of authority is to the contrary,³⁷ yet, as a matter of fact, the statutes usually govern this question by giving probate courts authority to permit the sale of the land of persons under guardianship for such purposes as are specified by the statutes.³⁸ In most jurisdictions, a special bond is required to insure the good faith of the sale and the application of the proceeds.³⁹ A confirmation by the court of the sale is also usually necessary for its validity.⁴⁰ In fact, sales by guardians are but a phase of judicial sales.

Conveyances by Executors and Administrators

In the administration of the estate of a decedent it may become necessary, by reason of the insufficiency of the personal estate, to sell part of the real property to satisfy the claims of creditors and to pay the expenses of administration, or to pay legacies which the testator has given. When executors are given a power to sell lands by the will which appoints them, the sale is made under the power, and not under the license of a court.⁴¹

At common law, the realty of deceased persons is not liable for their debts.⁴² Modern statutes, however, usually provide that the lands of a decedent shall be subject to his debts, and make provision for the sale of the same by the executor or administrator under the direction of the court.⁴³ Usually, this jurisdiction is

³⁶ *Baker v. Lorillard*, 4 N. Y. 257; *Singleton v. Love*, 1 Head (Tenn.) 357; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

³⁷ *Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510; *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347; *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968.

³⁸ *Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66; *Winch v. Tobin*, 107 Ill. 212; *Robert v. Casey*, 25 Mo. 584; *Balliet's Appeal*, 2 Walk. (Pa.) 268.

³⁹ *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Hughes v. Saffel*, 134 Ky. 175, 119 S. W. 804; *Fender v. Powers*, 67 Mich. 433, 35 N. W. 80; *Hughes v. Goodale*, 26 Mont. 93, 66 Pac. 702, 91 Am. St. Rep. 410; *Arrowsmith v. Gieson*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630.

⁴⁰ *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *People ex rel. Monroe v. Judge of Circuit Court*, 19 Mich. 296; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Gillelan v. Witherspoon* (Tex. Civ. App.) 121 S. W. 909.

⁴¹ *White v. Moses*, 21 Cal. 44; *Payne v. Payne*, 18 Cal. 291.

⁴² *Le Moyne v. Quimby*, 70 Ill. 399; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Sheldon v. Rice's Estate*, 30 Mich. 296, 18 Am. Rep. 136; *Carr v. Hull*, 65 Ohio St. 394, 62 N. E. 439, 58 L. R. A. 641, 87 Am. St. Rep. 623.

⁴³ *Woods v. Legg*, 91 Ala. 511, 8 South. 342; *Harwell v. Foster*, 102 Ga. 38, 28 S. E. 967; *Crouch v. Eveleth*, 12 Mass. 503; *Bridgewater v. Brookfield*, 3 Cow. (N. Y.) 299.

conferred upon probate courts.⁴⁴ The usual procedure involves an application for the sale,⁴⁵ notice to all persons interested in the estate,⁴⁶ the order of sale,⁴⁷ and confirmation of the sale by the court.⁴⁸

Conveyances of Settled Lands

Under the English Settled Land Acts,⁴⁹ a "settlement" is a deed, will, or agreement by virtue of which any estate or interest in lands stands for the time being limited to or in trust for any persons by way of succession.⁵⁰ Any estate which is the subject of a settlement may, by act of parliament,⁵¹ be sold by the tenant for life.⁵² This power to sell is absolute, and may be exercised free from any restrictions.⁵³ The leave of the court is required in order to exercise the power of sale,⁵⁴ and the proceeds are invested for the equitable benefit of all persons interested in the settled lands.⁵⁵

Closely similar to this phase of the English statutes are statutes in some of our American states. When the alienation of the fee in land in ordinary ways is impossible because the whole ownership is divided between life tenants and remaindermen, some of whom may be unborn or unascertained, there are in some states statutes which permit the sale of such lands, under direction of the court, and the investment of the proceeds in other realty under the same limitations. Such sales are often desirable when the

⁴⁴ Doe ex dem. Smith v. Hileman, 1 Scam. (Ill.) 323; Stratton v. McCandliss, 32 Kan. 512 4 Pac. 1018; In re Kingsland v. Murray, 133 N. Y. 170, 30 N. E. 845; Miskimins' Appeal, 114 Pa. 530, 6 Atl. 743.

⁴⁵ Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Monahan v. Vandyke, 27 Ill. 154; Long v. Burnett, 13 Iowa, 28, 81 Am. Dec. 420; Lawson v. Acton, 57 N. J. Eq. 107, 40 Atl. 584.

⁴⁶ Marshall v. Rose, 86 Ill. 374; Walker v. Fuller 147 Mass. 489, 18 N. E. 400; Rogers v. Johnson, 125 Mo. 202, 28 S. W. 635; Picard v. Montross (Miss.) 17 South. 375; Corwin v. Merritt, 3 Barb. (N. Y.) 341.

⁴⁷ The order to sell must describe the land. Borders v. Hodges, 154 Ill. 498, 39 N. E. 597; Melton v. Fitch, 125 Mo. 281, 28 S. W. 612.

⁴⁸ Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Maynard v. Cocke (Miss.) 18 South. 374; Stilwell v. Swarthout 81 N. Y. 109; Greenough v. Small, 137 Pa. 132, 20 Atl. 553, 21 Am. St. Rep. 859.

⁴⁹ Laws of Eng. vol. 25, p. 264.

⁵⁰ From 1882 to 1890; from 45 & 46 Vict. c. 38, to 53 & 54 Vict. c. 69.

⁵¹ 45 & 46 Vict. c. 38, § 3.

⁵² Wheelwright v. Walker, 23 Ch. Div. 752; In re Pearson's Will [1900] 83 L. T. 626.

⁵³ In re Chaytor's Estate, 25 Ch. D. 651.

⁵⁴ In re Bagot's Settlement, [1894] 1 Ch. 177; In re Tuthill, [1907] 1 L. R. 305.

⁵⁵ 45 & 46 Vict. c. 38, § 34.

lands are of no beneficial value to the life tenants, or are subject to incumbrances.⁵⁶ Sales of such estates cannot be made, however, unless there is a statute authorizing them.⁵⁷

SAME—TAX TITLES

248. Title to land may be acquired by a tax deed in connection with the sale of land for delinquent taxes. Such a sale may be either

- (a) A ministerial sale; or
- (b) A judicial sale.

When land is sold for delinquent taxes under a judicial sale, the action may be:

- (a) In personam, or against the delinquent taxpayer; or it may be a proceeding
- (b) In rem, that is against the land itself.

249. RIGHT OF REDEMPTION—In almost all the states the statutes provide that land sold for taxes may be redeemed during a certain period from the time of sale, or before the delivery of the tax deed.

250. ESTATE OR INTEREST ACQUIRED—In most states, the estate acquired by a tax title is a fee simple. In some states, however, the purchaser acquires only the same interest the delinquent taxpayer had. In a few states, a forfeiture of land is incurred for nonpayment of taxes, and title to the land becomes vested in the state.

A "tax title" is the title by which one holds land purchased at a tax sale.⁵⁸ It is not a derivative title,⁵⁹ but is a purely technical one, as distinguished from a meritorious title.⁶⁰ The power to tax involves the power to enforce the payment of the tax by a sale of the land.⁶¹ Title to land thus sold does not pass merely by the sale itself, since a statutory right to save the property by re-

⁵⁶ 2 Dembitz, Land Tit. § 156. And see *Luttrell v. Wells*, 97 Ky. 84, 30 S. W. 10, construing the Kentucky statute.

⁵⁷ *Baker v. Baker*, 1 Rich. Eq. (S. C.) 392.

⁵⁸ *Willcuts v. Rollins*, 85 Iowa, 247, 52 N. W. 199; *Beirne v. Burdett*, 52 Miss. 795.

⁵⁹ *Willcuts v. Rollins*, *supra*.

⁶⁰ *Black*, Tax Titles, § 409; *KERN v. CLARKE*, 59 Minn. 70, 60 N. W. 809, *Burdick Cas. Real Property*.

⁶¹ *Biscoe v. Coulter*, 18 Ark. 423; *Larimer County v. Bank*, 11 Colo. 564, 19 Pac. 537; *Rhinehart v. Schuyler*, 2 Gilman (Ill.) 473; *Chadwell v. Jones*, 1 Tenn. Ch. 493. And see *Pritchard v. Madren*, 24 Kan. 486, 491.

demption is usually given,⁶² and the purchaser does not become vested with ownership until that time has expired and he has received a deed.⁶³ A tax sale may be either ministerial⁶⁴ or judicial.⁶⁵ The former is a sale made, without a judicial proceeding, by the tax collector or some other official designated by law for the purpose. The latter is a sale made only in accordance with a judgment or decree of a court. All tax sales are regulated wholly by statute.

Ministerial Sale

In most states the statutes provide for summary methods for the sale of lands for unpaid taxes. They authorize the proper officers to advertise the land for sale and sell it after a certain period of delinquency. Such proceedings are constitutional, although no actual notice of the sale is brought home to the owner.⁶⁶ Whatever may be the form of notice required, however, by statute, whether personal service, published advertisement, or posting of notice, the statutory requirements must be complied with substantially, if not literally, and a failure to observe these directions will invalidate the sale.⁶⁷

It is also necessary to the validity of a tax sale that it is made by a duly authorized official,⁶⁸ and in executing the sale he must strictly follow the requirements of the statute.⁶⁹ The officer making the sale must see that it is conducted in a fair and proper manner, and any conduct on his part which tends to prevent the attendance of bidders or a fair competition among those present will ordinarily avoid the sale.⁷⁰ The sale must also be made at the place specified by law,⁷¹ and also at the time appointed.⁷² The

⁶² *Infra*.

⁶³ *Infra*.

⁶⁴ *Infra*.

⁶⁵ *Infra*.

⁶⁶ Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414.

⁶⁷ Eames v. Woodson, 120 La. 1031, 46 South. 13; Williams v. Bowers, 197 Mass. 565, 84 N. E. 317; Leland v. Bennett, 5 Hill (N. Y.) 286; Jenks v. Wright, 61 Pa. 410; Early v. Doe, 16 How (U. S.) 610, 14 L. Ed. 1079; CONNERS v. CITY OF LOWELL, 209 Mass. 111, 95 N. E. 412, Ann. Cas. 1912B, 627, Burdick Cas. Real Property.

⁶⁸ Garrick v. Chamberlain, 97 Ill. 620; People ex rel. Attorney General v. St. Clair County, 30 Mich. 388; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; McCoy v. Turk, 1 Pen. & W. (Pa.) 499.

⁶⁹ Hays v. Hunt, 85 N. C. 303; Cruger v. Dougherty, 43 N. Y. 107; Cahoon v. Coe, 57 N. H. 556; Millikan v. Patterson, 91 Ind. 515; CONNERS v. CITY OF LOWELL, 209 Mass. 111, 95 N. E. 412, Ann. Cas. 1912B, 627, Burdick Cas. Real Property.

⁷⁰ Townsend Sav. Bank v. Todd, 47 Conn. 190; Gage v. Graham, 57 Ill. 144; Christian v. Soderberg, 118 Mich. 47, 76 N. W. 126; Younger v. Meadows, 63 W. Va. 275, 59 S. E. 1087.

⁷¹ Richards v. Cole, 31 Kan. 205, 1 Pac. 647; Whitney v. Bailey, 88 Minn. 247, 92 N. W. 974; Keenan v. Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703.

⁷² Essington v. Neill, 21 Ill. 139; Entrekin v. Chambers, 11 Kan. 368;

amount for which the land may be sold is regulated by statute, although it is never intended that it should be sold for less than the total amount of taxes due, together with the legal fees and charges.⁷³ To offer, however, the land for sale for an amount in excess of what is lawfully due, will invalidate the sale.⁷⁴ Some cases hold that even the slightest excess in the amount alleged to be due will vitiate the proceedings,⁷⁵ although there are other decisions to the effect that very trifling overcharges will not have that result.⁷⁶

So many tax sales have been invalidated by failure to comply with statutory requirements that, in some states, tax titles are very unfavorably regarded, and there are judicial dicta to the effect that all such titles are of doubtful validity.⁷⁷ In other states, however, there are statutory provisions which in various ways serve to protect the purchaser's title,⁷⁸ and in many states a reasonable and substantial compliance with the statutes is all that is required.⁷⁹ A recognized authority upon the subject of tax sales has laid down the following rule for determining a sufficient compliance with statutory requirements: "When the statute under which the land is sold for taxes directs an act to be done, or prescribes the form, time, and manner of doing an act, such an act must be done in the form, time, and manner prescribed, or the title is invalid, and in this respect the statute must be strictly, if not literally, complied with. But, in determining what is required

Houghton County v. Auditor-General, 41 Mich. 28, 1 N. W. 890; *McLemore v. Anderson*, 92 Miss. 42, 43 South. 878, 47 South. 801; *Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931.

⁷³ *Griffin v. Tuttle*, 74 Iowa, 219, 37 N. W. 167; *Moore v. Auditor General*, 122 Mich. 599, 81 N. W. 561; *Chadbourn v. Hartz*, 93 Minn. 233, 101 N. W. 68; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437.

⁷⁴ *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; *Glenn v. Stewart*, 78 Kan. 608, 97 Pac. 863; *Sayers v. O'Connor*, 124 Mich. 256, 82 N. W. 1044; *Loud v. Penniman*, 19 Pick. (Mass.) 539; *Landis v. Vineland* (N. J. Sup.) 43 Atl. 569.

⁷⁵ *McLaughlin v. Thompson*, 55 Ill. 249; *Glenn v. Stewart*, 78 Kan. 605, 97 Pac. 863; *Boyce v. Sebring*, 66 Mich. 210, 33 N. W. 815; *Chippewa River Land Co. v. Land Co.*, 118 Wis. 345, 94 N. W. 37, 95 N. W. 954.

⁷⁶ *O'Grady v. Barnhisel*, 23 Cal. 287; *Ireland v. George*, 41 Kan. 751, 21 Pac. 776; *Colman v. Shattuck*, 62 N. Y. 348. And see *Glenn v. Stewart*, 78 Kan. 605, 97 Pac. 863, where it is held that an excess caused by an erroneous calculation does not invalidate the sale.

⁷⁷ See *Ferris v. Coover*, 10 Cal. 589; *Wilson v. Doe*, 7 Leigh (Va.) 22; *Brown v. Veazie*, 25 Me. 359.

⁷⁸ See *infra*, Title or Estate Acquired.

⁷⁹ *Jenkinson v. Auditor General*, 104 Mich. 34, 62 N. W. 163; *Mosely v. Rely*, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721; *Bedgood v. McLain*, 94 Ga. 283, 21 S. E. 529; *Stieff v. Hartwell*, 35 Fla. 606, 17 South. 899; *Henderson v. Ellerman*, 47 La. Ann. 306, 16 South. 821.

to be done, the statute must receive a reasonable construction; and when no particular form or manner of doing an act is prescribed, any mode which effects the object with reasonable certainty is sufficient. But special stress should always be laid upon those provisions which are designed for the protection of the taxpayer."⁸⁰

Judicial Sale

In some states, by virtue of constitutional or statutory provisions, land cannot be sold for delinquent taxes by summary proceedings, but only after suit has been brought by the proper officer,⁸¹ and a decree or judgment of sale has been duly rendered.⁸² These suits are of two kinds, either a personal action against the person who owes the taxes, or a proceeding in rem, directed against the land itself. When brought against the person who owes the taxes, jurisdiction of the person must be acquired, and the judgment, when rendered, may be enforced by execution, the same as any other judgment.⁸³

A suit in rem, on the other hand, seeks to subject the land to sale for the delinquent tax, and does not involve any personal judgment against the owner.⁸⁴ Notice to the owner of the proceeding may be merely constructive, as notice by publication.⁸⁵ Such a suit, unless limited by a special statute, may be brought at any time.⁸⁶ The deed given upon the sale stands upon the same footing as a sheriff's deed in other cases.⁸⁷

⁸⁰ Black, *Tax Titles* (2d Ed.) § 155. See, also, by the same author, the article *Taxation, subdivision Sale of Land for Delinquent Taxes*, in 37 *Cyc.* 1281.

⁸¹ 2 *Dembitz, Land Tit.* 1334. As to who can sue, see *San Diego Co. v. Railroad Co.*, 108 Cal. 46, 40 Pac. 1052; *Beers v. People*, 83 Ill. 488; *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314.

⁸² *Webster v. Chicago*, 62 Ill. 302; *Bleirdorn v. Abel*, 6 Iowa, 5; *Carlin v. Cavender*, 56 Mo. 286. See *KERN v. CLARKE*, 59 Minn. 70, 60 N. W. 809, *Burdick Cas. Real Property*.

⁸³ *Byrne v. La Salle*, 123 Ill. 581, 14 N. E. 679; *Reed v. Louisville*, 61 S. W. 11, 22 Ky. Law Rep. 1636; *Mercier's Succession*, 42 La. Ann. 1135, 8 South. 732, 11 L. R. A. 817.

⁸⁴ *People ex rel. Ream v. Dragstran*, 100 Ill. 286; *Kipp v. Collins*, 33 Minn. 394, 23 N. W. 554; *Neenan v. St. Joseph*, 126 Mo. 89, 28 S. W. 963; *Steen's Estate*, 175 Pa. 299, 34 Atl. 732.

⁸⁵ *Schmidt v. Niemeyer*, 100 Mo. 207, 13 S. W. 405; *Payne v. Lott*, 90 Mo. 676, 3 S. W. 402. But see *Martin v. Parsons*, 49 Cal. 95. Such notice, if given, must contain a description of the land. *Smith v. Kipp*, 49 Minn. 119, 51 N. W. 656; *Vaughan v. Daniels*, 98 Mo. 230, 11 S. W. 573; *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175.

⁸⁶ *Louisville v. Johnson*, 95 Ky. 254, 24 S. W. 875; *State v. Ward*, 79 Minn. 362, 82 N. W. 686; *Stevens v. Paulsen*, 64 Neb. 488, 90 N. W. 211; *Barnes v. Brown*, 1 Tenn. Ch. App. 726.

⁸⁷ *Bedgood v. McLain*, 89 Ga. 793, 15 S. E. 670; *Pritchard v. Madren*, 31 Kan. 38, 2 Pac. 691.

Redemption

In almost all the states, the statutes provide that land sold for taxes may be redeemed from the sale.⁸⁸ This statutory right of redemption exists for the benefit of the owner, and, as a rule, for any person who has an interest in the property.⁸⁹ The statutes fix the time in which the redemption may be made, which is usually from one to three years.⁹⁰ In some states, the right may be exercised any time before the delivery of the tax deed.⁹¹

At the time of the sale, the purchaser is usually given merely a certificate of sale.⁹² This does not pass title, but is evidence of the purchaser's inchoate title,⁹³ and it contains a recital of the time when the holder will be entitled to a deed, providing the property is not, in the meantime, redeemed.⁹⁴ The statutes also usually provide that the rights of a purchaser under a certificate may be assigned.⁹⁵ Until the period of redemption expires, the owner is, in most states, entitled to possession of the land and to its profits.⁹⁶ The holder of the certificate of purchase is usually entitled to a deed on the expiration of the period of redemption,⁹⁷

⁸⁸ Black, *Tax Titles* (2d Ed.) c. 23. And see *People ex rel. Marsh v. Campbell*, 143 N. Y. 335, 38 N. E. 300; *Douglass v. McKeever*, 54 Kan. 767, 39 Pac. 703; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022; *Stone v. Stone*, 163 Mass. 474, 40 N. E. 897; *Wilson v. Insurance Co.*, 140 Ky. 642, 131 S. W. 785; *McNeil v. O'Brien*, 204 Mass. 594, 91 N. E. 138.

⁸⁹ *Griffith v. Utley*, 76 Iowa, 292, 41 N. W. 21; *Stone v. Stone*, 163 Mass. 474, 40 N. E. 897; *Parsons v. Real Estate Co.*, 86 Neb. 271, 125 N. W. 521, 44 L. R. A. (N. S.) 666.

⁹⁰ *Brasch v. Mumey*, 99 Ark. 324, 138 S. W. 458, Ann. Cas. 1913B, 38; *Byington v. Carlin*, 146 Iowa, 301, 125 N. W. 233; *Shea v. Campbell*, 71 Misc. Rep. 222, 128 N. Y. Supp. 508; *Brew v. Sharer*, 42 Pa. Super. Ct. 89.

⁹¹ *Stockhand v. Hall*, 54 Wash. 106, 102 Pac. 1037; *Kahn v. Thorpe*, 43 Wash. 463, 86 Pac. 855.

⁹² In some states a tax deed may be given immediately upon the sale. Consult the statutes. And see *Ives v. Lynn*, 7 Conn. 505.

⁹³ *Stewart v. Colter*, 31 Minn. 385, 18 N. W. 98; *Kohle v. Hobson*, 215 Mo. 213, 114 S. W. 952; *State ex rel. United States Mortgage & Trust Co. v. Godfrey*, 62 Ohio St. 18, 56 N. E. 482; *Curtis Land Co. v. Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

⁹⁴ *Stout v. Coates*, 35 Kan. 382, 11 Pac. 151.

⁹⁵ *Hall v. Baker*, 74 Wis. 118, 42 N. W. 104. An assignment in the absence of such a statutory authorization would probably be void. *Billings v. McDermott*, 15 Fla. 60; *Sapp v. Morrill*, 8 Kan. 677.

⁹⁶ *Elrod v. Wagon Co.*, 128 Ga. 361, 57 S. E. 712; *Elliott v. Parker*, 72 Iowa, 746, 32 N. W. 494; *Mayo v. Woods*, 31 Cal. 269; *Holmes v. Loud*, 149 Mich. 410, 112 N. W. 1109; *Millard v. Breckwoldt*, 100 App. Div. 44, 90 N. Y. Supp. 890; *Woodland Oil Co. v. Shoop*, 107 Pa. 293.

⁹⁷ *Wettig v. Bowman*, 39 Ill. 416; *Gordon v. Joyner*, 112 Va. 347, 71 S. E. 652; *Corry v. Shea*, 144 Wis. 135, 128 N. W. 892, Ann. Cas. 1912A, 1154.

but in some states a foreclosure of the right of redemption is necessary.⁹⁸ The tax deed, when issued, must contain all the elements required by the statute, and show by its recitals a complete performance of all that is required by law to make the sale lawful, such as authority,⁹⁹ assessment and delinquency.¹ There must also be a description of the lands sold.² If any of these requirements are omitted, the deed cannot be reformed in equity.³ In some states, the statutes prescribe the form of a tax deed, and in such states it is generally held that a substantial compliance with the statutory form will be sufficient.⁴

Title or Estate Acquired

The purchaser at a tax sale does not usually acquire title until he has received the deed, his interest pending the period of redemption being in the nature of a lien.⁵ While the possibility of defects and irregularities in the proceedings prior to the delivery of the deed are many, any one of which may invalidate the deed, yet there are statutes, in some states, which tend to protect the purchaser. For example, statutes may cure the effect of irregularities in the assessment of the tax,⁶ or they may make a tax deed con-

⁹⁸ Black, *Tax Titles* (2d Ed.) § 383; *Alexander v. Thacker*, 43 Neb. 494, 61 N. W. 738; *Vaughn v. Stone*, 54 Iowa. 376, 2 N. W. 973, 6 N. W. 596; *Mead v. Brewer*, 77 Neb. 400, 109 N. W. 399; *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

⁹⁹ *Eagan v. Connelly*, 107 Ill. 458; *Cogel v. Raph*, 24 Minn. 194; *Madland v. Benland*, 24 Minn. 372; *Atkison v. Improvement Co.*, 125 Mo. 565, 28 S. W. 861; *Ward v. Montgomery*, 57 Ind. 276; *Call v. Dearborn*, 21 Wis. 503; *CONNERS v. CITY OF LOWELL*, 209 Mass. 111, 95 N. E. 412, Ann. Cas. 1912B, 627, *Burdick Cas. Real Property*

¹ *Smith v. Bodfish*, 27 Me. 289; *Gilfillan v. Chatterton*, 38 Minn. 335, 37 N. W. 583; *Hubbard v. Johnson*, 9 Kan. 632.

² *Mahaska County v. Bennett*, 150 Iowa, 216, 129 N. W. 838; *Campbell v. Packard*, 61 Wis. 88, 20 N. W. 672; *Ellsworth v. Nelson*, 81 Iowa, 57, 46 N. W. 740. For descriptions held sufficient, see *Sibley v. Smith*, 2 Mich. 486; *Taylor v. Wright*, 121 Ill. 455, 13 N. E. 529; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044; *Levy v. Ladd*, 35 Fla. 391, 17 South. 635.

³ *De Paige v. Douglas*, 234 Mo. 78, 136 S. W. 345; *Altes v. Hinckler*, 36 Ill. 265, 85 Am. Dec. 406; *Keepfer v. Force*, 86 Ind. 81; *Bowers v. Andrews*, 52 Miss. 596. Contra, *Hickman v. Kempner*, 35 Ark. 505.

⁴ *Phillips v. Cox*, 7 Cal. App. 308, 94 Pac. 377; *Dye v. Railroad Co.*, 77 Kan. 488, 94 Pac. 785; *Allen v. McCabe*, 93 Mo. 138, 6 S. W. 62; *Geekie v. Carpenter Co.*, 106 U. S. 379, 1 Sup. Ct. 315, 27 L. Ed. 157.

⁵ *Douglass v. Dickson*, 31 Kan. 310, 1 Pac. 541; *James v. Blanton*, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328; *Kaighn v. Burgin*, 56 N. J. Eq. 852, 42 Atl. 1117; *Shalemiller v. McCarty*, 55 Pa. 186.

⁶ *Tyler v. Hardwick*, 6 Metc. (Mass.) 470; *Petrie Lumber Co. v. Collins*, 66

clusive evidence of certain matters, such as the regularity of the sale.⁷ Moreover, in many states, the statutes of limitation prescribe a much shorter period for impeaching tax titles than for other titles.⁸

In most states, the interest acquired by purchase at tax sale, upon the delivery of the deed, is an estate in fee simple.⁹ A new title is usually created, the previous chain of title disregarded,¹⁰ and all contingent rights in the land cut off, although, when this is the rule, a remainderman, and others having contingent interests, are given an opportunity to redeem from the sale.¹¹ If, however, they do not redeem, they lose their rights. This extends even to the rights of dower¹² and homestead.¹³ Mortgage liens are likewise destroyed when a tax sale creates a new title, and when the statute makes a tax lien paramount to all other liens.¹⁴ A mortgagee will, however, have a right to redeem within the period allowed by statute.¹⁵

In some states, on the other hand, a tax deed passes only the interest of the person assessed, and the tax deed holder takes the land subject to all the existing liens thereon.¹⁶

Mich. 64, 32 N. W. 923; *People v. McDonald* 69 N. Y. 362; *Stewart v. Schoenfelt*, 13 Serg. & R. (Pa.) 360.

⁷ *Farmers' Loan & Trust Co. v. Wall*, 129 Iowa, 651, 106 N. W. 160; *Bennett v. Kovarik*, 44 App. Div. 629, 60 N. Y. Supp. 1133; *Eustis v. Henrietta*, 91 Tex. 325, 43 S. W. 259.

⁸ *Kelley v. McDuffy*, 79 Ark. 629, 96 S. W. 358; *Bowman v. Cockrill*, 6 Kan. 311; *Commissioner of State Land Office v. Auditor General*, 131 Mich. 147, 91 N. W. 153; *Sheik v. McElroy*, 20 Pa. 25.

⁹ *Jones v. Randle*, 68 Ala. 258; *Flower v. Beasley*, 52 La. Ann. 2054, 28 South. 322; *Toolan v. Longyear* 144 Mich. 55, 107 N. W. 699, 121 Am. St. Rep. 603; *Smith v. Messer*, 17 N. H. 420.

¹⁰ *Atkins v. Hinman*, 2 Gilman (Ill.) 437; *McFadden v. Goff*, 32 Kan. 415, 4 Pac. 841; *Langley v. Chapin*, 134 Mass. 82; *Kunes v. McCloskey*, 115 Pa. 461, 9 Atl. 83.

¹¹ *Atkins v. Hinman*, 7 Ill. 437; *Kunes v. McCloskey*, 115 Pa. 461, 9 Atl. 83; *Langley v. Chapin*, 134 Mass. 82; *Jackson v. Babcock*, 16 N. Y. 246.

¹² *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168; *Jones v. Devore*, 8 Ohio St. 430; *Black, Tax Titles*, § 422. But that the wife must be made a party to a tax suit, see *Blevins v. Smith*, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441.

¹³ *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

¹⁴ *Douglass v. Lowell*, 64 Kan. 533, 67 Pac. 1106; *Abbott v. Frost*, 185 Mass. 398, 70 N. E. 478; *Robbins v. Barron*, 32 Mich. 36; *Erie County Sav. Bank v. Schuster*, 187 N. Y. 111, 79 N. E. 843; *Cadmus v. Jackson*, 52 Pa. 295.

¹⁵ *Verdery v. Dotterer*, 69 Ga. 194; *Myers v. Bassett*, 84 Mo. 479; *Becker v. Howard*, 66 N. Y. 5.

¹⁶ *Gross v. Taylor*, 81 Ga. 86, 6 S. E. 179; *Dyer v. Bank*, 14 Ala. 622; *Lippincott v. Taylor* (Tex. Civ. App.) 135 S. W. 1070; *Williams v. Land Co.*, 146 Wis. 55, 130 N. W. 880.

Forfeiture for Delinquent Taxes

For failure to pay taxes charged against the land, a forfeiture of the property may be incurred in some jurisdictions.¹⁷ Such statutes are not unconstitutional, if due notice is given to the owner of the land, and if the forfeiture is based upon a judicial inquiry and judgment.¹⁸ The statutes usually provide that the former owner,¹⁹ or any other person having an interest in the land,²⁰ may redeem within a certain time after the forfeiture.²¹ If redemption is not effected, the title becomes absolute in the state,²² and the land may be sold by the state as owner.²³

Statutes providing for forfeiture for nonpayment of taxes are strictly construed,²⁴ and defects and irregularities in the proceedings will invalidate them.²⁵

EMINENT DOMAIN

251. Eminent domain has been defined as the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn and take private property for public use upon paying the owner a due compensation, to be ascertained according to law.²⁶

¹⁷ See *Wilbert v. Mitchel*, 42 La. Ann. 853, 8 South. 607; *Eastern Land Lumber & Mfg. Co. v. State Board of Education*, 101 N. C. 35, 7 S. E. 573; *Lohrs v. Miller's Lessee*, 12 Grat. (Va.) 452; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

¹⁸ *Kentucky Union Co. v. Commonwealth*, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398; *Martinez v. State Tax Collectors*, 42 La. Ann. 677, 7 South. 796; *Usher's Heirs v. Pride*, 15 Grat. (Va.) 190; *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214.

¹⁹ *Keith v. Freeman*, 43 Ark. 296; *Bishop v. Lovan*, 4 B. Mon. (Ky.) 116.

²⁰ *People's Bank of New Orleans v. Ballowe*, 34 La. Ann. 565; *Reynolds v. Lieper's Heirs*, 7 Ohio 17, pt. 1; *Dixon v. Hockady*, 36 S. C. 60, 15 S. E. 342; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

²¹ *Ebaugh v. Mullinax*, 40 S. C. 244, 18 S. E. 802; *Hale v. Branscum*, 10 Grat. (Va.) 418; *State v. King*, 64 W. Va. 546, 63 S. E. 468.

²² *Usher's Heirs v. Pride*, 15 Grat. (Va.) 190; *Garner v. Anderson*, 27 La. Ann. 338, *Morrison v. Larkin*, 26 La. Ann. 639; *Hall v. Hall*, 23 La. Ann. 135.

²³ *George v. Cole*, 109 La. 816, 33 South. 784; *State v. Garnett*, 66 W. Va. 106, 66 S. E. 98; *State v. King*, 64 W. Va. 610, 63 S. E. 495.

²⁴ *Millett v. Mullen*, 95 Me. 400, 49 Atl. 871; *Bennett v. Hunter*, 9 Wall. (U. S.) 326, 19 L. Ed. 672; *Schenk v. Peay*, 1 Dill. 267, Fed. Cas. No. 12,451; *Magruder v. Esmay*, 35 Ohio St. 221; *Bond v. Pettit*, 89 Va. 474, 16 S. E. 666.

²⁵ *Kentucky Union Co. v. Commonwealth*, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398; *Bell v. Taylor*, 37 La. Ann. 56; *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233; *Bowman v. Dewing*, 50 W. Va. 445, 40 S. E. 576.

²⁶ See *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 474, 9 Am. Rep. 94; *Hale v. Lawrence*, 21 N. J. Law, 714, 728, 47 Am. Dec. 190; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 536, 12 L. Ed. 535.

The right of the nation or state to take private property for public use, upon just compensation, is recognized by the federal and state constitutions. Independent, however, of constitutional right, the power is a necessary and inherent one in every sovereign government.²⁷ The taking of land under the right of eminent domain is quite different from the power of taxation, with its attendant right to sell the land for delinquent taxes. A sale for taxes is a sale for the recovery of a debt due the government, the consideration for which is the protection of person and property. The taking of land by the right of eminent domain is the appropriation of private property or some use or easement respecting it, for the public use; full compensation therefor being made. The sale of land for taxes is usually effected by summary action. The taking of land by eminent domain is always effected by judicial or quasi judicial proceedings.²⁸

Power to condemn lands under the right of eminent domain may be delegated to corporations, public²⁹ or private,³⁰ and even to individuals,³¹ providing such corporations or individuals are exercising some public function, and the property is taken for the benefit of the general public.³² No exact definition can be given of what constitutes a "public use," since each case must depend upon

²⁷ *Steele v. County Commissioners*, 83 Ala. 304, 3 South. 761; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; *Bidwell v. Murray* 40 Hun (N. Y.) 190; *Samish River Boom Co. v. Boom Co.*, 32 Wash. 586, 73 Pac. 670.

²⁸ *Griffin v. Dogan*, 48 Miss. 11; *In re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255.

²⁹ *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *Kansas City v. Oil Co.*, 140 Mo. 458, 41 S. W. 943, *In re Buffalo* (Super. Buff.) 15 N. Y. Supp. 123; *Smith v. Gould*, 59 Wis. 631, 18 N. W. 457.

³⁰ *Postal Telegraph-Cable Co. of Indiana Co. v. Railroad Co.*, 30 Ind. App. 654, 66 N. E. 919; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *In re Brooklyn Union Ferry Co.*, 98 N. Y. 139. As to railway corporations, see *Middlesex & S. Traction Co. v. Metlar*, 70 N. J. Law, 98, 56 Atl. 142; *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. 100; *Philadelphia & B. Pass. R. Co. v. Railroad Co.*, 6 Pa. Dist. R. 269.

³¹ *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872; *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Boyd v. Negley*, 40 Pa. 377; *Peterson v. Bean*, 22 Utah, 43, 61 Pac. 213.

³² *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235; *Berrien Springs Water Power Co. v. Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; *Beekman v. Railroad Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Weir v. Railroad Co.*, 18 Minn. 155 (Gil. 139); *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288; *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. Ed. 67; *United States v. Certain Tract of Land*, 67 Fed. 869; *Jockheck v. Commissioners*, 53 Kan. 780, 37 Pac. 621. And see cases in preceding notes.

local needs and conditions.³³ The question, however, is one of law, and is for the courts to decide in any disputed case.³⁴

Any property is subject to the exercise of the right of eminent domain,³⁵ including franchises.³⁶ The United States may condemn lands belonging to a state as well as lands owned by private persons.³⁷ When, however, the United States or a state take land under this right, the nation or the state must make compensation the same as corporations or individuals who exercise the right under delegated authority.³⁸

The proceedings to condemn property under the right are generally prescribed by statute. They are usually in rem in nature,³⁹ the object being to fix the compensation.⁴⁰ The proceedings may be instituted by the proper public official or agent,⁴¹ or by the corporation or individual with delegated power to exercise the right.⁴²

³³ *Farnsworth v. Railroad Co.*, 83 Me. 440, 22 Atl. 373; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Board of Health of Portage v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *In re Burns*, 155 N. Y. 23, 49 N. E. 246; *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300.

³⁴ *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *In re St. Paul & N. P. Ry. Co.*, 34 Minn. 227, 25 N. W. 345; *Matter of Tuthill*, 36 App. Div. 492, 55 N. Y. Supp. 657; *Apex Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513.

³⁵ *New York, H. & N. R. Co. v. Railroad Co.*, 36 Conn. 196; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541; *Richmond, F. & P. R. Co. v. Railroad Co.*, 13 How. (U. S.) 71, 14 L. Ed. 55.

³⁶ *Metropolitan City Ry. Co. v. Railroad Co.*, 87 Ill. 317; *Central Bridge Corp. v. Lowell*, 4 Gray (Mass.) 474; *Commonwealth v. Canal Co.*, 66 Pa. 41, 5 Am. Rep. 329; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774; *Matter of Long Island Water Supply Co.*, 73 Hun, 499, 26 N. Y. Supp. 198.

³⁷ *Stockton v. Railroad Co.*, 32 Fed. 9. A state may condemn property of the United States. *United States v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16,114; *United States v. Chicago*, 7 How. (U. S.) 185, 12 L. Ed. 660.

³⁸ *McCauley v. Weller*, 12 Cal. 500; *Dolan v. Railroad Co.*, 74 App. Div. 434, 77 N. Y. Supp. 815; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; *Meade v. United States*, 2 Ct. Cl. 224. But see *Brady v. Atlantic Works*, Fed. Cas. No. 1,794. The constitution of Texas provides that compensation shall be made for the taking of private property, except when the taking is "for the use of the state." *Travis County v. Trogden*, 88 Tex. 302, 31 S. W. 358.

³⁹ *Costello v. Burke*, 63 Iowa, 361, 19 N. W. 247; *Chicago, K. & W. R. Co. v. Selders*, 4 Kan. App. 497, 44 Pac. 1012; *St. Paul, M. & M. Ry. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143.

⁴⁰ *Henry v. Railroad Co.*, 121 Ill. 264, 12 N. E. 744; *In re Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Mountz v. Railroad Co.*, 203 Pa. 128, 52 Atl. 15.

⁴¹ *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; *In re Rugheimer*, 36 Fed. 369.

⁴² See *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R.

The proceedings must be conducted before the court or tribunal designated by statute,⁴³ and the steps prescribed by the statutes must be followed in order to give validity to the proceedings.⁴⁴ The measure of compensation or damages is the market value of the property taken when an entire tract is taken, and damages in general will depend upon the interest or extent of right taken, as also upon the resulting injury or benefit to the owner of the property.⁴⁵

A. 581, 92 Am. St. Rep. 188; *Smith v. Connelly's Heirs*, 1 T. B. Mon. (Ky.) 58; *Pitzer v. Williams*, 2 Rob. (Va.) 241.

⁴³ *Prentiss v. Parks*, 65 Me. 559; *Nishabotna Drainage Dist. v. Campbell*, 154 Mo. 151, 55 S. W. 276; *St. Louis, K. C. & C. Ry. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *West v. Porter*, 89 Mo. App. 150.

⁴⁴ *Chicago & A. R. Co. v. Smith*, 78 Ill. 96; *Powers' Appeal*, 29 Mich. 504; *Graves v. Middletown*, 137 Ind. 400, 37 N. E. 157; *In re Buffalo*, 78 N. Y. 362; *Svennes v. West Salem*, 114 Wis. 650, 91 N. W. 121.

⁴⁵ *Sexton v. Transit Co.*, 200 Ill. 244, 65 N. E. 638; *Kansas City, W. & N. W. R. Co. v. Fisher*, 49 Kan. 17, 30 Pac. 111; *Beale v. Boston*, 166 Mass. 53, 43 N. E. 1029; *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; *Matter of Armory Board*, 73 App. Div. 152, 76 N. Y. Supp. 766; *Friday v. Railroad Co.*, 204 Pa. 405, 54 Atl. 339; *LEHIGH VALLEY R. CO. v. McFARLAN*, 43 N. J. Law, 605, *Burdick Cas. Real Property*.

CHAPTER XXV

RESTRAINTS AND DISABILITIES OF TRANSFERS

- 252. Restraints on Alienation.
- 253. Restraints Imposed by Early Common Law.
- 254. Restraints Imposed in Favor of Creditors.
- 255. Restraints Imposed in Favor of Subsequent Purchasers.
- 256. Restraints Imposed in Creation of Estate.
- 257. Restraints Imposed by Federal Bankrupt Act.
- 258. Persons under Disabilities to Convey Title.
- 259. Persons of Unsound Mind.
- 260. Drunkards.
- 261. Infants.
- 262. Married Women.
- 263. Aliens.
- 264. Corporations.
- 265. Capacity to Take Title.

RESTRAINTS ON ALIENATION

252. There are certain restraints imposed upon the freedom to transfer real property. They may be classified as follows:
- (a) Restraints imposed by the early common law.
 - (b) Restraints imposed in favor of creditors.
 - (c) Restraints imposed in favor of subsequent purchasers.
 - (d) Restraints imposed in the creation of estates.
 - (e) Restraints imposed by the federal bankrupt act.

SAME—RESTRAINTS IMPOSED BY THE EARLY COMMON LAW

253. By the early common law, restraints on alienation were imposed on the owner of lands:
- (a) In favor of his heirs.
 - (b) In favor of his lord.
- The statute of *quia emptores*, however, established the right of free tenants to alienate their lands.

Restraints in Favor of Heirs

In the Anglo-Saxon period of English law a man had full freedom of alienation over his *boc land*.¹ As to *folk land*,² however,

¹ See chapter IV, ante. And see, also, *Holds. Hist. of Eng. Law*, 111, 65.

² See chapter IV, ante.

there was a limit to this power.³ He was required to keep a reasonable part for the heirs, and, for this reason, the consent of the presumptive heirs was necessary to validate the title to a purchaser.⁴

According to Glanville,⁵ a distinction was made between lands acquired by purchase and lands acquired by inheritance, the owner having greater power to dispose of the former. One could, however, give a marriage portion to his daughter, or make gifts to the church.⁶

In the course of time, the necessity of the consent of the heir to an alienation of land disappeared.⁷ Although land was conveyed to one "and his heirs," the heirs obtained no interest thereby, the phrase merely signifying the duration of the estate, that is, a fee simple.⁸ Even, in the case of a "conditional gift,"⁹ a limitation to one and the heirs, of his body, it became the law that such a limitation was on condition that the donee had an heir, the ancestor having full power of alienation as soon as an heir was born.¹⁰ It has already been shown how these estates were converted into estates in fee tail by the statute de donis. The tenants were thereby prevented from alienating their estates, as against their heirs, until Taltarum's Case, which, as we have seen, took away all restraints on the alienation of estates in fee tail.¹¹

Restraints in Favor of the Lord

It has previously been shown that, in early times, under the feudal system, a tenant in fee simple could transfer all his lands, the grantee becoming tenant to the original lord in place of the grantor. He could also alienate a part of his lands by subinfeudation. In case of transfer by a tenant, he retained no interest at all in the land or in its profits. In case of subinfeudation, he was entitled to the service due from his own tenant, although as mesne lord he still owed service to his own lord.¹² It is said, upon the highest authority,¹³ that, under the feudal system, it seems to be

³ Chapter IV, ante. See, also, Holds. Hist. of Eng. Law, III, 65.

⁴ Laws of England, vol. 24, § 518, Glanville, VII, c. 1; Digby, Hist. of Law of Real Prop. (5th Ed.) 101; Pollock & Maitland, I, 632.

⁵ Glanville, VII, c. 1.

⁶ Glanville, VII, c. 1.

⁷ Pollock & Maitland, I, 13; Digby Hist. of Law of Real Prop. (5th Ed.) 157.

⁸ Pollock & Maitland, I, 13, Digby, Hist. of Real Prop. (5th Ed.) 157.

⁹ See Fee Tails, ante, chapter VI.

¹⁰ Ante, Fee Tails, chapter VI. See, also, Pollock & Maitland, II, 17.

¹¹ Ante, chapter VI.

¹² See ante, chapters IV and V.

¹³ Pollock & Maitland, I, 326.

unsettled whether the lord ever had a recognized right to forbid alienation, although he may have had a right to forbid an alienation that would be prejudicial to him.¹⁴ The Great Charter of 1217¹⁵ provided, however, that no free man should give or sell so much of his land as that out of the residue he might not be able to do the service pertaining to his fee. This made the lord's license necessary for an alienation.¹⁶

Statute of Quia Emptores

The statute of quia emptores¹⁷ put an end, as already stated,¹⁸ to the growing practice of subinfeudation of estates in fee simple, and also established the right of free tenants to alienate their lands. Since that statute the right of an owner in fee simple to alienate his land has been an inherent incident of such an estate.¹⁹

At the present time, the owner of land in fee simple can alienate his interest by deed, or dispose of it by will, substantially as he pleases, provided he complies with the formalities of conveyancing or devising required by law. That he cannot, however, create an estate to vest at too remote a period has already been discussed in connection with the rule against perpetuities.²⁰

Other early Statutes

As also previously pointed out,²¹ the church and its various ecclesiastical bodies secured, in time, so much of the land in England that statutes were passed, called statutes of mortmain, which made conveyances to such corporations void.²² As to transfer of land by judicial sale, by the early common law a man's land was not liable to be taken for his debts; but this was changed by the statute of Westminster I,²³ the statute of merchants,²⁴ and the statute of 27 Edw. III, c. 9.²⁵

¹⁴ See Pollock & Maitland, I, 320.

¹⁵ Chapter 39.

¹⁶ Laws of Eng. vol. 24, § 517; Challis, Real Property (3d Ed.) 21.

¹⁷ 18 Edw. I, c. 1 (1290).

¹⁸ See ante, chapter V.

¹⁹ Id.

²⁰ Ante, chapter XVI.

²¹ See Equitable Estates, ante, chapter XIV.

²² 1 Pol. & M. Hist. Eng. Law, 314. See, also, Magna Charta, c. 43.

²³ 13 Edw. I, c. 18 (1275 A. D.).

²⁴ 13 Edw. I.

²⁵ Called "statute staple." See 2 Blk. Comm. 161.

SAME—RESTRAINTS IMPOSED IN FAVOR OF CREDITORS

254. An owner of land cannot dispose of it with an intent to hinder, delay, or defraud his creditors.

An owner of land is restricted in its alienation, in that he cannot dispose of it in such a way as to work a fraud upon his creditors.²⁶ The famous English statute of 13 Elizabeth²⁷ provided, in substance, that all conveyances of property made with intent to delay, hinder, or defraud creditors should be null and void against them.²⁸ This statute, however, is merely declaratory of the common law, since, in the absence of such a statute, a conveyance in fraud of creditors may be set aside,²⁹ yet it has, to quote Mr. Justice Story,³⁰ "been universally adopted in America as the basis of our jurisprudence upon the subject."³¹ The statute does not, however, although often erroneously so supposed, make transfers void as between the parties.³² A conveyance will be valid as to them,³³ and it is only a defrauded creditor who can complain of the transaction.³⁴ It is, moreover, the general rule that only existing cred-

²⁶ *Strauss v. Abrahams*, 32 Fed. 310; *Spencer v. Slater*, 4 Q. B. Div. 13. See as to frauds on purchasers, *Gooch's Case*, 5 Coke, 60a; *Colville v. Parker*, Cro. Jac. 158; *Doe v. Manning*, 9 East, 59.

²⁷ 13 Eliz. c. 5 (1570).

²⁸ The statute of 13 Elizabeth was made perpetual by the statute of 29 Elizabeth, c. 5, passed in 1587. There are even earlier English statutes upon the subject of fraudulent conveyances, but the most important are those passed in the reign of Elizabeth.

²⁹ *Ewing v. Runkle*, 20 Ill. 448-461; *Diefendorf v. Oliver*, 8 Kan. 365; *In re Jordan*, 9 Metc. (Mass.) 292; *Seymour v. Wilson*, 19 N. Y. 417; *Clark v. Douglass*, 62 Pa. 408-416.

³⁰ Eq. Jur. § 353.

³¹ *Ewing v. Runkle*, supra; *Patton v. Walker's Trustees* (Ky.) 118 S. W. 312; *Sturtevant v. Ballard*, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281; *Clark v. Douglass*, supra.

³² *Chicago v. McGraw*, 75 Ill. 566; *Perry v. Hayward*, 12 Cush. (Mass.) 344; *Graser v. Stellwagen*, 25 N. Y. 315; *Phipps v. Boyd*, 54 Pa. 342; *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *Central Trust Co. of New York v. Trust Co.*, 200 N. Y. 577, 93 N. E. 975.

³³ *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 553; *Harmon v. Harmon*, 63 Ill. 512; *Welsh v. Welsh*, 105 Mass. 229; *Wheeler v. Wallace*, 53 Mich. 355, 364, 19 N. W. 33, 37; *Moore v. Livingston*, 14 How. Prac. (N. Y.) 1; *Bonesteel v. Sullivan*, 104 Pa. 9; *Johnston v. Jickling*, 141 Iowa, 444, 119 N. W. 746.

³⁴ *Mullan v. O'Shea*, 85 Ill. App. 385; *Hunt v. Spencer*, 20 Kan. 126; *Bodine v. Simmons*, 38 Mich. 682; *Cushman v. Addison*, 52 N. Y. 628.

itors can assail an alleged fraudulent conveyance,³⁵ although subsequent creditors may also attack such conveyances in case of actual fraud upon them,³⁶ or where a conveyance is made on the eve of incurring large obligations, or before embarking on financial risks; the grantor intending thereby to cast the hazard of the enterprise upon those having subsequent dealings with him.³⁷ Whether or not a conveyance is fraudulent is generally a question of consideration and intent; that is, it must have been made with an intent to delay, hinder, or defraud creditors.³⁸ Where, however, a conveyance is voluntary, that is, gratuitous or without consideration, an actual intent to defraud is not necessary;³⁹ but it is a question of fact whether under the circumstances of the case the conveyance was fraudulent.⁴⁰ As a rule, however, where the effect of the conveyance is to defraud creditors, the intent will be implied, and this presumption is generally conclusive.⁴¹

Where the grantor alone is guilty of an intent to defraud, a bona fide grantee, for valuable consideration, and without notice of the fraud, obtains a valid title.⁴² If, however, the grantee does not

³⁵ *Chicago Daily News Co. v. Siegel*, 212 Ill. 617, 72 N. E. 810; *Bodine v. Simmons*, 38 Mich. 682; *Dygart v. Remerschnider*, 32 N. Y. 629; *Ketner v. Donten*, 15 Pa. Super. Ct. 604; *State Bank of Chase v. Chatten*, 69 Kan. 435, 77 Pac. 96; *Phoenix Bank v. Stafford*, 89 N. Y. 405.

³⁶ *Ebbitt v. Dunham*, 25 Misc. Rep. 232, 55 N. Y. Supp. 78; *Barrow v. Barrow*, 108 Ind. 345, 9 N. E. 371.

³⁷ *Case v. Phelps*, 39 N. Y. 164; *Tunison v. Chamblin*, 88 Ill. 378; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. Div. 588; *Herschfeldt v. George*, 6 Mich. 456; *Mullen v. Wilson*, 44 Pa. 413 84 Am. Dec. 461; *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554. Cf. *TODD v. NELSON*, 109 N. Y. 316, 16 N. E. 360, *Burdick Cas. Real Property*.

³⁸ *Chandler v. Von Roeder*, 24 How. (U. S.) 224, 16 L. Ed. 633; *Bunn v. Ahl*, 29 Pa. 387, 72 Am. Dec. 639; *Bowden v. Bowden*, 75 Ill. 143; *Van Vliet v. Halsey*, 37 Kan. 116, 14 Pac. 482; *Hollister v. Loud*, 2 Mich. 309; *Truesdell v. Sarles*, 104 N. Y. 164, 10 N. E. 139; *TODD v. NELSON*, supra. It is not necessary that there be an intent "to defraud," since an intent "to delay or to hinder" is also sufficient. *Adams v. Pease*, 113 Ill. App. 356; *Kimball v. Thompson*, 4 Cush. (Mass.) 441, 50 Am. Dec. 799; *Hessing v. McCloskey*, 37 Ill. 341; *Dougherty v. Cooper*, 77 Mo. 528.

³⁹ *Wooten v. Steele*, 109 Ala. 563, 19 South. 972, 55 Am. St. Rep. 947; *Bouquet v. Heyman*, 50 N. J. Eq. 114, 24 Atl. 266; *Farmers' & Merchants' Bank of Humansville v. Price*, 41 Mo. App. 291.

⁴⁰ *Bowden v. Bowden*, 75 Ill. 143; *Adams v. Kellogg*, 63 Mich. 105, 29 N. W. 679; *Hicks v. Stone*, 13 Minn. 434 (Gil. 398); *Davenport v. Cummings*, 15 Iowa, 219; *TODD v. NELSON*, 109 N. Y. 316, 16 N. E. 360, *Burdick Cas. Real Property*.

⁴¹ *Haas v. Sternbach*, 156 Ill. 44, 41 N. E. 51; *Appeal of Kisterbock*, 51 Pa. 483; *Viers v. Package Co.*, 119 Mich. 192, 77 N. W. 700.

⁴² *Hughes v. Noyes*, 171 Ill. 575, 49 N. E. 703; *Parmenter v. Lomax*, 68 Kan. 61, 74 Pac. 634; *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St.

pay a valuable consideration, he cannot hold the land against the creditors.⁴³ In some cases, moreover, a sale for a grossly insufficient consideration may be enough to put the grantee upon an inquiry, and thus affect him with notice.⁴⁴ On the other hand, although the grantee pays a valuable consideration, yet if he knows of the fraudulent purpose of the grantor, he cannot hold the land against the grantor's creditors.⁴⁵ It is not necessary that the grantee should have aided or intended to aid in the fraudulent design; knowledge or implied notice of the grantor's fraud is sufficient.⁴⁶ A person, however, may be actually insolvent, and still may sell his lands for a valuable consideration, since this may be the best way of providing funds for the benefit of his creditors.⁴⁷ When, however, a man is in embarrassed financial circumstances, any conveyance made by him upon a merely good consideration will not stand, as, for example, transfers to a wife or children.⁴⁸ Marriage, however, is regarded as a valuable consideration.⁴⁹ An insolvent debtor may make, moreover, a valid transfer to a creditor, although a transfer to some other person might be fraudu-

Rep. 432; *Delavan v. Wright*, 110 Mich. 143, 67 N. W. 1110. So expressly provided also in St. 13 Eliz. c. 5, § 6.

⁴³ *Van Wyck v. Seward*, 18 Wend. (N. Y.) 375; *Potter v. McDowell*, 31 Mo. 62; *Hunters v. Waite*, 3 Grat. (Va.) 26; *Bauer Grocer Co. v. Shoe Co.*, 87 Ill. App. 434; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676; *Clark v. Depew*, 25 Pa. 509, 64 Am. Dec. 717.

⁴⁴ *Kaine v. Weigley*, 22 Pa. 179; *State, to Use of Sinnamon, v. Evans*, 38 Mo. 150. That, however, mere inadequacy of price is not sufficient to put a purchaser on inquiry, see *Bendetson v. Moody*, 100 Mich. 553, 59 N. W. 252; *Moyer v. Bloomingdale*, 38 App. Div. 227, 56 N. Y. Supp. 991.

⁴⁵ *Wadsworth v. Williams*, 100 Mass. 126; *Williamson v. Wachenheim*, 58 Iowa, 277, 12 N. W. 302. *Twyne's Case*, 3 Coke, 80b. Cf. *Tibbals v. Jacobs*, 31 Conn. 428.

⁴⁶ *Gumberg v. Treusch*, 110 Mich. 451, 68 N. W. 236; *Holmes v. Clark*, 48 Barb. (N. Y.) 237; *Urdangen & Greenberg Bros. v. Donef*, 122 Iowa, 533, 98 N. W. 317.

⁴⁷ *State Bank v. Whittle*, 48 Mich. 1, 11 N. W. 756; *Wood v. Clark*, 121 Ill. 359, 12 N. E. 271; *Kellog v. Richardson*, 19 Fed. 70.

⁴⁸ *Farrand v. Caton*, 69 Mich. 235, 37 N. W. 199; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375; *Gridley v. Watson*, 53 Ill. 193; *Baldwin v. Tuttle*, 23 Iowa, 74; *In re Ridler*, 22 Ch. Div. 74. Cf. *Freeman v. Pope*, 5 Ch. App. 538; *Kent v. Riley*, L. R. 14 Eq. 190; *Salmon v. Bennett*, 1 Conn. 525, 7 Am. Dec. 237; *Winchester v. Charter*, 12 Allen (Mass.) 606; *Newstead v. Searles*, 1 Atk. 265.

⁴⁹ *Prewit v. Wilson*, 103 U. S. 22, 26 L. Ed. 360; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Clayton v. Earl of Wilton*, 6 Maule & S. 67, note; *Clarke v. Wright*, 6 Hurl. & N. 849, affirming s. c. sub nom. *Dickenson v. Wright*, 5 Hurl. & N. 401; *Price v. Jenkins*, 5 Ch. Div. 619, reversing 4 Ch. Div. 483. Cf. *Townsend v. Westacott*, 2 Beav. 340; *Jenkins v. Keymes*, 1 Lev. 237; *Warden v. Jones*, 2 De Gex & J. 76.

lent.⁵⁰ A grantee who is a creditor, and who takes the property for a pre-existing debt, occupies a different position from a purchaser for a present consideration.⁵¹ Although a creditor knows that his debtor is insolvent,⁵² and that the property transferred is all that the debtor has,⁵³ and although his only purpose is to secure his own debt, yet if the property is not materially in excess of the amount due, the transfer is not fraudulent.⁵⁴

It should furthermore be noted that, although a transfer may be fraudulent, a bona fide purchaser without notice from a fraudulent grantee may, nevertheless, take a good title.⁵⁵

Remedies

The statute of Elizabeth⁵⁶ provides that conveyances fraudulent against creditors shall be "null and void." Many of our state statutes use the same language, although some use the word "voidable." Under the influence of the term "void," it is held, in some cases, that a conveyance fraudulent as to creditors is absolutely void as to them.⁵⁷ On the other hand, even in jurisdictions where the statute employs the word "void," it is held that such a conveyance is not void, but only voidable, and that it will be regarded as invalid only in case a creditor takes active steps to enforce his rights.⁵⁸

Courts of law and courts of equity have, as a rule, concurrent jurisdiction in cases of fraudulent conveyances.⁵⁹ In courts of

⁵⁰ Walsh v. O'Neill, 192 Ill. 202, 61 N. E. 409; First Nat. Bank of Concordia v. Marshall, 56 Kan. 441, 43 Pac. 774; Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Dudley v. Danforth, 61 N. Y. 626; Snayberger v. Fahl, 195 Pa. 336, 45 Atl. 1065, 78 Am. St. Rep. 818.

⁵¹ Lockren v. Rustan, 9 N. D. 43, 48, 81 N. W. 60.

⁵² Harman v. Reese, 1 Browne (Pa.) 11; Kiehn v. Bestor, 30 Ill. App. 458.

⁵³ Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137; Goldsmith v. Erickson, 48 Neb. 48, 66 N. W. 1029.

⁵⁴ Standard Implement Co. v. Parlin & Orendorff Co., 51 Kan. 632, 33 Pac. 362; Sommers v. Cottentin, 26 App. Div. 241, 49 N. Y. Supp. 652; Damon v. Bache, 55 Pa. 67, 93 Am. Dec. 730; Brown v. Lessing, 70 Tex. 544, 7 S. W. 783.

⁵⁵ Gridley v. Wynant, 23 How. (U. S.) 500, 16 L. Ed. 411; Boies v. Henney, 32 Ill. 130; Mansfield v. Dyer, 131 Mass. 200; Weatherbee v. Cockrell, 44 Kan. 380, 24 Pac. 417; Cole v. Malcolm, 66 N. Y. 363.

⁵⁶ 13 Eliz. c. 5.

⁵⁷ Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Jacobi v. Schloss, 7 Cold. (Tenn.) 385; Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889.

⁵⁸ Parrott v. Crawford, 5 Ind. T. 103, 82 S. W. 688; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856; In re Estes, 5 Fed. 60.

⁵⁹ Cleland v. Taylor, 3 Mich. 201; Mulford v. Peterson, 35 N. J. Law, 127; Orendorff v. Budlong, 12 Fed. 24.

law, under the theory of a void transfer, creditors may generally treat the property just as if no conveyance had been made,⁶⁰ no action to set aside the conveyance being necessary.⁶¹ Accordingly, such property may be attached,⁶² or sold on execution,⁶³ just as if the fraudulent conveyance did not exist.

The remedy in equity, in the case of a fraudulent conveyance, is usually a suit by a creditor to have the conveyance set aside.⁶⁴ Although a court of equity will not, as a rule, entertain jurisdiction where there is an adequate remedy at law, yet where the legal remedy is not plain and adequate, equity will entertain a suit to set aside the conveyance.⁶⁵

SAME—RESTRAINTS IMPOSED IN FAVOR OF SUBSEQUENT PURCHASERS

255. As a general rule, conveyances of real property with intent to defraud subsequent purchasers of the same land are void as to such purchasers.

As a further restraint upon alienation, a voluntary conveyance of real property may, in most states, be set aside by subsequent bona fide purchasers, providing the prior conveyance was made with intent to defraud such subsequent purchasers.⁶⁶

This restraint of alienation is generally based upon the statute of 27 Elizabeth,⁶⁷ which provided that conveyances with intent to defraud and deceive subsequent purchasers of the same land, or any part thereof, should be utterly void, frustrate, and of none

⁶⁰ *Campbell v. Jones*, 25 Minn. 155; *Ryland v. Callison*, 54 Mo. 513.

⁶¹ *Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Lynn v. Le Gierse*, 48 Tex. 138; *Brainard v. Van Kuran*, 22 Iowa, 261.

⁶² *McKinney v. Bank*, 104 Ill. 180; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; *Rinckey v. Stryker*, 28 N. Y. 45, 84 Am. Dec. 324.

⁶³ *Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771; *Sherman v. Davis*, 137 Mass. 132; *Pierce v. Hill*, 35 Mich. 194, 24 Am. Rep. 541; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Drum v. Painter*, 27 Pa. 148.

⁶⁴ *Trask v. Green*, 9 Mich. 358; *Hammond v. Machine Co.*, 20 Barb. (N. Y.) 378; *Orr v. Peters*, 197 Pa. 606, 47 Atl. 849; *Stratton v. Hernon*, 154 Mass. 310, 28 N. E. 269.

⁶⁵ *Harting v. Jockers*, 31 Ill. App. 67; *Patchen v. Rofkar*, 52 App. Div. 367, 65 N. Y. Supp. 122; *People's Nat. Bank of Pittsburg v. Loeffert*, 134 Pa. 164, 38 Atl. 996.

⁶⁶ *Hill v. Ahern*, 135 Mass. 158; *Wadsworth v. Havens*, 3 Wend. (N. Y.) 411; *Wolf v. Van Metre*, 23 Iowa, 397.

⁶⁷ 27 Eliz. c. 4.

effect. This statute, however, merely declares the common law.⁶⁸ It has been substantially followed by similar statutes in this country.⁶⁹

In some cases it is held that a conveyance actually fraudulent is void against a subsequent purchaser for a valuable consideration, even with notice,⁷⁰ and other cases hold that a mere voluntary conveyance is also void against a subsequent bona fide purchaser with or without notice, fraud being presumed.⁷¹

By construction, however, in some states, and by force of statute in others, no prior conveyance or charge upon land is adjudged fraudulent as against subsequent purchasers solely on the ground that it was not founded on a valuable consideration,⁷² and, as to notice, the prevailing rule is that a subsequent purchaser, who buys with a full knowledge of a previous fraudulent conveyance, cannot contest the validity of the prior conveyance.⁷³ Purchasers at execution sales⁷⁴ and subsequent mortgagees⁷⁵ are included within "subsequent purchasers," but not a mere judgment creditor.⁷⁶ All subsequent purchasers, in order to be protected, must act in good faith and must give valuable consideration.⁷⁷

⁶⁸ *Jackson v. Henry*, 10 Johns. (N. Y.) 185, 6 Am. Dec. 328; *Gardner v. Cole*, 21 Iowa, 205; *Cadogan v. Kennett*, 2 Cowp. 432.

⁶⁹ *Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218; *Gardner v. Cole*, supra; *Cathcart v. Robinson*, 5 Pet. (U. S.) 280, 8 L. Ed. 120.

⁷⁰ *Wolf v. Van Metre*, 23 Iowa, 397; *Earle v. Couch*, 3 Metc. (Ky.) 450; *Wyman v. Brown*, 50 Me. 139.

⁷¹ *Ricker v. Ham*, 14 Mass. 137; *Roberts v. Anderson*, 3 Johns. Ch. (N. Y.) 371; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Doe v. Rusham*, 17 Q. B. 723.

⁷² *Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218.

⁷³ *Chaffin v. Kimball's Heirs*, 23 Ill. 36; *Dennis v. Dennis*, 119 Mich. 380, 78 N. W. 333; *Thomson v. Dougherty*, 12 Serg. & R. (Pa.) 448; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. Ed. 120.

⁷⁴ *Carter v. Castleberry*, 5 Ala. 277; *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559.

⁷⁵ *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; *Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746; *Fox v. Clark*, Walk. Ch. (Mich.) 535; *Cook v. Landrum*, 82 S. W. 585, 26 Ky. Law Rep. 813.

⁷⁶ *Beavan v. Oxford*, 6 De G. M. G. 507, 2 Jur. N. S. 121.

⁷⁷ *Eddins v. Wilson*, 1 Ala. 237; *Cox v. Jackson*, 6 Allen (Mass.) 108; *Starr v. Strong*, 2 Sandf. Ch. (N. Y.) 139; *Lewis v. Castleman*, 27 Tex. 407.

SAME—RESTRAINTS IMPOSED IN CREATION OF ESTATE

256. General restraints on alienation imposed in the creation of fee simple estates are void. Partial restraints on alienation, either that the owner shall not alien to certain persons, or, in some jurisdictions, shall not alien for a certain time, may be upheld.

Ever since the statute of *quia emptores*, the right of alienation has been considered an inseparable incident to an estate in fee.⁷⁸ Before that statute, or in jurisdictions where the statute was not regarded as a part of the common law,⁷⁹ restraints on alienation were valid, because the grantor who was the feudal lord had the escheat or the reversion.⁸⁰ After that statute, however, they were invalid, since the escheat or reversion was by the statute taken away from the feudal lord.⁸¹ It follows, therefore, that in the creation of fee simple estates any general restraint, either in a conveyance or a will, upon the right of the grantee, or devisee, to alienate the same, is void.⁸² With reference, also, to life estates, they are cases holding that the same rule applies, and that there can be no restraint upon their alienation,⁸³ although the Supreme Court of the United States has said that the power of alienation is not a necessary incident to a life estate in real prop-

⁷⁸ Co. Litt. 436; *Potter v. Couch*, 141 U. S. 296-315, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828.

⁷⁹ See, *ante*, chapter V.

⁸⁰ 4 Kent, Comm. 423; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Burgess v. Wheat*, 1 W. Bl. 133.

⁸¹ *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

⁸² Litt. § 360; Co. Litt. 206b; *HARKNESS v. LISLE*, 132 Ky. 767, 117 S. W. 264, *Burdick Cas. Real Property*; *Kelley v. Meins*, 135 Mass. 231, and cases there cited; *English v. Beehle*, 32 Mo. 186, 82 Am. Dec. 126; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Ware v. Cann*, 10 Barn. & C. 433; *Hood v. Oglander*, 34 Beav. 513; *In re Rosher*, 26 Ch. Div. 801. A condition against alienation in a certain manner is bad. *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. 42; *Campbell v. Beaumont*, 91 N. Y. 464; *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418; *Holmes v. Godson*, 8 De Gex, M. & G. 152. See *Doe v. Glover*, 1 C. B. 448. See, also, *Shaw v. Ford*, 7 Ch. Div. 669; *Jackson ex dem. Livingston v. Robins*, 16 Johns. (N. Y.) 537.

⁸³ *McCleary v. Ellis*, 54 Iowa, 311, 6 N. W. 571, 37 Am. Rep. 205; *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480; *Pace v. Pace*, 73 N. C. 119; *Tillinghast v. Bradford*, 5 R. I. 205.

erty,⁸⁴ and decisions upholding restraints on alienation on life estates have been frequently made.⁸⁵ As to estates in fee tail, a condition imposing a forfeiture for alienation is good,⁸⁶ although such a condition may be destroyed by a barring of the entail,⁸⁷ which we have seen cannot be prevented.⁸⁸ So, too, estates for years may be granted with the condition that they shall be forfeited on alienation, and such a condition will be good.⁸⁹ Conditions in a deed or a devise imposing partial restraints on the power of alienation, particularly with reference to alienation to certain persons, are upheld, even in the case of a fee simple estate,⁹⁰ although the weight of authority is that conditions against all alienation for a limited period of an estate in fee are void, as depriving the first taker during that time of the inherent power of alienation.⁹¹ It is also held that a provision in a deed in fee that the grantors, or their heirs and assigns, shall have the right to repurchase the land, and that no conveyance shall be made to any other person without first giving the said grantors, their heirs or assigns, the

⁸⁴ Mr. Justice Miller, in *Nichols v. Eaton*, 91 U. S. 716, 725, 23 L. Ed. 254.

⁸⁵ *Waldo v. Cummings*, 45 Ill. 421; *Camp v. Cleary*, 76 Va. 140; *Dommett v. Bedford*, 6 Term R. 684; *Shee v. Hale*, 13 Ves. 404; *Hurst v. Hurst*, 21 Ch. Div. 278. See, also, *Rochford v. Hackman*, 9 Hare, 475, 480; *Wilkinson v. Wilkinson*, 3 Swanst. 515; *Wilson v. Greenwood*, 1 Swanst. 481.

⁸⁶ *Croker v. Trevithin*, Cro. Eliz. 35; *Anon.*, 1 Leon. 292; *Newis v. Lark*, Plowd. 403.

⁸⁷ *Stansbury v. Hubner*, 73 Md. 228, 20 Atl. 904, 11 L. R. A. 204, 25 Am. St. Rep. 584; *Rex v. Burchell*, Amb. 379; *Dawkins v. Penrhyn*, 4 App. Cas. 51. And see *Bradley v. Peixoto*, 3 Ves. 324.

⁸⁸ See chapter VI, ante.

⁸⁹ *Doe v. Hawke*, 2 East, 481; *Roe v. Harrison*, 2 Term R. 425; *Roe v. Galliers*, Id. 133.

⁹⁰ Litt. § 361; 2 Redf. Wills, 288; Gray, *Restr. Alien.* (2d Ed.) § 31; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Jackson ex dem. Lewis v. Schutz*, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195; *Langdon v. Ingram's Guardian*, 28 Ind. 360; *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451; *Shackelford v. Hall*, 19 Ill. 212; *Dougal v. Fryer*, 3 Mo. 40, 22 Am. Dec. 458. *Doe v. Pearson*, 6 East, 173, holding a restriction of alienation, except to sisters or their children, good.

⁹¹ *Potter v. Couch*, 141 U. S. 296, 315, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Bennett v. Chapin*, 77 Mich. 526, 43 N. W. 893, 7 L. R. A. 377; *Roosevelt v. Thurman*, 1 Johns. Ch. (N. Y.) 220; *Appeal of Kepple*, 53 Pa. 211; *Jaureche v. Proctor*, 48 Pa. 466; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602; *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828. See, however, *HARKNESS v. LISLE*, 132 Ky. 767, 117 S. W. 264, *Burdick Cas. Real Property*, holding a restraint on alienation for a reasonable time valid. See, also, *Stewart v. Brady*, 3 Bush (Ky.) 623; *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131; *In re Dugdale*, 38 Ch. Div. 176.

privilege of repurchasing, is void, because it is repugnant to a grant of land in fee.⁹²

As to equitable life interests, they may be so limited in many states, that they may be held without power of voluntary or involuntary alienation,⁹³ and the separate estates of married women may be limited with valid conditions restraining their alienation.⁹⁴

In all cases, however, where restraints on alienation may be valid, regard must be had to the local statutes, because in a number of states the statutes forbid the suspension of the power of alienation beyond a certain period, as, for example, for a longer period than during the lives of persons in being at the creation of the estate and twenty-one years thereafter,⁹⁵ or beyond two lives in being at the creation of the estate.⁹⁶ This question, however, is connected with the rule against perpetuities, which has been previously considered.⁹⁷

⁹² *Hardy v. Galloway*, *supra*.

⁹³ *Appeal of Overman*, 88 Pa. 276; *Thackara v. Mintzer*, 100 Pa. 151; *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; *Billings v. Marsh*, 153 Mass. 311, 26 N. E. 1000, 10 L. R. A. 764, 25 Am. St. Rep. 635; *Steib v. Whitehead*, 111 Ill. 247; *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258; *Partidge v. Cavender*, 96 Mo. 452, 9 S. W. 785. Cf. *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312; *In re Coleman*, 39 Ch. Div. 443; *Lord v. Bunn*, 2 Younge & C. Ch. 98. Contra, in other states. *Bryan v. Knickerbocker*, 1 Barb. Ch. (N. Y.) 409; *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102; *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46, 55 Am. Dec. 654; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & M. 395; *Younghusband v. Gisborne*, 1 Colly, 400. And see *Gray, Restr. Alien.* (2d Ed.) preface.

⁹⁴ *Moses v. Micou*, 79 Ala. 564; *Monroe v. Trenholm*, 114 N. C. 590, 19 S. E. 377; *Tullett v. Armstrong*, 4 Mylne & C. 377; *Cooper v. Macdonald*, 7 Ch. Div. 288. Cf. *Barton v. Briscoe*, Jac. 603. But see *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Holmes v. Penney*, 3 Kay & J. 90. And cf. *Harland v. Binks*, 15 Q. B. 713; *Russell v. Woodward*, 10 Pick. (Mass.) 408.

⁹⁵ *Jordan v. Woodin*, 93 Iowa, 453, 61 N. W. 948. And see *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434; *Todhunter v. Railroad Co.*, 58 Iowa, 206, 12 N. W. 267.

⁹⁶ *Galway v. Bryce*, 10 Misc. Rep. 255, 30 N. Y. Supp. 985; *Rausch v. Rausch* (Sup.) 31 N. Y. Supp. 786; *In re Corlies' Will*, 11 Misc. Rep. 670, 33 N. Y. Supp. 572; *Sanford v. Goodell*, 82 Hun, 369, 31 N. Y. Supp. 490. See, generally, *Chapl. Suspend. Power*, c. 2.

⁹⁷ See ante, chapter XVI.

SAME—RESTRAINTS IMPOSED BY FEDERAL BANKRUPT ACT

257. There are certain restraints upon alienation imposed by the national bankrupt law.

It is provided by the national bankruptcy act of 1898 that all conveyances, transfers, or incumbrances of property made by a debtor at any time within four months prior to the filing of the petition in bankruptcy, and while insolvent, which are null and void as against creditors by the law of the state in which the property is situated, are null and void against such creditors if the debtor is adjudged a bankrupt, and the property in question will pass to the assignee.⁹⁸

PERSONS UNDER DISABILITIES

258. Persons may be under natural or legal disability to convey title. Personal capacity to transfer real property is, in general, governed by the same principles as capacity to make contracts. The capacity to take and hold real property is greater than the capacity to convey it.

Capacity of Parties

It is essential, in order to give validity to a deed, that there should be a person able to contract, and also a person able to be contracted with.⁹⁹ In other words, the grantor must have legal capacity to execute the conveyance, and the grantee be competent to receive the same.¹ Power to convey real property is, in general, the same as the power to make contracts.² Disabilities connected with personal capacity are of two kinds, natural and legal; natural, such as that of insanity, and legal, as in the case of married women and corporations. Some disabilities, such as infancy, may be both natural and legal. Some persons have power to hold land, but cannot convey it. For instance, persons under disability may

⁹⁸ Act July 1, 1898, c. 541; § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449). And see *In re Steinger Mercantile Co.*, 107 Fed. 669, 46 C. C. A. 548; *Tiffany v. Lucas*, 15 Wall. (U. S.) 410, 21 L. Ed. 198.

⁹⁹ Co. Litt. 35c; 2 Blk. Comm. 296.

¹ *Martin v. Gale*, 4 Ch. Div. 428; *Wright v. Snowe*, 2 De G. & Sm. 321; *Dupree v. Dupree*, 45 N. C. 164, 59 Am. Dec. 590; *Ready v. Kearsley*, 14 Mich. 215.

² See *Clark*, Cont. 211.

take land by descent, although, by reason of insanity or some other cause, they may have no power to make a binding contract to sell it. Certain disabilities, also, which arise from the relation of trustee and cestui que trust, and of mortgagor and mortgagee, have been previously considered.³

SAME—PERSONS OF UNSOUND MIND

259. Conveyances by insane persons under guardianship are void. Their conveyances, if not under guardianship, are merely voidable in some jurisdictions, although void in others.

SAME—DRUNKARDS

260. Conveyances by intoxicated persons are governed by substantially the same rules as apply to insane persons.

A deed may be void on account of the insanity or mental impairment of the grantor.⁴ Mere mental weakness does not necessarily render one incompetent to execute a deed,⁵ but the infirmity must be such that the grantor did not have capacity to understand the nature and effect of his act.⁶ The incapacity is a question of fact in each case. Nonsoundness of mind may arise from age, sickness, accident, or other cause; but the legal consequences are the same. Although mere weakness of mind does not incapacitate, yet when such weakness of mind is shown, less proof of duress or fraud is required to have the conveyance set aside.⁷ If an insane person has been placed under guardianship, any conveyances made by him are absolutely void, and not merely voidable;⁸ otherwise, according to some jurisdictions, they are voidable only,⁹ but in some states the courts hold that conveyances

³ See chapters XIV and XVIII, ante.

⁴ *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187; *Seerley v. Sater*, 68 Iowa, 375, 27 N. W. 262; *Brown v. Freed*, 43 Ind. 253.

⁵ *Williams v. Williams*, 133 Mich. 21, 94 N. W. 370; *Hoey v. Hoey*, 53 App. Div. 208, 65 N. Y. Supp. 778; *Edwards v. Davenport*, 20 Fed. 756.

⁶ *Hayman v. Wakeham*, 133 Mich. 363, 94 N. W. 1062; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587.

⁷ *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Harding v. Handy*, 11 Wheat. (U. S.) 103, 6 L. Ed. 429.

⁸ *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Mohr v. Tulip*, 40 Wis. 66; *Rogers v. Walker*, 6 Pa. 371, 47 Am. Dec. 470. A deed of his homestead is void though his wife joins. *New England Loan & Trust Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799.

⁹ *Burnham v. Kidwell*, 113 Ill. 425; *Allis v. Billings*, 6 Metc. (Mass.) 415,

by insane persons, though not under guardianship, are void.¹⁰ When the unsoundness of mind is only in the form of a monomania, power to transact business is affected only in case the transaction in question is connected with the subject on which the person is insane.¹¹ Insanity arising after a valid contract of sale or purchase has been made does not affect the validity of the contract.¹² On the other hand, conveyances made during the insanity of the grantor may be ratified by him after he has recovered.¹³ The voidable conveyance of an insane person may during his life, be set aside at the suggestion of his guardian, or after his death on the application of his heirs or personal representatives.¹⁴ The cases are conflicting as to the necessity for the restoration of the purchase money when deeds of insane persons are set aside. It seems, however, that there should be a restoration when the grantee was ignorant of his grantor's incapacity, or when there was no fraud present.¹⁵ As in the case of infants, the lands of insane persons may be conveyed by order of court. Although, in earlier times, a deaf and dumb person was considered non compos mentis,¹⁶ nevertheless, at the present time, a deaf and dumb person may execute a valid conveyance.¹⁷ Old age in itself does not render one incompetent to execute a deed.¹⁸ By

39 Am. Dec. 744; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

¹⁰ *Evans v. Horan*, 52 Md. 602; *Van Deusen v. Sweet*, 51 N. Y. 378; *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504; *German Sav. & Loan Soc. v. De Lashmuth*, 67 Fed. 399. See, as to the theory of lucid intervals, *Whart. & S. Med. Jur.* §§ 61, 62; 2 *Hamilton, Leg. Med.* 113, 222.

¹¹ *Trich's Ex'r v. Trich*, 165 Pa. 586, 30 Atl. 1053; *Ekin's Heirs v. McCracken*, 11 Phila. (Pa.) 534; *Turner v. Rusk*, 53 Md. 65; *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501.

¹² *Ekin's Heirs v. McCracken*, 11 Phila. (Pa.) 534.

¹³ *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.

¹⁴ *Campbell v. Kuhn*, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479; *Arnold v. Townsend*, 14 Phila. (Pa.) 216. But see *Key's Lessee v. Davis*, 1 Md. 32. The wife and children of the grantor cannot, during his lifetime, question his mental capacity to convey land, *Baldwin v. Golde*, 88 Hun, 115, 34 N. Y. Supp. 587; nor can a remainder-man, *McMillan v. William Deering & Co.*, 139 Ind. 70, 38 N. E. 398.

¹⁵ *Davis Sewing-Mach. Co. v. Barnard*, 43 Mich. 379, 5 N. W. 411; *Scanlan v. Cobb*, 85 Ill. 296; *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413. Contra, *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766; *Flanders v. Davis*, 19 N. H. 139.

¹⁶ *Co. Litt.* 42. So in Blackstone's day. See 1 Blk. Comm. 304.

¹⁷ *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

¹⁸ *Stone v. Wilhern*, 83 Ill. 105; *Weller v. Weller*, 112 N. Y. 655, 19 N. E. 433.

reason, however, of advanced years one may be mentally incompetent.¹⁹ The fact, also, that the grantor was sick at the time he signed a deed does not invalidate it, unless such illness rendered him incapable of understanding the nature of his act.²⁰

Intoxicated Persons

Drunkenness is not a ground for setting aside a deed,²¹ unless the state of intoxication was such that the grantor was not capable of understanding the transaction,²² or unless the intoxication was procured by the grantee,²³ or unless an unfair advantage was taken of the grantor's condition.²⁴ The disability of persons who are incapacitated to deal with their real property by reason of intoxication is much the same as that of insane persons. In fact, the rules to be applied are those which determine the soundness of the understanding of the person. While conveyances by such persons are voidable,²⁵ yet it may be that, in states where a drunkard may be placed under guardianship, deeds made by him after that time would be void.²⁶

SAME—INFANTS

261. An infant's conveyances of his real property are voidable, not void. They may be ratified or disaffirmed by him after he reaches majority.

While an infant has power to take real estate either by descent or by conveyance to him,²⁷ his transfers of real property, while not void, are yet voidable.²⁸ The privilege of avoiding them is personal, however, with him, and cannot be taken advantage of

¹⁹ *Thomas v. Crawford*, 118 Mich. 253, 76 N. W. 394; *Hoeh v. Hoeh*, 197 Pa. 387, 47 Atl. 351.

²⁰ *Barnes v. Gill*, 21 Ill. App. 129; *Lenhard v. Lenhard*, 59 Wis. 60, 17 N. W. 877; *Hepler v. Hosack*, 197 Pa. 631, 47 Atl. 847. And see *HALL v. BOLLEN*, 148 Ky. 20, 145 S. W. 1136, Ann. Cas. 1913E, 436, *Burdick Cas. Real Property*.

²¹ *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

²² *Shackelton v. Seebree*, 86 Ill. 616; *Van Wyck v. Brasher*, 81 N. Y. 260.

²³ *Woods v. Pindall*, Wright (Ohio) 507.

²⁴ *O'Connor v. Rempt*, 29 N. J. Eq. 156.

²⁵ *Mansfield v. Watson*, 2 Iowa, 111; *Wilson v. Bigger*, 7 Watts & S. (Pa.) 111; *Wiley v. Ewalt*, 66 Ill. 26; *Warnock v. Campbell*, 25 N. J. Eq. 485.

²⁶ See *Clark*, Cont. 275.

²⁷ 1 Devl. Deeds, § 116.

²⁸ *Irvine v. Irvine*, 9 Wall. (U. S.) 618, 19 L. Ed. 800; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Jenkins v. Jenkins*, 12 Iowa, 195; *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. Ed. 345.

by a stranger,²⁹ although it may be by his heirs after his death.³⁰ An infant grantor may, after attaining his majority, disaffirm his previous conveyance, although his grantee may have conveyed the property to a bona fide purchaser.³¹ An infant who has made a conveyance of his real property has no power to disaffirm the conveyance during¹ his infancy, however, nor, of course, would a ratification by him during that time be of any validity.³² In the event of the infant's death before reaching majority, his heirs may affirm or disaffirm the conveyance without waiting until the time has elapsed which would have made him of age, had he lived. Ratification or disaffirmance, by one who has reached majority, of a conveyance made during infancy, need not be by express acts, but may be by implication. Thus a conveyance of the property to another person is a disaffirmance of a deed made during minority.³³ A ratification need not be by deed.³⁴ The cases are conflicting as to whether acquiescence after reaching majority is an affirmation. Many cases hold that a minor who has conveyed real estate must disaffirm his conveyance within a reasonable time after his minority ceases, or be barred;³⁵ yet, on the other hand, many other cases hold that he is not barred by mere acquiescence for a shorter period than that prescribed by the statute of limitations.³⁶ As a matter of practice, therefore, one who contemplates the purchase of land, whose chain of title contains a conveyance by a minor, should see to it, if the statutory period barring recovery has not elapsed, that a confirmation after majority of such conveyance be obtained.³⁷

As to the appointment of an attorney in fact by an infant, see 1 Jones, Real Prop. § 4.

²⁹ *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660.

³⁰ *Veal v. Fortson*, 57 Tex. 482; *Bozeman v. Browning*, 31 Ark. 364.

³¹ 5 Minor, § 859.

³² See *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

³³ *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. (N. Y.) 539; *Chapin v. Shafer*, 49 N. Y. 407; *Cresinger v. Welch's Lessee*, 15 Ohio, 156, 45 Am. Dec. 565.

³⁴ *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Robbins v. Eaton*, 10 N. H. 561.

³⁵ *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; *Hastings v. Dollarhide*, 24 Cal. 195; *Cole v. Pennoyer*, 14 Ill. 158; *Robinson v. Weeks*, 56 Me. 102.

³⁶ *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Norcum v. Gaty*, 19 Mo. 65; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. (N. Y.) 539.

³⁷ *Dembitz, Land Titles*, p. 422; *Wilson v. Branch*, 77 Va. 68, 46 Am. Rep. 709; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Irvine v. Irvine*, 9 Wall. (U. S.) 618, 19 L. Ed. 800.

While a second deed executed during minority is no disaffirmance of a prior one,³⁸ yet bringing suit after majority for the land conveyed during infancy is, of course, a disaffirmance of such conveyance. On disaffirming a conveyance, there should be a restoration of the consideration received for the land, if the money is still in the grantor's hands.³⁹ An infant's lands may be conveyed by his guardian, acting under due authority of the statutes and order of the court.⁴⁰

SAME—MARRIED WOMEN

262. At common law, a married woman's deed is absolutely void. This disability has been removed, however, by statute, in most states.

At common law, the deed of a married woman is absolutely void.⁴¹ The only way, at common law, by which a married woman could convey her title to lands was by fine.⁴² The statute of 3 & 4 Wm. IV, c. 75, gave a married woman power to sell her lands if her husband joined in the conveyance, though it required that she be examined separate and apart from her husband, by some officer, in order to determine whether her consent to the conveyance was voluntary. By early custom, however, in many of the American states, even before the adoption of statutes concerning the subject, a married woman, by a deed in which her husband joined, could convey a valid title to her lands.⁴³ In all of the states, at the present time, there are statutes relating to conveyances by married women. With reference, however, to the separate property of married women, the statutes should be consulted, since the *jus tenendi* is by no means the same thing as the *jus dispon-*

³⁸ *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *McCormic v. Leggett*, 53 N. C. 425.

³⁹ *Brandon v. Brown*, 106 Ill. 519. Where the consideration received has been wasted by the infant, no offer to restore it is necessary. *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Green v. Green*, 7 Hun (N. Y.) 492. But contra, *Stout v. Merrill*, 35 Iowa, 47; *Kerr v. Bell*, 44 Mo. 120.

⁴⁰ *Battell v. Torrey*, 65 N. Y. 294; *Wood v. Truax*, 39 Mich. 628. Cf. *Merritt v. Simpson*, 41 Ill. 391.

⁴¹ *Hoyt v. Swar*, 53 Ill. 134; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Thorn-dell v. Morrison*, 25 Pa. 326.

⁴² *Albany Fire Ins. Co. v. Bay*, *supra*; *Lane v. McKeen*, 15 Me. 304.

⁴³ *Whiting v. Stevens*, 4 Conn. 44; *Durant v. Ritchie*, 8 Fed. Cas. No. 4,190; *Lindell v. McNair*, 4 Mo. 380.

endi.⁴⁴ In some states they have as much power as if unmarried to dispose of their property, though the statutes generally provide that the husband must join in the conveyance, and the provision for a separate examination of the wife has been re-enacted in some states. The cases under these married women's acts, as they are called, are conflicting on many points, but it is held that the statutes must be strictly followed.⁴⁵ Some cases hold that, where a married woman is also an infant, her deed is void,⁴⁶ although other cases hold it only voidable.⁴⁷ In some states it is held that a wife cannot give a power of attorney to convey her lands;⁴⁸ but where her disabilities have been removed there seems to be no good reason for this rule.⁴⁹ Even at common law, when the disability of coverture was removed by death or divorce, the power to convey was restored.

By the common law a married woman has no power to dispose of her land by will,⁵⁰ but in equity such a power is recognized as to all property coming under the jurisdiction of the court.⁵¹ In many states the statutes now give married women the same testamentary power as though unmarried,⁵² and in some states married women have greater power to devise their lands than if unmarried, since marriage removes the disability of infancy.⁵³

SAME—ALIENS

263. Real property held by an alien may be alienated by him.

The lands of an alien may, at common law, be claimed by the state by escheat upon office found, but until so claimed they

⁴⁴ *Bressler v. Kent*, 61 Ill. 426, 14 Am. Rep. 67; *Miller v. Wetherby*, 12 Iowa, 415.

⁴⁵ *Garrett v. Moss*, 22 Ill. 363; *Rumfelt v. Clemens*, 46 Pa. 455; *Glidden v. Strupler*, 52 Pa. 400; *Elwood v. Klock*, 13 Barb. (N. Y.) 50.

⁴⁶ *Hoyt v. Swar*, 53 Ill. 134; *Youse v. Norcum*, 12 Mo. 549, 51 Am. Dec. 175.

⁴⁷ *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Losey v. Bond*, 94 Ind. 67; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374. See *Ellis v. Alford*, 64 Miss. 8, 1 South. 155.

⁴⁸ *Snyder v. Sponable*, 1 Hill (N. Y.) 567; *Oulds v. Sansom*, 3 Taunt. 261.

⁴⁹ See 1 Stim. Am. St. Law, § 6506.

⁵⁰ *In re Steinmetz's Estate*, 168 Pa. 175, 31 Atl. 1092. The power of a married woman to devise land held by her in right of another—for instance, as executrix—is an apparent, rather than a real, exception to the common-law disability. *Scammell v. Wilkinson*, 2 East, 552. And see *Rich v. Cockell*, 9 Ves. 369.

⁵¹ 1 Jarm. Wills, 39; 1 Woerner, Adm. 27.

⁵² 1 Stim. Am. St. Law, § 6460. And see *Dillard v. Dillard's Ex'rs* (Va.) 21 S. E. 669.

⁵³ 1 Stim. Am. St. Law, § 2602.

may be conveyed by him.⁵⁴ The right of aliens to take and to dispose of real estate may be regulated, however, by federal treaties⁵⁵ and statutes,⁵⁶ and also by the statutes of the several states. In most jurisdictions the property disabilities of aliens have been removed.⁵⁷

SAME—CORPORATIONS

264. Corporations have capacity, in general, to alienate their lands.

The question may, however, be governed by their charters or by the statutes.

At common law, corporations of whatever nature have a general right to alienate their lands held in fee.⁵⁸ Under the English statutes of mortmain,⁵⁹ however, lands acquired by corporations without license to take in mortmain were liable to forfeiture, and of such lands no valid conveyance could be made.⁶⁰ Moreover, in England, at the present time, a statutory corporation cannot alienate land, except for the purpose of its incorporation.⁶¹ In this country, however, even if a corporation acquires real estate

⁵⁴ *Sheaffe v. O'Neil*, 1 Mass. 256; *Marshall v. Conrad*, 5 Call (Va.) 364; *Halstead v. Lake Co.*, 56 Ind. 363; *Montgomery v. Dorion*, 7 N. H. 475. But that the estate so conveyed will be subject to forfeiture in the hands of the grantee, see *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *People v. Conklin*, 2 Hill (N. Y.) 67.

⁵⁵ *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; *Doehrel v. Hillmer*, 102 Iowa, 169, 71 N. W. 204.

⁵⁶ *Beard v. Rowan*, 1 McLean, 135, Fed. Cas. No. 1,181; Act March 2, 1897, c. 363, 29 Stat. 618; Rev. St. Supp. 1899, p. 573 (U. S. Comp. St. Supp. 1911, p. 1168).

⁵⁷ *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; *Wainwright v. Low*, 132 N. Y. 313, 30 N. E. 747; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Lumb v. Jenkins*, 100 Mass. 527.

⁵⁸ *Laws of England*, vol. 8, 375.

⁵⁹ That is, the statutes which prohibit corporations from taking land except in special cases. See 2 Blk. Comm. 268; 2 Story, Eq § 1137; *Yates v. Yates*, 9 Barb. (N. Y.) 323. The statute of 9 Geo. II (1736) c. 36, is known as the mortmain statute by pre-eminence.

⁶⁰ 2 Blk. Comm. 293; *Colchester Corporation v. Lowten* (1813) 1 Ves. & B. 226. And see *Sutton's Hospital Case* (1612) 10 Coke, 23a, 30b. In England, many corporations, such as ecclesiastical corporations, the universities, etc., are under special statutory control with regard to their powers of alienation. For example, a hospital founded under St. 39 Eliz. c. 5, which enables persons to found hospitals for the poor and to incorporate them, cannot alienate or concur in alienating real estates conveyed to and vested in it under that act. *Newcastle-upon-Tyne Corporation v. A. G.* (1845) 12 Cl. & Fin. 402, H. L.

⁶¹ *Laws of Eng.* vol. 8, 375; *Mulliner v. Rail Co.*, 11 Ch. Div. 611 (1879).

ultra vires, nevertheless, in absence of proceedings by the state, the corporation may convey a good title to the same, since an individual cannot question the legality of the transaction.⁶²

CAPACITY TO TAKE TITLE

265. As previously stated, the capacity to take and hold title to real property is greater than the capacity to alienate it. As a rule, any person, regardless of his disability to convey, may be the taker of a title to land.

In General

As a general rule, any person, whether an infant, insane person, married woman, corporation, or alien,⁶³ may take title to real property. Coke says, however, that "a person able to be contracted with," is an essential incident of a deed.⁶⁴ He means, however, deeds in general, that is, formal agreements, since in case of a conveyance by deed capacity of contracting is not a requirement in a grantee.⁶⁵ The grantee must, however, be in existence,⁶⁶ since, at common law, the grantee must be one to whom livery of seisin can be made.⁶⁷ It consequently follows that an unborn child cannot take as a grantee,⁶⁸ although en ventre sa mere at the time of the execution of the deed,⁶⁹ and it may be shown, in avoidance of a deed, that the grantee was born after the deed was delivered.⁷⁰ In conveyances under the doctrine of uses, or of wills, however, there is a settled rule to treat an infant en ventre as in esse, yet it is said⁷¹ that no case can be found in which it was ever so treated in a common-law conveyance of an immediate estate in

⁶² Minor, Inst. § 869.

⁶³ *Melvin v. Proprietors, etc.*, 16 Pick. (Mass.) 167; *Spencer v. Carr*, 45 N. Y. 410, 6 Am. Rep. 112; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 387; *Rivard v. Walker*, 39 Ill. 413.

⁶⁴ *Supra*.

⁶⁵ See *Rivard v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 174; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112.

⁶⁶ 2 Blk. Comm. 296; *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Jackson v. Cary*, 8 Johns. (N. Y.) 385.

⁶⁷ *Dupree v. Dupree*, 45 N. C. 164, 59 Am. Dec. 590; *Miller v. Chittenden*, 2 Iowa, 315-368.

⁶⁸ *Dupree v. Dupree*, 45 N. C. 164, 59 Am. Dec. 590; *Lillard v. Ruckers*, 9 Yerg. (Tenn.) 64.

⁶⁹ *Morris v. Caudle*, 178 Ill. 9, 52 N. E. 1036, 44 L. R. A. 489, 69 Am. St. Rep. 282.

⁷⁰ *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835.

⁷¹ *Dupree v. Dupree*, *supra*.

possession.⁷² In cases of uses or trusts, however, a grant may be made to a trust for the benefit of children yet unborn.⁷³ Moreover, a statute may provide that an unborn child may take as grantee in an ordinary conveyance.⁷⁴ When the deed is by way of remainder, an exception exists to the rule that the grantee must be in esse.⁷⁵ There can be no grant to a dead person,⁷⁶ and a deed of land "to the estate" of a person named is a nullity.⁷⁷ Likewise a grant "to the heirs" of a living person is void, since a living person has no "heirs."⁷⁸ In such cases, however, the courts confine the word "heirs" to its technical meaning, and if from the entire deed the construction of "children" can be given to the term as used, the living children of the person named may take as grantees.⁷⁹ A deed to the heirs of a deceased person is, of course, valid,⁸⁰ and it is held that, although a deed to the heirs of a living person will not pass a legal title, yet it may be sufficient to pass the equitable title.⁸¹

Insane Persons

While a deed to an insane person will convey a good title to him, and his acceptance will be presumed on the ground of his presumed benefit,⁸² yet such a person may, if he desires, disaffirm such a conveyance upon regaining his reason.⁸³

Married Women

In the absence of a dissent on the part of the husband, a married woman may, even at common law, acquire or take property by deed.⁸⁴ The husband, however, may dissent to her purchase,

⁷² *Id.*

⁷³ *Gay v. Baker*, 58 N. C. 344, 68 Am. Dec. 229.

⁷⁴ See *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155.

⁷⁵ *Newsom v. Thompson*, 24 N. C. 277.

⁷⁶ *Morgan v. Lodge*, 53 Miss. 665; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

⁷⁷ *Simmons v. Spratt*, 26 Fla. 449, 8 South. 123, 9 L. R. A. 243; *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130.

⁷⁸ *Hall v. Leonard*, 1 Pick. (Mass.) 27 (leading case); *Morris v. Stevens*, 46 Pa. 200; *Outland v. Bowen*, 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; *Booker v. Tarwater*, 138 Ind. 385, 37 N. E. 979.

⁷⁹ *Huss v. Stephens*, 51 Pa. 282; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077.

⁸⁰ *Hoover v. Malem*, 83 Ind. 195; *Shaw v. Loud*, 12 Mass. 447; *Boone v. Moore*, 14 Mo. 420.

⁸¹ *Bailey v. Willis' Heirs*, 56 Tex. 212.

⁸² 2 Blk. Comm. 291.

⁸³ 2 Blk. Comm. 291; *Concord Bank v. Bellis*, 10 Cush. (Mass.) 276.

⁸⁴ *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Bortz v. Bortz*, 48 Pa. 382, 86 Am. Dec. 603; *Emery v. Wase*, 5 Ves. Jr. 486, 31 Eng. Reprint, 889.

or to a devise to her, of real property, since he might, otherwise, incur liabilities to his disadvantage.⁸⁵ In equity and under the statutes, a married woman may acquire and hold property to her sole and separate use, unaffected by any marital rights of the husband. At common law, a wife could take a conveyance of real property directly from her husband.⁸⁶ In order to make such a conveyance of land, it was necessary for the husband to first transfer to a trustee, who would convey back to the wife.⁸⁷ Relief was, however, granted in equity when such a precaution had not been taken.⁸⁸ The rule is now different in most states, and the husband may convey to the wife and the wife to the husband directly.⁸⁹

Corporations

The English statutes of mortmain prohibited the conveyances of lands to corporations without a license from the crown.⁹⁰ These statutes, however, have not been regarded as a part of the common law in this country, except in Pennsylvania.⁹¹ Consequently the English common-law rule, in absence of statutes to the contrary, obtains with us, namely, that corporations may take and hold, as grantees, as much land as may be reasonably necessary for the purposes of their creation.⁹² Although a corporation may exceed its powers in the acquiring of lands, the general rule is that it will hold the lands until the state intervenes.⁹³ Constitutional and statutory provisions may, of course, limit the powers of various corporations to take and hold land, as, for example, in the

⁸⁵ Jackson ex dem. White v. Cary, 16 Johns. (N. Y.) 302; Baxter v. Smith, 6 Bin. (Pa.) 427; Granby v. Allen, 1 Ld. Raym. 224.

⁸⁶ Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396.

⁸⁷ Jewell v. Porter, 31 N. H. 34; Bancroft v. Curtis, 108 Mass. 47.

⁸⁸ Loomis v. Brush, 36 Mich. 40.

⁸⁹ Burdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225; Allen v. Hooper, 50 Me. 371. But see Winans v. Peebles, 32 N. Y. 423; 1 Stim. Am. St. Law, § 6471. And see 21 Cyc. pp. 1286, 1292, article on Husband and Wife, by author of this work.

⁹⁰ 2 Blk. Comm. 268-272.

⁹¹ 2 Kent, Comm. 282, 283; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, holding that, while the land may pass to the corporation, yet the corporation cannot hold it without a license, and that the right to it vests in the state. And see Lathrop v. Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595.

⁹² Brown v. Hogg, 14 Ill. 219; First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313.

⁹³ Shewalter v. Pirner, 55 Mo. 218; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

case of banking corporations.⁹⁴ The power of foreign corporations to take and hold land is governed by the state in which the land is situated.⁹⁵ While a de facto corporation may take as a grantee,⁹⁶ nevertheless a deed to a corporation having no existence is a nullity, and conveys legal title to no one.⁹⁷ An equitable title might, however, arise from such a transaction.⁹⁸

Partnerships

Some cases hold that a deed to a partnership name alone conveys no legal title to any one, although an equitable title may arise, since a partnership is not a person, either natural or artificial.⁹⁹ Moreover, it is the general rule that a grant to certain persons named as partners is a grant to them as tenants in common, subject to the equitable rights of the partnership in the property.¹ A grant, however, to "A. & Co." vests title only in A.²

Aliens

Aliens may even at common law be grantees, subject, however, to escheat of their lands by the state.³ The common-law disabilities of aliens consist principally in their incapacity to hold real property after the title has been passed to them, for it is held that the title passes out of the grantor and is held by the alien until the state institutes proceedings to divest it.⁴ This is called "office found." Under modern statutes aliens may take and hold lands by purchase the same as other persons,⁵ although a distinction may

⁹⁴ *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

⁹⁵ *Farmers' Loan & Trust Co. v. Railroad Co.*, 68 Fed. 412; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740.

⁹⁶ *Smith v. Sheeley*, 12 Wall. (U. S.) 358, 20 L. Ed. 430; *Myers v. Croft*, 13 Wall. (U. S.) 291, 20 L. Ed. 562; *Mercers of Shrewsbury v. Hart*, 1 Car. & P. 113.

⁹⁷ *Russell v. Topping*, 5 McLean, 194-202, Fed. Cas. No. 12,163; *Harriman v. Southam*, 16 Ind. 190; *Douthitt v. Stinson*, 63 Mo. 268; *Phelan v. County of San Francisco*, 6 Cal. 531.

⁹⁸ *White Oak Grove Benev. Soc. v. Murray*, 145 Mo. 622, 47 S. W. 501.

⁹⁹ See *Jones*, Conv. 212, § 245.

¹ *Morse v. Carpenter*, 19 Vt. 613; *Orr v. How*, 55 Mo. 328; *Newton v. McKay*, 29 Mich. 1; *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252; *Baldwin v. Richardson*, 33 Tex. 16.

² *Arthur v. Weston*, 22 Mo. 378; *Lindsay v. Jaffray*, 55 Tex. 626; *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

³ Co. Litt. 42b; *Wright v. Saddler*, 20 N. Y. 320; *Carlow v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. 873; *Norris v. Hoyt*, 18 Cal. 217; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532.

⁴ *Doe ex dem. Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332, 6 L. Ed. 488; *Sheaffe v. O'Neil*, 1 Mass. 256; *Wadsworth v. Wadsworth*, 12 N. Y. 376.

⁵ *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; *Wulster v. Folin*, 60 Kan.

be made between resident and nonresident aliens.⁶ While the power of aliens to hold land is a matter for state regulation, yet the state laws are subject to treaties which may be made by the United States.⁷ In some states aliens may buy and hold land, but are not permitted to take it by descent.⁸

At common law, aliens could not inherit, nor could the inheritance be transmitted through them. These rules, however, have been largely changed by statute. In some states the disabilities are entirely removed; in others, they exist except as to alien friends or residents; and now in all states, probably, the alienage of an ancestor would not prevent the inheritance passing to naturalized citizens.⁹

334, 56 Pac. 490; *People v. Snyder*, 41 N. Y. 397; *Cross v. Del Valle*, 1 Wall. (U. S.) 1, 17 L. Ed. 515.

⁶ Consult the statutes of the various states.

⁷ *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 432; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Carneal v. Banks*, 10 Wheat. (U. S.) 181, 6 L. Ed. 297; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, 4 L. Ed. 234. Recent legislation in the state of California with reference to the capacity of aliens to acquire land will be recalled. For restrictions imposed by congress on the capacity of aliens to hold real property, see Act March 3, 1887, c. 340, 24 Stat. 476 (U. S. Comp. St. Supp. 1911, p. 1167).

⁸ 1 *Stim. Am. St. Law*, § 6013. See *Bennett v. Hibbert*, 88 Iowa, 154, 55 N. W. 93; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. A citizen cannot inherit in some states through an alien ancestor. *Furenes v. Mickelson*, 86 Iowa, 508, 53 N. W. 410; *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 35.

⁹ 1 *Stim. Am. St. Law*, §§ 6013-6017; 1 *Dembitz, Land Tit.* 302.

CHAPTER XXVI

THE CREATION OF INTERESTS IN LAND BY POWERS

- 266. Powers in General.
- 267. General Classification of Powers.
- 268. Powers of Appointment.
- 269. Classification of Powers of Appointment as to Estate of the Donee.
- 270. Powers Collateral.
- 271. Powers Appendant and in Gross.
- 272. Classification of Powers of Appointment as to the Appointees.
- 273. General Powers.
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- 275. Classification of Powers of Appointment as to Duty of Execution.
- 276. Extinguishment of Powers.
- 277. Rights of Creditors.
- 278. Execution of Powers.
- 279. Fraudulent Appointments.
- 280. Codification of Powers.

POWERS IN GENERAL

266. Speaking generally, a power is a right ability, or authority to do something.¹ As used here, however, it means an authority reserved by or limited to a person to dispose of property either for his own benefit or for the benefit of another, and operating upon an estate vested either in himself or in another.²

GENERAL CLASSIFICATION OF POWERS

267. Powers to dispose of property may be conveniently classified as follows:
- (a) Common-law powers.
 - (b) Statutory powers.
 - (c) Powers of attorney.
 - (d) Powers of appointment.

Common-Law Powers

A common-law power is an authority given to one person by another to do an act for him which is recognized by and operative

¹ *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691, 78 Am. St. Rep. 157, quoting *Bouvier L. Dict.*; *Remington v. Peckham*, 10 R. I. 550, 553.

² *Freme v. Clement*, 18 Ch. D. 499, 504 (1881); *Maryland Mut. Benev. Soc. of Improved Order of Red Men v. Clendinen*, 44 Md. 429, 433, 22 Am. Rep. 52; *Co. Litt.* 342b, *Buller* note 1.

at common law.³ At common law, however, a power cannot be given to a person for the purpose of creating any future interest in land.⁴ Freehold estates in land could be created only in possession, or by way of reversion or remainder. Livery of seisin⁵ was, moreover, required.

The only modern instances of powers over land that have effect by the common law, or "common-law powers," are powers given by will to the testator's executors to sell his real estate in order to raise money for the payment of his debts, or of legacies given by the will; the land not being devised for the purpose to the executors, but devolving, until the power is exercised, upon the testator's heir at law. Such directions to executors were recognized in the early law as valid in wills of lands, which, by custom, were devisable at common law;⁶ and after the extension of the testamentary power by statute, in the reign of King Henry VIII,⁷ their validity in wills generally was established. Upon an alienation in pursuance of such a power, the estate passes to the alienee by force of the will, as if he had been named therein as devisee, the exercise of the power being merely the nomination of the person who is to take the estate under the will. In this respect a mere power of sale given to executors differs from a devise of land to the executors in trust for sale; for under such a devise the testator's estate in the land vests in the executors as trustees, and the purchaser takes by the conveyance from them.⁸ A power of appointment under a will is referred to by some writers as a "common-law power."⁹ This is, however, technically incorrect, and the phrase was probably used to distinguish powers of appointment by will from powers of appointment arising under the statute of uses.¹⁰ A recent English work¹¹ cites even powers of attorney, and powers created by acts of parliament, as other instances of common-law powers.¹²

Statutory Powers

A statutory power is one that is created by some statute. The authority given the assignee in bankruptcy to sell land, under

³ Laws of Eng. vol. 23, p. 3.

⁴ Co. Litt. 237a; Sugden on Powers, 4.

⁵ Post.

⁶ Litt. § 169; Co. Litt. 112b.

⁷ 32 Hen. VIII, c. 1.

⁸ Litt. § 169; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Sheton v. Homer*, 5 Metc. (Mass.) 462; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340; *Edw. Prop. in Land* (2d Ed.) 203.

⁹ Sugden on Powers, 45; 1 Leake, *Law of Property in Land*, 377.

¹⁰ 1 Leake, *Law of Property in Land*, 377.

¹¹ Laws of Eng. vol. 23, p. 3.

¹² Citing Sugden on Powers, 45.

our national bankruptcy act,¹³ is an illustration of such a power, as is, likewise, the statutory power, in some states, given to a mortgagee to sell the mortgaged property in case of default on the part of the mortgagor.¹⁴

Power of Attorney

The familiar authority given to one to act for another, known as "power of attorney," is merely a form of agency. It is created by contract, gives the agent, or attorney in fact, no right or interest in the land, and, in case of a power of attorney to sell land, the "attorney" acts, not for himself, but merely for his principal. When, for example, one executes a deed under a power of attorney, the deed is not his, but is the deed of the owner of the land. A power of attorney to execute a deed is an authority given a person to act in behalf of the grantor in making conveyance of land. For the execution of a valid power of attorney the same solemnities are required as for the execution of a deed.¹⁵ The power of attorney must contain a description of the premises to be conveyed,¹⁶ and in many states it must be recorded.¹⁷ Powers of attorney can be created only by persons who are sui juris.¹⁸ At common law, a married woman cannot give an effective power of attorney to convey her real estate.¹⁹ However, under modern statutes, she may appoint an attorney in fact in regard to her separate estate.²⁰ One member of a firm cannot convey partnership lands without a power of attorney from the other members.²¹ A power of attorney may be revoked at any time, unless a consideration has been paid for it;²² but not if it is coupled with an interest, in which case the power to revoke must be expressly reserved, or none exists.²³ The death of the one creating a power of attor-

¹³ Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

¹⁴ See Ch. XX.

¹⁵ Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Goree v. Wadsworth, 91 Ala. 416, 8 South. 712.

¹⁶ Stafford v. Lick, 13 Cal. 240.

¹⁷ 1 Stim. Am. St. Law, § 1624 (10).

¹⁸ Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73.

¹⁹ Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; Duckett v. Jenkins, 66 Md. 267, 7 Atl. 263; Hardenburgh v. Lakin, 47 N. Y. 109; Keen v. Philadelphia, 8 Phila. (Pa.) 49.

²⁰ Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Smith v. McGuinness, 14 R. I. 59; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014.

²¹ Frost v. Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.

²² MacGregor v. Gardner, 14 Iowa, 326.

²³ Martind. Conv. (2d Ed.) § 241; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76.

ney revokes it, if it is a mere naked power; that is, one not coupled with an interest, and powers of attorney to convey land, are generally of this kind.²⁴ The revocation of a power of attorney should be recorded, if the power itself has been.²⁵ Where a power of attorney has been given, the authority cannot be delegated unless such delegation is authorized by the power,²⁶ and a power to several cannot be executed by less than all, in the absence of a provision to that effect.²⁷ Powers of attorney are strictly construed,²⁸ and a power to "sell" does not give authority to "convey,"²⁹ and a power to sell implies a sale for cash.³⁰ Where a deed is executed by one who has a power of attorney, it must be in the name of the grantor, and not of the agent, and the agent himself must show that he executes it for his principal, as by signing "A. (principal), by B. (agent.)"³¹ Some cases, however, are less exacting, and a deed executed, "A. B., Agt. of C. D.," has been held a good execution of a deed in which C. D. was the grantor.³² In executing a deed by virtue of a power of attorney, the attorney must purport, however, to bind the grantor, and not himself.³³

POWERS OF APPOINTMENT

268. Powers of appointment are modes of disposing of property operating under the statute of uses or the statute of wills. Under the former statute, a power of appointment is a mere right to limit a use, a method of causing a use, with its resulting legal estate, to spring up at the will of any designated person.³⁴

²⁴ *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

²⁵ *Morgan v. Stell*, 5 Bin. (Pa.) 305.

²⁶ *Loeb v. Drakeford*, 75 Ala. 464. And see *Rogers v. Cruger*, 7 Johns. (N. Y.) 557.

²⁷ *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa, 115; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

²⁸ *Geiger v. Bolles*, 1 Thomp. & C. (N. Y.) 129; *Brantley v. Insurance Co.*, 53 Ala. 554.

²⁹ *Tharp v. Brenneman*, 41 Iowa, 251; *Force v. Dutcher*, 18 N. J. Eq. 401.

³⁰ *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Coulter v. Trust Co.*, 20 Or. 469, 26 Pac. 565, 27 Pac. 266.

³¹ *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Clarke v. Courtney*, 5 Pet. (U. S.) 349, 8 L. Ed. 140.

³² *Wilks v. Back*, 2 East, 142. And see *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328.

³³ *Echols v. Cheney*, 28 Cal. 157; *Fowler v. Shearer*, 7 Mass. 14; *Bassett v. Hawk*, 114 Pa. 502, 8 Atl. 18.

³⁴ *Sir Edward Clere's Case*, 6 Co. 17b; *Sugden on Powers*, 82; *Bouton v.*

Origin and Nature

Powers of appointment, otherwise simply called "powers," originated in connection with the creation of future uses, particularly springing uses. The word "power," as used in this connection, is therefore a technical term, and not used in a popular sense: As said years ago, by Chancellor Kent:³⁵ "The powers with which we are most familiar in this country are common-law authorities, of simple form and direct application, such as a power to sell land, to execute a deed, to make a contract, or to manage any particular business, with instructions more or less specific, according to the nature of the case. But the powers now alluded to are of a more latent and mysterious character, and they derive their effect from the statute of uses." At common law, as we have seen, estates can be limited only in possession, or by way of remainder or reversion; the latter taking effect only on the regular determination of the preceding estate. Consequently, a common-law power cannot be reserved to a grantor, or given to any other person, for the purpose of revoking or altering a grant by any future act or instrument.³⁶ In connection, however, with the equitable doctrine of uses, it was possible, long before the statute of uses, which was passed in 1535, to convey property to one person for the use of some other person to be designated at some future time. The person to whom the property was conveyed was known as the "feoffee to uses." The legal estate was, of course, in the feoffee, and, at the beginning, it was left to the feoffee's honor and good faith to respect the appointment when designated by the feoffor. In time, however, the court of chancery enforced this equitable duty, and compelled the feoffee to comply with the intention of the feoffor when he designated the person to whom the property should be conveyed. Should the feoffee to uses fail or refuse to convey, when it was his duty to do so, the court, in a proper case, would effectuate the desired result by its decree. The duty to execute an appointment to uses being thus established, it will be at once apparent that when the statute of uses was passed, converting a beneficial use into a legal estate, an appointment to uses became a simple method of creating a legal estate in futuro, which could not previously be created at the common law. Until the appointment was made, the interest to be created was only a future use, an equitable estate; but when the appointment was made, the statute executed the use into a legal estate.³⁷

- Doty, 69 Conn. 531, 542, 37 Atl. 1064; Williams, Real Prop. (17th Internat. Ed.) 438.

³⁵ Kent, Comm. 315.

³⁶ Co. Litt. 237a.

³⁷ Digby, Hist. Real Prop. 360; Sugden, Powers, c. 1; Laws of Eng. 23, § 4 et seq.

After the statute, such a right to declare the uses of land was called a "power,"³⁸ and the uses when declared, being executed by the statute, took effect as if they had been limited in the original instrument creating the power.³⁹ In the same way, under the statute of wills, a power may be given to some person designated in the will. Thus lands may be devised to A., with power of appointment, and upon the execution of the power the appointee would take the lands, just as if an executory devise had been made to him in the will.⁴⁰ Future legal estates being made possible, since the statute of uses and the statute of wills, by means of powers of appointment, such a power may be defined as simply a right to create or to change an estate in lands.⁴¹ Under the law of powers as codified in a number of our states,⁴² a well-known statutory definition of a power is "an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving the power, might himself lawfully perform."⁴³ Powers are usually created by deed,⁴⁴ or will.⁴⁵ No particular form of words is required, since any words which manifest an intention to give or to reserve a power will be sufficient.⁴⁶ Moreover, technical words as to the estates to be created by the power are not required.⁴⁷ For example, a power to sell in general would give a power to sell a fee, if the donor had a fee.⁴⁸ In creating a power, the person who confers the power is called the "donor." The person to whom it is given is the "donee." The act of executing the power is called the "appointment"; the donee thus becoming the "appointor," while the person for whose benefit the power is exercised is called the "appointee." A power can

³⁸ *Harrison v. Battle*, 21 N. C. 213.

³⁹ *Rodgers v. Wallace*, 50 N. C. 181; *Smith v. Garey*, 22 N. C. 42; *Leggett v. Doremus*, 25 N. J. Eq. 122.

⁴⁰ *Sugden, Powers*, 199.

⁴¹ *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Rodgers v. Wallace*, 50 N. C. 181. And see *HEINEMANN v. DE WOLF*, 25 R. I. 243, 35 Atl. 707, *Burdick Cas. Real Property*.

⁴² See *infra*.

⁴³ *Laws N. Y.* 1896, c. 547, § 111.

⁴⁴ *Johnson v. Yates' Devises*, 9 Dana (Ky.) 491; *Brown v. Renshaw*, 57 Md. 67; 1 *Sugden, Powers*, 152, 157.

⁴⁵ *Young v. Young*, 68 N. C. 309; 1 *Sugden, Powers*, 115 et seq.

⁴⁶ *Blount v. Moore*, 54 Ala. 360; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Lesser v. Lesser*, 11 Misc. Rep. 223, 32 N. Y. Supp. 167; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

⁴⁷ *Harris v. Knapp*, 21 Pick. (Mass.) 412; *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257; *Brant v. Iron Co.*, 93 U. S. 326, 23 L. Ed. 927.

⁴⁸ *North v. Philbrook*, 34 Me. 532; *Benesch v. Clark*, 49 Md. 497; *Liefe v. Saltingstone*, 1 Mod. 189.

be created only by a person who has legal capacity to perform the act he authorizes the donee to perform;⁴⁹ but, as a rule, a donee may be any person, even if not sui juris for the purposes of making contracts or conveyances.⁵⁰ For example, a donee may be an infant,⁵¹ or a married woman.⁵² A donor may also make himself the donee of a power, or, as usually stated, may reserve a power in himself, as where, for example, one creates a trust and reserves a power to sell the land to others.⁵³

A power may be created to do whatever the donor might himself lawfully do.⁵⁴ The ordinary purposes of powers, however, consist of powers to convey, sell, exchange, lease, or incumber property,⁵⁵ or to appoint property by will.

Distinguished from Estates

A power is not an "estate" or interest in land.⁵⁶ It is an authority to create an estate or interest. A power may be given to a person who has an estate in the land, or to a mere stranger.⁵⁷ A power may, however, be coupled with an interest in the land,⁵⁸ meaning, however, not an interest in the subject-matter to be created by the exercise of the power,⁵⁹ but an interest in the land concerning which the power is to be executed.⁶⁰ In other words, a power and an estate in the same land may coexist. For example, a

⁴⁹ Kennedy v. Ten Broeck, 11 Bush (Ky.) 241; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; Delaney v. McCormack, 88 N. Y. 174.

⁵⁰ Ford's Ex'r v. Ford, 2 Duv. (Ky.) 418; Armstrong v. Kerns, 61 Md. 364; Osgood v. Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; McMurtry v. Brown, 6 Neb. 368.

⁵¹ Sheldon's Lessee v. Newton, 3 Ohio St. 494; In re D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756.

⁵² Young v. Sheldon, 139 Ala. 444, 36 South. 27, 101 Am. St. Rep. 44; Armstrong v. Kerns, 61 Md. 364; Osgood v. Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488.

⁵³ Griffith v. Maxfield, 66 Ark. 513, 51 S. W. 832.

⁵⁴ See Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

⁵⁵ Dodge v. Moore, 100 Mass. 335; Cussack v. Tweedy, 126 N. Y. 81, 26 N. E. 1033; Parkhurst v. Trumbull, 130 Mich. 408, 90 N. W. 25; In re Kaiser's Estate, 2 Lanc. Law Rev. (Pa.) 362.

⁵⁶ Eaton v. Straw, 18 N. H. 320; Sewall v. Wilmer, 132 Mass. 131.

⁵⁷ Root v. Stuyvesant, 18 Wend. (N. Y.) 257, 283.

⁵⁸ Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. Ed. 522; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Shearman's Adm'r v. Hicks, 14 Grat. (Va.) 96.

⁵⁹ Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Coney v. Sanders, 28 Ga. 511.

⁶⁰ Benneson v. Savage, 130 Ill. 352, 22 N. E. 838; Hilliard v. Beattie, 67 N. H. 571, 39 Atl. 897; Russell v. Russell, 36 N. Y. 581, 93 Am. Dec. 540; White's Appeal, 36 Pa. 134.

man may be given an estate for life, with a general power of alienation, and in default of appointment a remainder in fee. In such case he could transfer a fee simple in the lands, either by the exercise of the power, or out of the estate which he owns, in default of appointment.⁶¹ In wills, it is often difficult to ascertain whether a testator meant to dispose of his estate, or to exercise a power which he had in the lands. In such cases the testator's intention governs, as far as it can be ascertained.⁶² Under deeds, such a difficulty seldom arises, because technical words are used in limiting the estates.

Powers of Revocation and Appointment

Powers are sometimes divided into powers of appointment, by which estates may be created; powers of revocation, by which estates may be terminated or reduced; and powers of appointment and revocation, which include both rights. The distinction is not of much value, however, since a power to limit new uses implies a power to revoke the old ones, and powers of revocation, unless a contrary intention expressly appears, include by implication powers to create new estates in place of those defeated.⁶³ A power of revocation may be reserved, in limiting estates, to revoke the estates created either wholly or in part, or part at one time and part at another.⁶⁴ Limiting new uses under a power of revocation or appointment is a revocation of the old estates, without any special words to that effect. When uses are revoked, and new ones appointed, there cannot be another revocation, unless a power to do so is reserved in the instrument limiting the uses.⁶⁵

Revocation of Powers

A revocation of a power should not be confused with a power of revocation.⁶⁶ A mere collateral power can be revoked at the pleasure of the donor,⁶⁷ and such a power is also revoked by his death,⁶⁸ unless from its very nature it is to be exercised only after the donor's

⁶¹ Phillips v. Brown, 16 R. I. 279, 15 Atl. 90; Brown v. Phillips, 16 R. I. 612, 18 Atl. 249; Lee v. Simpson, 34 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038; Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136; Logan v. Bell, 1 C. B. 872.

⁶² See HEINEMANN v. DE WOLF, 25 R. I. 243, 55 Atl. 707, Burdick Cas. Real Property.

⁶³ 2 Washb. Real Prop. (5th Ed.) 694; Wright v. Tallmadge, 15 N. Y. 307.

⁶⁴ Ricketts v. Railroad Co., 91 Ky. 221, 15 S. W. 182, 11 L. R. A. 422, 34 Am. St. Rep. 176. See, also, Willis v. Martin, 4 Term R. 39.

⁶⁵ 1 Sugden, Powers, 243.

⁶⁶ Supra.

⁶⁷ Taylor v. Burns, 8 Ariz. 463, 76 Pac. 623; Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543; Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159.

⁶⁸ Hawley v. Smith, 45 Ind. 183; Fisher v. Fair, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589.

death.⁶⁹ When, however, a power is coupled with an interest,⁷⁰ or given for a valuable consideration,⁷¹ it cannot be revoked by the donor after it has been created, nor will his death put an end to the right to exercise it.⁷² When a power is revocable, it can be revoked only by express terms or necessary implication.⁷³

CLASSIFICATION OF POWERS OF APPOINTMENT AS TO ESTATE OF THE DONEE

269. Powers as to the estate or interest of the donee in the land are either:

- (a) Powers collateral; or
- (b) Powers coupled with an interest, which are:
 - 1. Powers appendant; or
 - 2. Powers in gross.

SAME—POWERS COLLATERAL

270. A power given to a donee, who has no interest in the land apart from the power, is called a "power collateral," or a naked power.

SAME—POWERS APPENDANT AND IN GROSS

271. A power may be given to a donee who has some estate in the land in addition to the power. Such powers are:

- (a) Appendant, when the power is to be executed wholly or in part out of the estate of the donee.
- (b) In gross, when the execution of the power does not affect the donee's estate.

⁶⁹ *Hunt v. Ennis*, Fed. Cas. No. 6,889, 2 Mason, 244.

⁷⁰ *Baggett v. Edwards*, 126 Ga. 463, 55 S. E. 250; *Bonney v. Smith*, 17 Ill. 531; *Bergen v. Bennett*, 1 Caines, Cas. (N. Y.) 1, 2 Am. Dec. 281; *Lightner's Appeal*, 82 Pa. 301.

⁷¹ *Bonney v. Smith*, 17 Ill. 531; *Smyth v. Craig*, 3 Watts & S. (Pa.) 14; *Pacific Coast Co. v. Anderson*, 107 Fed. 973, 47 C. C. A. 106.

⁷² *Benneson v. Savage*, 130 Ill. 352, 22 N. E. 838; *Stephens v. Sessa*, 50 App. Div. 547, 64 N. Y. Supp. 28; *Frank v. Mortgage Co.*, 86 Miss. 103, 38 South. 340, 70 L. R. A. 135, 4 Ann. Cas. 54; *Wilburn v. Spofford*, 4 Sneed (Tenn.) 698; *Armstrong v. Moore*, 59 Tex. 646.

⁷³ *New v. Potts*, 55 Ga. 420; *Bennett v. Rosenthal*, 11 Daly (N. Y.) 91; *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166.

Powers Collateral

A power simply collateral, otherwise called a naked power, or a power unconnected with an interest, is a power given to a person who has no interest in the land at the time of the execution of the instrument creating the power, and to whom no estate is limited by that instrument.⁷⁴ For example, if property is given to A., as a trustee, for the use of B. for life, and after B.'s death, as C. shall appoint, C. has a power simply collateral.

Powers Appendant, or in Gross

As already stated, a power may be coupled with an interest in the land on which the power is to operate. Such powers are appendant, or in gross. Powers appendant, or appurtenant, are so called because they depend upon the estate limited to the donee;⁷⁵ that is, they depend for their validity upon the estate which is in him.⁷⁶ When the estates to be created by the execution of power must take effect out of the interest in the lands held by the donee, the power is said to be appendant or appurtenant; for example, where one having a life estate is given a power to make leases which must take effect wholly or in part out of his own estate.⁷⁷ When, however, the execution of the power will not affect the donee's estate in the lands, the power is said to be in gross, as when the owner of a life estate has a power to create estates to begin after the termination of his estate.⁷⁸ A power, moreover, may be both appendant and in gross, with reference to the different estates in the land on which it is to operate; it may be appendant to one, and in gross to another.⁷⁹

⁷⁴ 1 Sugden, Powers, 45; Taylor v. Eatman, 92 N. C. 601; Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721. And see Hammond v. Croxton, 162 Ind. 353, 69 N. E. 250, 70 N. E. 368; Bradt v. Hodgdon, 94 Me. 559, 48 Atl. 179.

⁷⁵ 1 Sugden, Powers, 43. And see Brown v. Renshaw, 57 Md. 67, 79; Reid v. Gordon, 35 Md. 174, 184.

⁷⁶ Root v. Stuyvesant, 18 Wend. (N. Y.) 257, 283; Wilson v. Troup, 2 Cow. (N. Y.) 195, 236, 14 Am. Dec. 458; In re D'Angibau, 15 Ch. D. 228, 49 L. J. Ch. 756.

⁷⁷ 1 Sugden, Powers, 78; Clark v. Wilson, 53 Miss. 119; Garland v. Smith, 164 Mo. 1, 64 S. W. 188; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; Maundrell v. Maundrell, 10 Ves. 246.

⁷⁸ 1 Sugden, Powers, 44; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458. See, also, Thorington v. Thorington, 82 Ala. 489, 1 South. 716.

⁷⁹ Reid v. Gordon, 35 Md. 174; Garland v. Smith, 164 Mo. 1, 64 S. W. 188.

CLASSIFICATION OF POWERS OF APPOINTMENT AS TO THE APPOINTEES

272. Powers with reference to the persons or class of persons to whom the appointment is to be made are classified as:

- (a) General powers; and
- (b) Special powers.

SAME—GENERAL POWERS

273. Under a general power, the donee can make any one he chooses an appointee.

SAME—SPECIAL POWERS

274. Under a special power, the donee can make only certain designated persons appointees. Special powers are:

- (a) Exclusive, when the donee must select one out of a class, and appoint to him;
- (b) Nonexclusive, when the donee can appoint to all of the class of persons designated.

General and Special Powers

A general power is one which the donee can exercise in favor of such person or persons as he pleases, including himself,⁸⁰ his wife,⁸¹ or his executors and administrators.⁸² Such a power is equal to the ownership of the fee, because the donee can convey a fee simple.⁸³ Under some of the statutory definitions, a general power is one which authorizes the alienation in fee, by either a conveyance or a will, or charge of the lands embraced in the power, to any alienee whatever.⁸⁴ A special or particular power is one in which the appointment can be made only to the persons or classes of per-

⁸⁰ *Irvin v. Farrer*, 19 Ves. 85 (1812).

⁸¹ 2 Washb. Real Prop. (5th Ed.) 714; *New v. Potts*, 55 Ga. 420. But see *Shank v. Dewitt*, 44 Ohio St. 237, 6 N. E. 255.

⁸² *Mackenzie v. Mackenzie*, 3 Mac. & G. 559 (1851).

⁸³ *Wright v. Wright*, 41 N. J. Eq. 382, 4 Atl. 855; *Com. v. Williams' Ex'rs*, 13 Pa. 29; *Roach v. Wadham*, 6 East, 289. See Appeal of APPLETON, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

⁸⁴ See *Laws N. Y.* 1896, c. 547, §§ 114, 115; *Rev. Laws Minn.* 1905, §§ 3270, 3271. And see *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *Hershey v. Bank*, 71 Minn. 255, 265, 73 N. W. 967.

sons designated in the instrument creating the power.⁸⁵ Under a particular power, the appointment may be to a trustee for the benefit of the appointee; but otherwise the donee is limited, in his appointment under such a power, to the persons or class designated.⁸⁶ In such an instrument an authority to appoint to the children of the donor does not include the grandchildren,⁸⁷ unless some special circumstances show that such must have been the intention, as, for instance, where there are no children living.⁸⁸ A power to appoint "to relations" includes only those relatives who could take under the statute of distributions, but the word "issue" includes all descendants of the donor.⁸⁹ If the power is to select one or more of certain designated persons, and to appoint the whole estate to him, the power is said to be exclusive. If, however, part of the estate may be given to each of the persons named, or the power is only to determine the amount which each shall receive, the power is nonexclusive. For example, a power to appoint "amongst the testator's children" would be a nonexclusive power, and the donee would have only a discretion as to the amount which each should receive.⁹⁰ Under a nonexclusive power, where a number of persons or a class are named as donees, if no appointment is made, the court will give the estate to all the donees, in equal shares, according to the maxim that equality is equity.⁹¹ Until appointment,

⁸⁵ *Thompson v. Garwood*, 3 Whart. (Pa.) 287, 31 Am. Dec. 502; *Wright v. Wright*, 41 N. J. Eq. 382, 4 Atl. 855. And see, as to powers under the New York statute, which establishes a new classification, *Jennings v. Conboy*, 73 N. Y. 280; *Coleman v. Beach*, 97 N. Y. 545. And compare *Appeal of APPLETON*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

⁸⁶ *Hood v. Haden*, 82 Va. 588; *Varrell v. Wendell*, 20 N. H. 431; *Stuyvesant v. Neil*, 67 How. Prac. (N. Y.) 16; *In re Farncombe's Trusts*, 9 Ch. Div. 652.

⁸⁷ *Horwitz v. Norris*, 49 Pa. 213; *Carson v. Carson*, 62 N. C. 57; *Little v. Bennett*, 58 N. C. 156.

⁸⁸ *Ingraham v. Meade*, 3 Wall. Jr. 32, Fed. Cas. No. 7,045.

⁸⁹ *Drake v. Drake*, 56 Hun, 590, 10 N. Y. Supp. 183; *Glenn v. Glenn*, 21 S. C. 308; *Varrell v. Wendell*, 20 N. H. 431.

⁹⁰ *Walsh v. Wallinger*, 2 Russ. & M. 78; *Gainsford v. Dunn*, L. R. 17 Eq. 405. See for applications, *Wilson v. Piggott*, 2 Ves. Jr. 351; *Ricketts v. Loftus*, 4 Younge & C. 519; *Paske v. Haselfoot*, 33 Beav. 125. If only one child, the whole could be appointed to that child. *Bray v. Bree*, 2 Clark & F. 453. As to "illusory appointments," see *infra*.

⁹¹ *Withers v. Yeadon*, 1 Rich. Eq. (S. C.) 324; *Harding v. Glyn*, 1 Atk. 469; *In re Phene's Trusts*, L. R. 5 Eq. 346; *Casterton v. Sutherland*, 9 Ves. 445; *Wilson v. Duguid*, 24 Ch. Div. 244. See, also, *Faulkner v. Wynford*, 15 Law J. Ch. 8.

the uses revert to the grantor, unless otherwise provided,⁹² as would be the case when the estate is given to the donee for life, with a power of appointing the remainder.⁹³

CLASSIFICATION OF POWERS OF APPOINTMENT AS TO DUTY OF EXECUTION

275. Powers with reference to the mandatory or discretionary duty of their execution may be classified as:

- (a) Powers in trust; and
- (b) Mere powers.

Powers in Trust and Mere Powers

As a rule, powers are distinguished from trusts, in that the courts will compel the execution of a trust, but will not compel the execution of a power.⁹⁴ There are powers, however, which are in the nature of trusts; that is, where the donee of the power is a trustee for the execution of the power.⁹⁵ Distinguished from such powers, a power whose execution is entirely discretionary with the donee is referred to as a "mere power."⁹⁶ Under some of the statutes, powers in trust are defined as either general or special, and a general power in trust is defined as one where any person or class of persons other than the grantee of the power is designated as entitled to the proceeds, or other benefits to result from its execution; a special power in trust being defined as (1) where the disposition or charge which it authorizes is limited to be made to a person, or class of persons, other than the grantee, or (2) where a person, or a class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power.⁹⁷

⁹² See *Lambert v. Thwaites*, L. R. 2 Eq. 151.

⁹³ *Ward v. Amory*, 1 Curt. 419, Fed. Cas. No. 17,146; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23.

⁹⁴ See *infra*.

⁹⁵ 1 Sugden, Powers, 588.

⁹⁶ 1 Sugden, Powers, 593.

⁹⁷ 1 Rev. St. N. Y. pt. 2, c. 1, tit. 2, p. 734, §§ 94, 95; Rev. Laws Minn. 1905, §§ 3287, 3288. And see *Murray v. Miller*, 178 N. Y. 316, 70 N. E. 870; *Hershey v. Bank*, 71 Minn. 255, 73 N. W. 967.

EXTINGUISHMENT OF POWERS

276. Powers may be extinguished:.

- (a) By execution.
- (b) By death of one whose consent to the execution is required.
- (c) By alienation in certain cases of the estate to which the power is appendant.
- (d) By release, unless the power is simply collateral.
- (e) By failure of the object for which created.

Extinguishment

A power is, of course, extinguished by its execution, and any further power reserved in the instrument of execution would not be the same, but a new power.⁹⁸ The death of one whose consent to the execution of the power is required also destroys the power.⁹⁹ The alienation of the estate to which the power is annexed, providing such alienation is inconsistent with the exercise of the power, destroys the power, in whole or in part, because the donee will not be permitted to execute the power in derogation of his conveyance of the estate.¹ So a partial alienation of the estate might suspend or qualify the power; as, should the donee make a lease, an estate created by a subsequent execution of the power would be postponed until the termination of the lease.² An absolute alienation, however, may be made, without extinguishing the power, provided nothing is done in derogation of the alienee's estate,³ and, as a rule, a power in gross is not affected by an alienation of the donee's estate.⁴

All powers, excepting those simply collateral⁵ and powers in

⁹⁸ *Hele v. Bond*, Prec. Ch. 474; *Hatcher v. Curtis*, Freem. Ch. 61.

⁹⁹ *Kissam v. Dierkes*, 49 N. Y. 602; *Powles v. Jordan*, 62 Md. 499. But see *Leeds v. Wakefield*, 10 Gray (Mass.) 514; *Sohier v. Williams*, 1 Curt. 479, Fed. Cas. No. 13,159.

¹ *Foakes v. Jackson*, 1 Ch. 807, 69 L. J. Ch. 352 (1900); *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Parkes v. White*, 11 Ves. 209; *Bringle v. Goodson*, 4 Bing. N. C. 726. So a recovery extinguishes, *Smith v. Death*, 5 Madd. 371; *Savile v. Blacket*, 1 P. Wms. 777; or a fine, *Bickley v. Guest*, 1 Russ. & M. 440; *Walmsley v. Jowett*, 23 Eng. Law & Eq. 353. And see *Hole v. Escott*, 2 Keen, 444.

² *Noel v. Henley*, McClel. & Y. 302.

³ *Leggett v. Doremus*, 25 N. J. Eq. 122; *Laws of Eng.* vol. 23, p. 65, n.

⁴ 1 Sugden, Powers, 85; *Foakes v. Jackson*, [1900] 1 Ch. 807, 69 L. J. Ch. 352; *In re Hancock*, [1896] 2 Ch. 173, 65 L. J. Ch. 690; *Maundrell v. Maundrell*, 10 Ves. 246b. But see *Doe v. Britain*, 2 Barn. & Ald. 93.

⁵ *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. 307. See, also, *Wilks v. Burns*, 60 Md. 64; *Learned v. Tallmadge*, 26 Barb. (N. Y.) 443.

trust,⁶ may be released by the donee, and thus extinguished;⁷ that is, they may be released to one having a freehold in possession, reversion, or remainder, and so destroyed.⁸ The rule that a power simply collateral cannot be destroyed by the donee is changed by statute, however, in England,⁹ and in that country, since January 1, 1882, a person to whom any power is given, whether coupled with an interest or not, may release it by deed, or contract not to exercise it.¹⁰ Where the execution of a power becomes impossible,¹¹ or when the object for which it was created has failed, the power ceases and is destroyed.¹² As a rule, the doctrine of merger does not apply to powers, since a donee may have both an estate and a power.¹³ Thus the fee may be in the donee, with a general power of appointment. In such a case, the fee will be divested by the execution of the power.¹⁴ It has been held, however, that a power given to the owner of a particular estate, whether appendant or in gross, is extinguished by his acquisition of the fee.¹⁵ Equity, however, will interfere, in proper cases, in order to give effect to the intention of the parties.¹⁶

⁶ *Atkinson v. Dowling*, 33 S. C. 414, 12 S. E. 93; *Lewis v. Howe*, 174 N. Y. 340, 66 N. E. 975, 1101; *In re Eyre*, 49 L. T. Rep. N. S. 259.

⁷ *Hill v. Hill*, 81 Ga. 516, 8 S. E. 879; *Norris v. Thomson*, 19 N. J. Eq. 307; *Dooper v. Noelke*, 5 Daly (N. Y.) 413; *Neilson's Appeal*, 10 Sadler (Pa.) 558, 13 Atl. 943.

⁸ *De Wolf v. Gardiner*, 9 R. I. 145; *Grosvenor v. Bowen*, 15 R. I. 549, 10 Atl. 589; *Albany's Case*, 1 Coke, 110b.

⁹ Conveyancing Act of 1881.

¹⁰ Laws of Eng. vol. 23, p. 64.

¹¹ *Hetzel v. Barber*, 69 N. Y. 1; *Sharpsteen v. Tillou*, 3 Cow. (N. Y.) 651.

¹² *Hetzel v. Barber*, 69 N. Y. 1; *Sharpsteen v. Tillou*, 3 Cow. (N. Y.) 651; *Smith's Lessee v. Folwell*, 1 Bin. (Pa.) 546; *Bates v. Bates*, 134 Mass. 110, 45 Am. Rep. 305. But see *Ely v. Dix*, 118 Ill. 477, 9 N. E. 62 (a partial failure).

¹³ *Benesch v. Clark*, 49 Md. 497; *Henderson v. Vaulx*, 10 Yerg. (Tenn.) 30; *Sing v. Leslie*, 2 Hem. & M. 68, 33 L. J. Ch. 549.

¹⁴ *Maundrell v. Maundrell*, 10 Ves. Jr. 265, 32 Eng. Reprint, 839; *Richardson v. Harrison*, 16 Q. B. D. 85, 54 L. T. Rep. N. S. 456.

¹⁵ *Cross v. Hudson*, 3 Bro. C. C. 31 (1789).

¹⁶ Laws of Eng. vol. 23, p. 66, r.

RIGHTS OF CREDITORS

277. As a rule creditors of the donee of a power have no rights in the subject-matter of the power.

EXCEPTION—When, however, the power is general, creditors may enforce their claims against a voluntary appointee. Creditors of the appointee may enforce their claims against his estate after appointment to him, but cannot compel the execution of the power.

EXCEPTION—In some states, however, by statute, creditors may compel the execution of a beneficial power.

Under a special power in which the donee has no beneficial interest, his creditors have no rights in the subject-matter of the power.¹⁷ Likewise, before the execution of a general power, equity will not hold the subject-matter of the power as assets of the donee for the benefit of his creditors, against the donor or such persons to whom the property is limited in default of non-execution.¹⁸ By statute, however, in some states, when an absolute power of disposition of the property is given to one who has in it a particular estate for years or for life, the donee has the fee, which becomes subject to the claims of his creditors, providing the power is not executed.¹⁹ When a general power, either by deed or will, is executed in favor of a mere volunteer, that is, not a bona fide purchaser of value, equity will permit the creditors of the donee to seize the property in the hands of such voluntary appointee.²⁰ This rule does not apply, however, against a bona fide purchaser.²¹ Creditors of the appointee under a power may levy on the lands after the power is executed, but they cannot compel an execution, even in cases of special powers.²² But in several states, including New York, Michigan, Wisconsin, and

¹⁷ *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694.

¹⁸ *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143; *Gilman v. Bell*, 99 Ill. 144; *Crawford v. Langmaid*, 171 Mass. 309, 50 N. E. 606; *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908.

¹⁹ Code Ala. 1907, § 3423; Laws N. Y. 1896, c. 547, § 129; St. 1898, Wis. § 2108.

²⁰ *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694; *Tallmadge v. Sill*, 21 Barb. (N. Y.) 34; *Clapp v. Ingraham*, 126 Mass. 200; *Knowles v. Dodge*, 1 Mackey (D. C.) 66; *Wales' Adm'r v. Bowdish's Ex'r*, 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819; *Lassells v. Cornwallis*, 2 Vern. 465; *Holmes v. Coghill*, 12 Ves. 206.

²¹ *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143; *Hart v. Middlehurst*, 3 Atk. 371, 26 Eng. Reprint, 1014.

²² 2 Sugd. Powers, 102.

Minnesota, it is provided by statute that the execution of a beneficial power—that is, a special power under which the debtor could compel an appointment in his favor—may be compelled by the creditors of the one entitled to the appointment.²³

EXECUTION OF POWERS

278. The execution of powers is subject to the following general rules:

- (a) It must be executed by the donee or donees named.
- (b) It must be executed within a reasonable time.
- (c) It must be executed in strict accordance with its terms.
- (d) The defective execution of a power may be corrected in equity.
- (e) The execution of a power in trust may be compelled in equity.
- (f) When the execution of a power is excessive, the excess will be void.

By Whom Executed

As a rule a power can be executed only by the person or persons named as the donee or donees in the instrument creating the power,²⁴ and where discretionary power is given to one in whom special confidence is reposed, he cannot delegate it to another,²⁵ and his refusal to act will render the power nugatory and void.²⁶ In general, no one can execute a power unless he has capacity to transfer real estate. An infant, however, may execute a power simply collateral or in gross.²⁷ He cannot, however, execute a power appendant.²⁸ A married woman, also, may execute, without the consent of her husband, any power given to her, whether she became the donee of the power before or after her marriage.²⁹ Before the married woman's property acts, this was the usual

²³ 1 Stim. Am. St. Law, § 1657.

²⁴ Koch v. Robinson, 83 S. W. 111, 26 Ky. L. Rep. 969; Pratt v. Rice, 7 Cush. (Mass.) 209.

²⁵ Hill v. Peoples, 80 Ark. 15, 95 S. W. 990; Shelton v. Horner, 5 Metc. (Mass.) 462; Coleman v. Beach, 97 N. Y. 545; Bohlen's Estate, 75 Pa. 304.

²⁶ Hinson v. Williamson, 74 Ala. 180.

²⁷ Sheldon's Lessee v. Newton, 3 Ohio St. 494, 507; Hill v. Clark, 4 Lea (Tenn.) 405; In re D'Angibau, 15 Ch. D. 228, 43 L. T. Rep. N. S. 135.

²⁸ Hill v. Clark, 4 Lea (Tenn.) 405; Thompson v. Lyon, 20 Mo. 155, 61 Am. Dec. 599. But cf. In re Cardross' Settlement, 7 Ch. Div. 728.

²⁹ Breit v. Yeaton, 101 Ill. 242; Osgood v. Bliss, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; Lippincott v. Wickoff, 54 N. J. Eq. 107, 33 Atl. 305; Coryell v. Dunton, 7 Pa. 530, 49 Am. Dec. 489.

mode of conferring upon a married woman a right to deal with her separate estate.⁸⁰ Under a will creating powers, if no donees are named, the executors may execute the power.⁸¹ If two or more donees are named in the instrument creating the power, all must join in the execution,⁸² unless otherwise provided. Such powers survive, however, after the death of one of the donees, and may be executed by the survivor,⁸³ unless the power is given to the several donees by name, showing that personal trust and confidence is imposed in them,⁸⁴ and even in these cases the power may be exercised by the survivors, if coupled with an interest.⁸⁵ Where a power is not a personal one, but is merely given to a class, as for example, "my executors," any person holding the office may execute it.⁸⁶ If, however, a power is given to executors specially named, they may appoint under the power, though they have resigned as executors.⁸⁷ Where no personal trust or confidence is imposed on the donee of a power, it may be executed by attorney;⁸⁸ otherwise, the donee must use his own discretion in making the appointment.⁸⁹ The mere execution, however, of an instrument may in all cases be by attorney.⁴⁰ A general power may be transferred, and when a power is given to a person and his assigns, it may be executed by his assigns in fact or in law.⁴¹

⁸⁰ *Claffin v. Van Wagoner*, 32 Mo. 252; *Rush v. Lewis*, 21 Pa. 72; *Ladd v. Ladd*, 8 How. (U. S.) 10, 12 L. Ed. 967.

⁸¹ *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Silverthorn v. McKinster*, 12 Pa. 67. Cf. *Doyley v. Attorney General*, 4 Vin. Abr. 435, pl. 16, where a power was executed by the court.

⁸² *Shelton v. Homer*, 5 Metc. (Mass.) 462; *Wilder v. Ranney*, 95 N. Y. 7; *Hertell v. Van Buren*, 3 Edw. Ch. (N. Y.) 20. Where executors are donees, less than all may execute if one or more refuse to act. *Bonifant v. Greenfield*, Cro. Eliz. 80; *Zebach's Lessee v. Smith*, 3 Bin. (Pa.) 69, 5 Am. Dec. 352.

⁸³ *Philadelphia Trust, Safe Deposit & Ins. Co. v. Lippincott*, 106 Pa. 295; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Lee v. Vincent*, Cro. Eliz. 26; *Houell v. Barnes*, Cro. Car. 382; *Lane v. Debenham*, 11 Hare, 188.

⁸⁴ *Peter v. Beverly*, 10 Pet. (U. S.) 532, 563, 9 L. Ed. 522; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Anon.*, 2 Dyer, 177a, pl. 32.

⁸⁵ *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635; *Parrott v. Edmondson*, 64 Ga. 332.

⁸⁶ *Druid Park Heights Co. of Baltimore City v. Oettinger*, 53 Md. 46; *Drummond v. Jones*, 44 N. J. Eq. 53, 13 Atl. 611; *Evans v. Chew*, 71 Pa. 47.

⁸⁷ *Clark v. Tainter*, 7 Cush. (Mass.) 567; *Tainter v. Clark*, 13 Metc. (Mass.) 222.

⁸⁸ *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449.

⁸⁹ *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Hood v. Haden*, 82 Va. 588.

⁴⁰ *Singleton v. Scott*, 11 Iowa, 589; *Bales v. Perry*, 51 Mo. 449.

⁴¹ *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Strother v. Law*, 54 Ill. 413; *Druid Park Heights Co. of Baltimore City v. Oettinger*, 53 Md. 46; *Collins v. Hopkins*, 7 Iowa, 463.

Time of Execution

It is a general rule that, when no time is specified, a donee is entitled to a reasonable time for the execution of a power,⁴² the circumstances of each case determining what is a reasonable time.⁴³ Moreover, even when the time is specified, it is the general rule that such an instruction is merely directory.⁴⁴ When, however, by reason of the object for which a power is created, or by express direction in the instrument creating the power, it must be exercised within a certain time, any execution after that time will be void.⁴⁵ Yet even to this broad rule there are many exceptions. The courts look for the main purpose of the donor, and when they conclude that the sale or other appointment directed by him was his main purpose, and that the time was inserted only as a matter of choice or preference, they will sustain an execution of the power at some other time than the one directed.⁴⁶ In case a power is given to be executed upon some contingency, it may be executed before the event happens, although it will not take effect until the subsequent happening of the event.⁴⁷

Mode of Execution

As a rule, a power must be strictly executed according to its terms.⁴⁸ At common law no particular mode of execution of a

⁴² *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468; *In re Weston's Estate*, 91 N. Y. 502; *Huston's Appeal*, 9 Watts (Pa.) 472. At any time which falls within the general purpose. *Moores v. Moores*, 41 N. J. Law, 440; *Cotton v. Burkelman*, 142 N. Y. 160, 36 N. E. 890, 40 Am. St. Rep. 584.

⁴³ Any time during the donee's life may be good. 1 Sugd. Powers, 346; *Richardson v. Sharpe*, 29 Barb. (N. Y.) 222; *Bakewell v. Ogden*, 2 Bush (Ky.) 265; *Coleman v. Seymour*, 1 Ves. 209, 27 Eng. Reprint, 987.

⁴⁴ *Kidwell v. Brummagim*, 32 Cal. 436; *Hale v. Hale*, 137 Mass. 168; *Marsh v. Love*, 42 N. J. Eq. 112, 6 Atl. 889; *Mott v. Ackerman*, 92 N. Y. 539; *Fahnestock v. Fahnestock*, 152 Pa. 56, 25 Atl. 313, 34 Am. St. Rep. 623.

⁴⁵ *Wilkinson v. Buist*, 124 Pa. 253, 16 Atl. 856, 10 Am. St. Rep. 580; *Fidler v. Lash*, 125 Pa. 87, 17 Atl. 240; *Harvey v. Brisbin*, 50 Hun, 376, 3 N. Y. Supp. 676; *Harmon v. Smith*, 38 Fed. 482. So the power must not be exercised before the time directed. *Booraem v. Wells*, 19 N. J. Eq. 87; *Henry v. Simpson*, 19 Grant (N. C.) 522; *Jackson v. Ligon*, 3 Leigh (Va.) 161.

⁴⁶ *Snell's Ex'rs v. Snell*, 38 N. J. Eq. 119; *Shalter's Appeal*, 43 Pa. 83, 82 Am. Dec. 552; *Hale v. Hale*, 137 Mass. 168; *Hallum v. Silliman*, 78 Tex. 347, 14 S. W. 797.

⁴⁷ *Machir v. Funk*, 90 Va. 284, 18 S. E. 197; *Sutherland v. Northmore*, 1 Dick. 56, 21 Eng. Reprint, 188.

RULE AGAINST PERPETUITIES.—That the rule of perpetuities applies to powers has already been considered. See Ch. XVI, ante. And see *Appeal of APPLETON*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

⁴⁸ *O'Brien v. Flint*, 74 Conn. 502, 51 Atl. 547; *Breit v. Yeaton*, 101 Ill. 242; *Haslen v. Kean's Heirs*, 4 N. C. 700, 7 Am. Dec. 718.

power is required. It may be by a simple writing.⁴⁹ This, however, is changed by statute in several states, and the execution must be by deed or will, according to the provisions of the instrument creating the power, and accompanied by the same formalities as are required for a conveyance of realty.⁵⁰ If, however, the instrument prescribes the mode, it must be followed. For instance, a power to be executed by deed cannot be appointed by will, nor one to be executed by will be appointed by deed during the donee's lifetime.⁵¹ If the first execution of a power is void, it may be disregarded, and another execution be made.⁵² Moreover, where there is an execution of a power by will, it may be revoked by a subsequent will.⁵³

Intention to Execute

It was the former doctrine that an instrument would not be held to execute a power unless the intention to execute it appeared by reference either (1) to the subject-matter, or (2) to the power, or (3) unless it appeared that the instrument itself would be of no effect except as an execution of the power.⁵⁴ It is still the rule that the intention to execute a power must appear,⁵⁵ but the cases do not limit the evidence of intent to one of the three ways stated above. Intention may be shown by express reference to the subject-matter,⁵⁶ but a direct reference to the power itself is not necessary,⁵⁷ and, in general, the intention is to be collected, as in other matters, from the entire instrument, and from all the circumstances of the case.⁵⁸ The question arises especially in

⁴⁹ *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141; *Cueman v. Broadnax*, 37 N. J. Law, 508; *Yard v. Railroad Co.*, 131 Pa. 205, 18 Atl. 874; *Ladd v. Ladd*, 8 How. (U. S.) 10, 30, 12 L. Ed. 967; *Christy v. Pulliam*, 17 Ill. 59.

⁵⁰ 1 Stim. Am. St. Law, § 1659.

⁵¹ *Moore v. Dimond*, 5 R. I. 121; *Weir v. Smith*, 62 Tex. 1; *Porter v. Thomas*, 23 Ga. 467.

⁵² 1 Sugd. Powers, 355.

⁵³ 1 Sugd. Powers, 461.

⁵⁴ *Denn v. Roake*, 6 Bing. 475.

⁵⁵ *Goff v. Pensenhafer*, 190 Ill. 200, 60 N. E. 110; *Bullerdick v. Wright*, 148 Ind. 477, 47 N. E. 931; *Weinstein v. Weber*, 178 N. Y. 94, 70 N. E. 115; *Wetherill v. Wetherill*, 18 Pa. 265.

⁵⁶ *Goff v. Pensenhafer*, 190 Ill. 200, 60 N. E. 110; *Loring v. Wilson*, 174 Mass. 132, 54 N. E. 502; *Papin v. Piednoir*, 205 Mo. 521, 104 S. W. 63; *Hutton v. Benkard*, 92 N. Y. 295.

⁵⁷ *Warner v. Insurance Co.*, 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962; *White v. Hicks*, 33 N. Y. 383; *Munson v. Berdan*, 35 N. J. Eq. 376; *Roach v. Wadham*, 6 East, 289.

⁵⁸ *Middlebrooks & Co. v. Ferguson*, 126 Ga. 232, 55 S. E. 34; *Rinkenberger v. Meyer*, 155 Ind. 152, 56 N. E. 913; *Ladd v. Chase*, 155 Mass. 417, 29 N. E. 637; *Brown v. Trust Co.*, 51 Hun, 386, 4 N. Y. Supp. 422; *Drusadow v. Wilde*, 63 Pa. 170.

the case of wills whether the testator has exercised powers of which he was the donee, or has merely disposed of his own property. As held by many cases, a power of appointment is not executed by a general devise or bequest "of all the testator's estate real and personal," where no reference is made to a power or its subject-matter.⁵⁹ On the other hand, such a general devise or bequest, as held in other states, will carry with it the execution of a power unless the contrary appears.⁶⁰ This latter view has been enacted into a statute in England⁶¹ and in many of our states.⁶²

Defective Execution

While equity cannot compel execution,⁶³ except where the power is in the nature of a trust,⁶⁴ yet it may correct an execution defective in form, as, for example, the omission of a seal, the requisite number of witnesses, or of signatures.⁶⁵ Equity relieves, however, only in favor of those having equities superior to those against whom the relief is asked.⁶⁶ Accordingly, it will refuse to act in favor of mere volunteers, legatees, brothers and sisters, or even a husband. It will relieve, however, in favor of a wife or children,⁶⁷ of creditors,⁶⁸ of purchasers for value,⁶⁹ and for a

⁵⁹ Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136; Balls v. Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545; Keefer v. Schwartz, 47 Pa. 503; In re Mayhew, [1901] 1 Ch. 677, 70 L. J. Ch. 428.

⁶⁰ Tudor v. Vail, 195 Mass. 18, 80 N. E. 590; Hassam v. Hazen, 156 Mass. 93, 30 N. E. 469; Emery v. Haven, 67 N. H. 503, 35 Atl. 940; Johnston v. Knight, 117 N. C. 122, 23 S. E. 92.

⁶¹ Wills Act, 1 Vict. c. 26, § 27 (1837).

⁶² Ky. St. 1903, § 4845; Laws Md. 1888, c. 249; Laws N. Y. 1896, c. 547, § 156, Act Pa. June 4, 1879 (P. L. 88); Code Va. 1904, § 2526; St. Wis. 1898, § 2151.

⁶³ Bond v. Ramsey, 72 Ill. 550; Robeson v. Shotwell, 55 N. J. Eq. 318, 36 Atl. 780; Ward v. Stanard, 82 App. Div. 386, 81 N. Y. Supp. 906; Stableton v. Ellison, 21 Ohio St. 527.

⁶⁴ *Infra*.

⁶⁵ American Freehold Land-Mortgage Co. v. Walker, 31 Fed. 103. See, also, Breit v. Yeaton, 101 Ill. 242; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Justis v. English, 30 Grat. (Va.) 565, 574.

⁶⁶ Lines v. Darden, 5 Fla. 51.

⁶⁷ Bruce v. Bruce, L. R. 11 Eq. 371, 40 L. J. Ch. 141; Hervey v. Hervey, 1 Atk. 561, 26 Eng. Reprint, 352; Tollett v. Tollett, 2 P. Wms. 489, 24 Eng. Reprint, 828.

⁶⁸ Evans v. Saunders, 1 Drew, 415, 22 L. J. Ch. 471; Hervey v. Hervey, 1 Atk. 561, 26 Eng. Reprint, 352.

⁶⁹ Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Beatty v. Clark, 20 Cal. 11; Morgan v. Milman, 3 De Gex, M. & G. 24. See, however, Blove v. Sutton, 3 Mer. 237; Sayer v. Sayer, 7 Hare, 377, affirmed Innes v. Sayer, 3 Macn. & G. 606; Pepper's Will, 1 Pars. Eq. Cas. (Pa.) 436.

charity.⁷⁰ When, moreover, an execution of a power has been made by a will, instead of by a deed as directed, equity will afford relief in a proper case.⁷¹

Compelling Execution

The execution of a power, will be compelled by equity only where the power is mandatory, or is a power in trust;⁷² that is, a power held in trust, without any discretion as to its exercise, and in which the donee has no beneficial interest, will be enforced in equity in conformity with the trust, although not executed by the donee of the power.⁷³ Thus, where a power is given to trustees to sell property and apply the proceeds upon trusts, and the trustees die without executing the power, the court will order a sale, and compel the heirs to join in the conveyance.⁷⁴ A court of equity will not, however, as a rule, execute or control a discretionary power,⁷⁵ although it may do so in special circumstances.⁷⁶

Excessive Execution

Where the execution of a power is excessive, the excess will be void, but the execution within the limits of the power will be good.⁷⁷ For example, the execution of a power may be excessive as to the object, as when, under a special power, estates are given to some who cannot be appointees;⁷⁸ or it may be excessive as to amount of subject-matter, in case more is given than the donee had power to appoint.⁷⁹ Again, a power to sell does not authorize the donee to mortgage, in the absence of expressions showing

⁷⁰ *Innes v. Sayer*, 16 Jur. 21, 42 Eng. Reprint, 393; *Atty. Gen. v. Burdett*, 2 Vern. Ch. 755, 23 Eng. Reprint, 393.

⁷¹ *Bruce v. Bruce*, L. R. 11 Eq. 371, 40 L. J. Ch. 141; *Tollet v. Tollet*, 2 P. Wms. 489; *Sneed v. Sneed*, Amb. 64.

⁷² *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533; *Doe ex dem. Gossom v. Ladd*, 77 Ala. 223.

⁷³ *Kintner v. Jones*, 122 Ind. 148, 23 N. E. 701; *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Smith v. Floyd*, 140 N. Y. 337, 35 N. E. 606; *Fahnestock v. Fahnestock*, 152 Pa. 56, 25 Atl. 313, 34 Am. St. Rep. 623.

⁷⁴ *Sugd. Powers*, 588.

⁷⁵ *Sugd. Powers*, 258, 659; *Crozier v. Hoyt*, 97 Ill. 23; *Eldredge v. Heard*, 106 Mass. 579; *Towler v. Towler*, 142 N. Y. 371, 36 N. E. 869; *In re Ingles' Estate*, 76 Pa. 430.

⁷⁶ *Taussig v. Reel*, 134 Mo. 530, 34 S. W. 1104.

⁷⁷ *Loring v. Blake*, 98 Mass. 253; *Ready v. Kearsley*, 14 Mich. 215; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; *Knox County Com'rs v. Nichols*, 14 Ohio St. 260. And see *Appeal of APPLETON*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, *Burdick Cas. Real Property*.

⁷⁸ *Alexander v. Alexander*, 2 Ves. Sr. 640; *Sadler v. Pratt*, 5 Sim. 632.

⁷⁹ *Knox County Com'rs v. Nichols*, 14 Ohio St. 260. See for executions held good, *Whitlock's Case*, 8 Coke, 69b; *Trollope v. Linton*, 1 Sim. & S. 477; *Talbot v. Tipper*, Skin. 427; *Thwayles v. Dye*, 2 Vern. 80.

such intention.⁸⁰ Also, a power to mortgage does not authorize a sale,⁸¹ although a mortgage may be in the form of a trust deed or a mortgage with a power of sale, if such is the usual mode of effecting a mortgage.⁸² A power to appoint a fee includes, however, a power to create lesser estates, because such a power is equal to ownership in fee, and the owner of a fee simple may create any estate he chooses.⁸³ When, in any case, the excess can be separated, the execution as to the remainder will be valid. For instance, in case of excessive execution as to the objects of the power, the estates appointed to those who could not take as appointees would be void, and the others good.⁸⁴ Also, a lease for 40 years, under a power to lease for 21 years, would be good as a lease for 21 years, the excess only being void.⁸⁵ If conditions, moreover, are improperly annexed to the appointment, the conditions will be treated as void, and the appointment freed from them.⁸⁶

FRAUDULENT APPOINTMENTS

279. Good faith must exist in the execution of a special or limited power; otherwise, the execution is a fraud on the power and may be set aside.

Fraud on Powers

Under a general power, as previously stated,⁸⁷ the donee may appoint the estates to any person he may choose, even himself.

⁸⁰ *Green v. Claiborne*, 83 Va. 386, 5 S. E. 376; *Norris v. Woods*, 89 Va. 873, 17 S. E. 552; *Smith v. Morse*, 2 Cal. 524. But see *Lancaster v. Dolan*, 1 Rawle (Pa.), 231, 18 Am. Dec. 625; *Zane v. Kennedy*, 73 Pa. 182.

⁸¹ 1 Sugd. Powers, 514.

⁸² *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25; *Jesup v. Bank*, 14 Wis. 331; *Bolles v. Munnerlyn*, 83 Ga. 727, 10 S. E. 365. A power to mortgage will authorize a renewal of a previous mortgage. *Warner v. Insurance Co.*, 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962.

⁸³ *Williams v. Woodard*, 2 Wend. (N. Y.) 487; *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163. But see *Seymour v. Bull*, 3 Day (Conn.) 388; *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590.

⁸⁴ 2 Sugd. Powers, 66. Proper appointees will take the whole. *Alexander v. Alexander*, 2 Ves. Sr. 640; *Sadler v. Pratt*, 5 Sim. 632; *In re Kerr's Trusts*, 4 Ch. Div. 600.

⁸⁵ *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Powcey v. Bowen*, 1 Ch. Cas. 23; *Campbell v. Leach*, Amb. 740.

⁸⁶ 2 Sugd. Powers (Ed. 1856) 84; *Blomfield v. Eyre*, 5 C. B. 713. See, however, *In re Brown's Trust*, L. R. 1 Eq. 74.

⁸⁷ *Supra*.

Consequently, in the execution of such a power no fraud can be practiced upon the rights or interests of others. In case, however, of a special or limited power, the donee may by executing the power for purposes not intended by the donor, or for corrupt purposes, be guilty of a fraud upon the power.⁸⁸ Thus, where a donee executes a power so as to benefit himself, as where, for example, a father having a power of appointment to one of his children appoints to one seriously ill, so that he may be the heir of the child in case of his death.⁸⁹ Moreover, a parent who executes a power in favor of children cannot bargain with them for the purchase of other expectant shares.⁹⁰ The burden of proving the corrupt purpose is on the person who attempts to avoid the appointment, and mere motives of anger and resentment are immaterial.⁹¹

Illusory Appointments

In the case of the execution of nonexclusive powers, which it will be remembered are powers where the donee can appoint to all of the class of persons designated,⁹² as, for example, a power to appoint "amongst all the testator's children," there may be such an uneven division of the property that, although it may not be strictly fraudulent, it may, nevertheless, be very unfair to certain members of the class. Such appointments, where only a mere nominal share is given to one or more of the class, are said to be "illusory."⁹³ The former rule in England, until changed by statute, was that such appointments were invalid, and that each member of the class was entitled to receive a reasonable share, although it was not necessary that they should all receive equal shares.⁹⁴ This would seem to be the prevailing rule in this country at the present time.⁹⁵ In England, however, a statute authorizes a donee to exercise his discretion in such cases, even to the extent of excluding certain members of the class altogether.⁹⁶

⁸⁸ *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523; *Stocker v. Foster*, 178 Mass. 591, 60 N. E. 407; *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489; *Trout v. Pratt*, 106 Va. 441, 56 S. E. 165. 8 L. R. A. (N. S.) 398.

⁸⁹ *Wellesley v. Mornington*, 2 Kay & J. 143.

⁹⁰ *Cuningham v. Anstruther*, L. R. 2 Sc. & Div. 223.

⁹¹ *Cuningham v. Anstruther*, L. R. 2 Sc. & Div. 223.

⁹² *Supra*.

⁹³ *Burrell v. Burrell*, Amb. 660; *Butcher v. Butcher*, 1 Ves. & B. 79; *Sugden on Powers*, 449, 938.

⁹⁴ *Sugden on Powers*, 449, 938; *Butcher v. Butcher*, 1 Ves. & B. 79.

⁹⁵ *Hatchett v. Hatchett*, 103 Ala. 556, 16 South. 550; *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523; *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. 160; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232.

⁹⁶ 37 & 38 Vict. c. 37, § 1 (1874).

CODIFICATION OF POWERS

280. A few states have reduced the law of powers to a code.

Codification of Powers

While in most states, if not all, there are various statutes, already referred to in the preceding pages, which regulate or modify in particular ways the general law of powers; yet, in a few states, the entire law upon the subject has been reduced to a formal code.⁹⁷ This is true of Michigan, Minnesota, New York, North Dakota, South Dakota, and Wisconsin.⁹⁸ These codes, in general, abolish powers as they previously existed, and then establish a law for powers de novo. In many respects these codes follow the common law, while in many other ways they depart from it. In order, however, to construe these statutes, it has frequently been found necessary to resort to the English and American decisions in general. The definition of a power under the New York statute has already been given.⁹⁹ Powers are divided into four classes, general, special, beneficial, and in trust. Attention has also been previously called to these statutory definitions of general and special powers, especially general and special powers in trust.¹⁰⁰ By beneficial powers are meant powers that are for the benefit of the donee, no other person having any interest in its execution. Under such statutes all beneficial powers except those specifically enumerated in the statute are void.¹⁰¹ It should be further noted that the New York code substitutes the words "grantor" and "grantee" for "donor" and "donee," a fact which causes, at times, no little confusion.

⁹⁷ 1 Stim. Am. St. Law, §§ 1650-1659.

⁹⁸ 1 Stim. Am. St. Law, § 1652.

⁹⁹ Supra.

¹⁰⁰ Supra.

¹⁰¹ Laws N. Y. 1896, c. 547, § 116; *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; Rev. Laws Minn. 1905, §§ 3272, 3285; *Hershey v. Bank*, 71 Minn. 255, 73 N. W. 967.

CHAPTER XXVII

DEEDS AND THEIR REQUISITES

- 281. Deed Defined.
- 282. Requisites of Deeds.
- 283. Formal Parts of Deeds.
- 284. Description of Property Conveyed.
- 285. The Habendum, Tenendum, and Conclusion.
- 286. Attestation of Deeds.
- 287. Acknowledgment of Deeds.
- 288. Recording of Deeds.
- 289. Delivery and Acceptance of Deeds.

DEED DEFINED

281. A deed is a writing sealed and delivered. It may contain any contract. The term is generally used, however, to mean a formal writing for the purpose of transferring the title to real property.

Coke, in referring to deeds in general, says¹ that, in the understanding of the common law, a deed "is an instrument written in parchment or paper, whereunto ten things are necessarily incident, viz.: (1) Writing; (2) in parchment or paper; (3) a person able to contract; (4) by a sufficient name; (5) a person able to be contracted with; (6) by a sufficient name; (7) a thing to be contracted for; (8) apt words required by law; (9) sealing; (10) delivery." A definition frequently employed in modern times is that a deed is a writing sealed and delivered.² At common law, the word "deed" implies a sealed instrument,³ although under modern statutes a seal may be no longer required.⁴ A deed did not have to be signed, however, prior to the statute of frauds.

¹ Co. Litt. 35b.

² From Latin *factum*, a thing *done, completed*; a matter of fact, as opposed to a matter of law.

³ *People v. Watkins*, 106 Mich. 437, 439, 64 N. W. 324; *McMurtry v. Brown*, 6 Neb. 368, 376; *McLeod v. Lloyd*, 43 Or. 260, 269, 71 Pac. 795, 74 Pac. 491. See *JACKSON ex dem. GOUCH v. WOOD*, 12 Johns. (N. Y.) 73, *Burdick Cas. Real Property*.

⁴ In some states, the statutes expressly dispense with the necessity of a seal. Consult the local statutes. See, also, the following cases: *Tatum v. Tatum*, 81 Ala. 388, 1 South. 195; *Atlanta, K. & N. R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215; *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567 (construing Kansas statute); *Jerome v. Orman*, 66 Mich. 668, 33 N. W. 759.

At common law, a deed may contain any contract, executory or executed. It may be, for example, a bond, a mere agreement to convey, a bill of sale—in fact, any writing under seal. At the present time, however, the word is generally used in this country to mean a formal writing, with or without a seal, according to the local law, for the purpose of transferring real property.⁵ Consequently, under such a meaning, deeds are distinguished from mere agreements to convey lands.⁶ The usual instruments of conveyance, however, and also mortgages and leases, are generally included under the term “deed.” By statute, however, a deed has been defined as “any instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or less.”

Indentures and Deeds Poll

Deeds are either indentures or deeds poll. The former is an instrument executed and signed by both the grantor and the grantee. In its usual form, it is executed in duplicate. Originally the duplicates were cut apart, in the middle, by an indented or irregular line, which gave the name to this form of deed.⁷ One part was given to each party, and when the deeds were produced in court the irregular margins, if they fitted, were evidence that the instruments before the court were genuine. This division is no longer usual, and an indenture now means, properly speaking, only a deed executed by both parties. Conveyances of this kind usually begin with the words, “This indenture witnesseth.”⁸ A deed poll, on the other hand, is one executed by the grantor only, and binds the grantee by its provisions only by reason of his acceptance of it. A deed poll usually commences with the words, “Know all men by these presents, that I,” etc.⁹ It derives its name, and was distinguished from an indenture, from the fact that the parchment or paper on which it was written was shaved even or smooth at the

⁵ In England, the word “deed” is still used in its broader meaning. See *Deeds*, *Laws of Eng.* vol. 10, 357.

⁶ The term “deed” may include a chattel mortgage (*People v. Watkins*, 106 Mich. 437, 64 N. W. 324); a mortgage (*Hellman v. Howard*, 44 Cal. 100; *Sanders v. Riedinger*, 30 App. Div. 277, 51 N. Y. Supp. 937); and an instrument by which a mortgagee acknowledges payment and satisfaction of the mortgage (*Meserve v. Commonwealth*, 137 Mass. 109).

⁷ *Burrill, L. Dict.*; *Overseers of Poor of Hopewell Tp. v. Amwell Tp.*, 6 N. J. Law, 169, 175; *Bowen v. Beck*, 94 N. Y. 86, 89, 46 Am. Rep. 124.

⁸ *Martind. Conv.* (2d Ed.) § 61; *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Currie v. Donald*, 2 Wash. (Va.) 58; *Maule v. Weaver*, 7 Pa. 329.

⁹ *Goodwin v. Gilbert*, 9 Mass. 510.

top, i. e., "polled" (from Latin, pollitum), and not indented.¹⁰ In modern times, the distinction in this country is of little importance, and in practice many legal blanks, although intended for deeds poll, that is, for execution by the grantor only, begin with the words "This indenture witnesseth."

REQUISITES OF DEEDS

282. At the present time, the requisites of a valid deed of conveyance may be enumerated as follows:

- (a) A sufficient writing.
- (b) Competent parties.
- (c) Property to be conveyed.
- (d) Question of consideration.
- (e) Words sufficient to specify the conveyance.
- (f) Proper execution, including—
 - 1. Signing.
 - 2. Sealing (in some states).
 - 3. Attesting (in some states).
 - 4. Acknowledgment (in some states).
- (g) Delivery and acceptance.
- (h) Recording, in some states.

In the time of Blackstone, the requisites of a valid deed, as enumerated by that writer, were eight, namely: (1) Persons able to contract, and a thing, or subject-matter, to be contracted for; (2) a good and sufficient consideration; (3) a writing; (4) an orderly setting forth of the written matter; (5) the reading of the deed; (6) sealing and signing; (7) delivery; (8) the attestation.¹¹ With but slight modifications and changes, most of these matters are necessary at the present time.

Necessity of Writing

Prior to the statute of frauds, conveyances could be made by parol.¹² Conveyances and deeds are not, however, synonymous, and deeds, from their very definition,¹³ are, and were, always written. Deeds, moreover, must be written, or printed, on paper

¹⁰ 2 Blk. Comm. 296; Laws of Eng. vol. 10, 379.

¹¹ 2 Blk. Comm. 296-307

¹² 2 Blk. Comm. 297; Moss v. Anderson, 7 Mo. 337; Tempel v. Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686; Martin v. McCord, 5 Watts (Pa.) 493, 30 Am. Dec. 342; JACKSON ex dem. GOUCH v. WOOD, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

¹³ Supra.

or parchment.¹⁴ A deed cannot be written upon wood, stone, slate, leather, cloth, or steel,¹⁵ but only upon "parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted."¹⁶ While deeds should be written with ink, yet this is not necessary, for a deed may be executed in pencil, in print, with paint, by engraving, or photography, or in any other mode that represents visible words.¹⁷ When the deed is written in part and printed in part, and there is a conflict between the written and the printed parts, the written words have the greater weight and will control.¹⁸

Filling Blanks

When blanks are left in the deed, the deed is of no effect, unless it can be operative without the omitted words; and if the blanks are filled after delivery the deed is void.¹⁹ There is an exception to this, however, in case the subsequently filled-in matter is only such as would be implied by law.²⁰ Where the grantee's name is left blank, no title passes,²¹ unless filled in by proper authority before delivery.²² Some cases hold, however, that the grantee's name, which has been omitted, may be inserted according to the intention of the parties.²³ So, also, according to the weight of modern cases in this country, a deed may be delivered accompanied by parol power to fill blanks,²⁴ although the contrary is held in England and by a number of American cases.²⁵

¹⁴ Laws of Eng. vol. 10, 378 (c).

¹⁵ Laws of Eng. vol. 10, 378 (d).

¹⁶ Co. Litt. 35b.

¹⁷ Laws of Eng. vol. 10, 379 (g); 1 Devl. Deeds, § 136. See *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

¹⁸ Laws of Eng. vol. 10; 379 (g); Martind. Conv. (2d Ed.) § 15.

¹⁹ *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549.

²⁰ *United States v. Nelson*, 2 Brock. 64, Fed. Cas. No. 15,862, per Marshall, C. J.

²¹ *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49; *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 802; *Clark v. Butts*, 73 Minn. 361, 76 N. W. 199; *Hardin v. Hardin*, 32 S. C. 599, 11 S. E. 102.

²² *Exchange Nat. Bank of El Dorado v. Fleming*, 63 Kan. 139, 65 Pac. 213; *Thummel v. Holden*, 149 Mo. 677, 51 S. W. 404; *Bell v. Kennedy*, 100 Pa. 215; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90.

²³ *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734; *Devin v. Himer*, 29 Iowa, 300. But see *Chauncey v. Arnold*, 24 N. Y. 330; *Drury v. Foster*, 2 Wall. (U. S.) 24, 17 L. Ed. 780.

²⁴ *Schintz v. McManamy*, 33 Wis. 299; *Clark v. Allen*, 34 Iowa, 190; *Pence v. Arbuckle*, 22 Minn. 417; *Otis v. Browning*, 59 Mo. App. 326 (grantee's name).

²⁵ Though an element of fraud is generally present. *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Cooper v. Page*, 62 Me. 192.

Alterations

A deed must be completely written when it is delivered, and for this reason any alterations or interlineations in the instrument must be made before delivery,²⁶ though they may be added after the deed has been signed.²⁷ Blanks, however, after delivery, may be filled in the presence and with the consent of the maker, and such evidence will support a delivery of the corrected or completed deed. An alteration by a stranger to the instrument does not affect the validity of a deed,²⁸ and as to the effect of such alterations by the grantee the cases are conflicting. Some courts hold that the only effect is on the remedy, that is, that the grantee cannot bring suit on the deed,²⁹ while other courts hold that the validity of the deed is affected only as far as it is to be used in evidence.³⁰ Where alterations or interlineations are present in a deed, the authorities are in conflict as to the effect of such appearance upon the burden of proof. The general rule, however, is that the presumption is that the change was made before delivery, and that the burden is upon the person assailing the integrity of the instrument to show otherwise, since the law will presume honesty.³¹ On the other hand, many cases hold that alterations on the face of a deed or other instrument raise a presumption that they were made after execution, and require an explanation on the part of the person producing it. In still other cases it is held that the mere appearance of a change raises no presumption as to when or by whom the change was made.³²

Property to be Conveyed

In order that a deed may operate, there must be something to be conveyed.³³ At common law, a mere possibility of having an estate in land at a future time, known as an executory or contingent interest, cannot be conveyed,³⁴ yet where an attempt is made to

²⁶ *People to Use of Buffington v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Wallace v. Harmstad*, 15 Pa. 462, 53 Am. Dec. 603.

²⁷ *Stiles v. Probst*, 69 Ill. 382; *Penny v. Corwithe*, 18 Johns. (N. Y.) 499.

²⁸ *Robertson v. Hay*, 91 Pa. 242.

²⁹ *Herrick v. Malin*, 22 Wend. (N. Y.) 388; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 133, 47 Am. Dec. 299; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406.

³⁰ *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67.

³¹ *Franklin v. Baker*, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Rosenbloom v. Finch*, 37 Misc. Rep. 318, 76 N. Y. Supp. 902; *James v. Holdam*, 142 Ky. 450, 134 S. W. 435.

³² *Hagan v. Insurance Co.*, 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259.

³³ 2 Blk. Comm. 296.

³⁴ *Dart v. Dart*, 7 Conn. 255.

convey an expectancy, even though no estate vests by such a conveyance, nevertheless such an instrument may be regarded in equity as an agreement to convey, and may be enforced when the lands come into the possession of the grantor. The property that may be conveyed includes any interest in land,³⁵ such, for example, as a freehold,³⁶ an incorporeal hereditament,³⁷ a right of profit à prendre,³⁸ standing timber,³⁹ an equitable title,⁴⁰ a chattel interest, such as a lease for years,⁴¹ or a reversion or remainder. A deed can convey no more, however, than the grantor has at the time of its execution.⁴²

Consideration

Although a modern deed usually contains a consideration,⁴³ and although in cases of alleged fraud upon creditors and subsequent purchasers a voluntary deed may be set aside,⁴⁴ yet, notwithstanding dicta to the contrary,⁴⁵ no consideration is necessary, at common law, to give validity to a deed.⁴⁶ Common-law conveyances, and conveyances under modern statutes, unless the statute otherwise expressly provides, are valid between the parties without a consideration being stated in the deed, or given by the grantee.⁴⁷ Moreover, equity will uphold an executed deed, against the grantor

³⁵ *Whetstone v. Ottawa University*, 13 Kan. 320; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543; *McCarthy v. McCarthy*, 36 Conn. 177; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352.

³⁶ *Whetstone v. Ottawa University*, 13 Kan. 320.

³⁷ *Nixon's Heirs v. Carco's Heirs*, 28 Miss. 414.

³⁸ *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352.

³⁹ *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543.

⁴⁰ *McCarthy v. McCarthy*, 36 Conn. 177.

⁴¹ *Laws of Eng.* vol. 10, p. 361 (k, q).

⁴² *Gilbert v. James*, 86 N. C. 244.

⁴³ 2 Blk. Comm. 297.

⁴⁴ *Clark v. Tray*, 20 Cal. 219; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607.

⁴⁵ 2 Blk. Comm. 296.

⁴⁶ *Walker v. Walker*, 35 N. C. 335.

⁴⁷ *Jones, Convey.* 227, 228; *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 241, 248; *Rogers v. Hillhouse*, 3 Conn. 398. It has sometimes been supposed that the reason that no consideration is required in a deed is because a deed is an instrument under seal, and (as repeated over and over again) that "a seal imports a consideration." Historically, however, a seal imports no such thing. The fixing of a seal to a written instrument imported a solemn, intentional act on the part of the person thus acting, and had no connection or association with the notion of a consideration. Our present idea of a consideration, so important in connection with contracts, is an evolution. It grew up as a rule of law in the enforcement of obligations. In the early Roman law, and in our early English law, contracts were formal affairs, characterized by ceremony and solemnity. Later, in the development of our common-law ac-

and his heirs, despite the fact that it is purely voluntary.⁴⁸ Even in cases where a valuable consideration may be technically required, the question of adequacy not being involved, any valuable consideration, however small, will be sufficient.⁴⁹ Before the statute of uses,⁵⁰ no consideration was required in any conveyance of land. A feoffment was valid by force of the very ceremony itself.⁵¹ After the statute of uses, however, the courts of chancery held that a valuable consideration, either in money or money's worth, was necessary, as a principle of equity, in a deed of bargain and sale, in order to raise a use.⁵² It was likewise held that a covenant to stand seised to uses must be supported by a consideration of blood or marriage.⁵³ It was not necessary, however, that the deed of bargain and sale should express the consideration; but a consideration must, in fact, have passed, which could be shown either by the recital in the deed, or by extrinsic evidence.⁵⁴ Moreover, after the statute of uses, another rule became established, namely, that a feoffment without consideration, or which declared no uses,⁵⁵ created a resulting use to the grantor, or, in other words, amounted to no conveyance at all. This doctrine, however, is purely technical, and not dependent upon the question of consideration. It rests upon the principle that a resulting trust arises in the residue of an estate, after the uses or trusts upon which it is conveyed are exhausted; consequently the mention of a consideration, however slight, or a declaration to the use of the feoffee, prevents any resulting trust,

tions *ex contractu*, the courts refused to enforce formless or informal agreements unless the plaintiff could prove some just cause why it should be enforced, some *quid pro quo*, or, in other words, some consideration. This was done in order to protect a defendant against hasty and inconsiderate promises. A consideration did not have to be proved, however, in case of a contract, or other obligation, under seal, since the seal itself imported an intentional, deliberate, solemn, ceremonial act on the part of the obligor.

⁴⁸ *Wyche v. Greene*, 16 Ga. 49.

⁴⁹ *Ocheltree v. McClung*, 7 W. Va. 232; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. Ed. 326; *Uhlick v. Muhlke*, 61 Ill. 499; *St. James Parish v. Bagley*, 138 N. C. 384, 50 S. E. 841, 70 L. R. A. 160.

⁵⁰ 27 Hen. VIII, c. 10.

⁵¹ See *Jones, Convey.* § 263.

⁵² *Jackson ex dem. Hudson v. Alexander*, 3 Johns. (N. Y.) 484, 492, 3 Am. Dec. 517, per Kent, C. J.

⁵³ *Jackson ex dem. Houseman v. Sebring*, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; *Wallis v. Wallis*, 4 Mass. 135, 3 Am. Dec. 210.

⁵⁴ *Peck v. Vandenberg*, 30 Cal. 11-25.

⁵⁵ This is the explanation of the custom of inserting in deeds, particularly in the habendum clause, the phrase, "unto him and unto the use of him," etc.

and confirms the legal title in the feoffee.⁵⁶ Although between the parties a deed is valid without the payment of any consideration,⁵⁷ it may not be so as to purchasers and creditors of the grantor, who attack its validity, claiming that it is in fraud of their rights.⁵⁸ Where the receipt of a consideration is acknowledged in a deed, this may be rebutted so far as it operates as a receipt;⁵⁹ although the amount so stated is *prima facie* the amount paid for the conveyance of the land.⁶⁰ Parol evidence is, however, admissible to prove the real consideration.⁶¹ When, however, the receipt of consideration is acknowledged, it may operate as a waiver of the vendor's lien as to subsequent purchasers.⁶²

FORMAL PARTS OF DEEDS

283. No particular form is essential to the validity of a deed. There are, however, certain well-recognized parts of a deed, the most important of which are the premises, the habendum, the warranty, and the conclusion.

Although a deed usually has certain, well-defined, formal parts,⁶³ yet a deed may be perfectly valid without containing all these parts.⁶⁴ In fact, no particular form is essential to the validity of a deed.⁶⁵ Any form that will carry into execution the lawful object of the maker, whether the form be feoffment, grant, bargain and sale, or release, will operate to pass title.⁶⁶

The earliest deeds were very simple and very brief.⁶⁷ Even Coke,

⁵⁶ *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Loyd v. Spillet*, 2 Atk. 148; 1 Spence's Eq. 449-451; *Saunders's Uses and Trusts*, 334.

⁵⁷ *Brown v. Brown*, 44 S. C. 378, 22 S. E. 412.

⁵⁸ *De Lancey v. Stearns*, 66 N. Y. 157; *Keys v. Test*, 33 Ill. 317; *Palmer v. Williams*, 24 Mich. 328; *Glidden v. Hunt*, 24 Pick. (Mass.) 221.

⁵⁹ *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Bullard v. Briggs*, 7 Pick. (Mass.) 537, 19 Am. Dec. 292; *Wilkinson v. Scott*, 17 Mass. 257; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572. And see *Mildmay's Case*, 1 Coke, 175; *Gale v. Williamson*, 8 Mees & W. 405.

⁶⁰ *Clements v. Landrum*, 26 Ga. 401. And cf. *Wilkes v. Leuson*, Dyer, 169a; *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

⁶¹ *VINCENT v. WALKER*, 93 Ala. 165, 9 South. 382, *Burdick Cas. Real Property*; *Jones, Convey.* 246.

⁶² *Jackson ex dem. Rounds v. McChesney*, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521, per *Sutherland, J.*

⁶³ *Bacon*, Abr. tit. "Feoffment." See, also, *infra*.

⁶⁴ *Supra*.

⁶⁵ *Bell v. McDuffie*, 71 Ga. 264.

⁶⁶ *Foster's Lessee v. Dennison*, 9 Ohio, 121.

⁶⁷ *Jones, Conv.* § 210.

with all his adherence to form, admits that "if a man by deed give lands to another and to his heirs, without more saying, this is good, if he put his seal to the deed, deliver it, and make livery accordingly."⁶⁸ According to Coke, however, eight formal or orderly parts of a deed of feoffment are recognized.⁶⁹ They are: (1) The premises;⁷⁰ (2) the habendum;⁷¹ (3) the tenendum;⁷² (4) the reddendum;⁷³ (5) the clause of warranty;⁷⁴ (6) the testimonium;⁷⁵ (7) the date; and (8) the testibus clause.⁷⁶ Blackstone, after stating that it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, says, however, that it is not prudent to depart from them without good reason.⁷⁷ He then enumerates eight parts of a deed, the first four being identical with the first four enumerated by Coke,⁷⁸ and the remaining four as follows: "(5) The clause of contingency, or the conditions; (6) the clause of warranty; (7) the clauses of agreement, or covenants; (8) the conclusion, which mentions the execution and date of the deed." While, in modern conveyancing, it is not necessary to observe, by name, any of these technical parts of a deed, and while, in many states, the present-day statutory forms of deeds are very simple,⁷⁹ yet, for the purposes of orderly arrangement and convenient reference, some of these terms should be preserved. Such terms as the premises, the habendum, the reddendum, the clause of warranties, the clause of conditions, the clause of covenants, and the conclusion are inherent, and are always of serviceable application.⁸⁰

The Premises

The premises of a deed include all those parts that go before the habendum. This clause, therefore, may be used to set forth the names of the parties, the consideration, the recitals, if any, the operative words of grant, and the description of the property.⁸¹

⁶⁸ Co. Litt. 7a.

⁶⁹ Co. Litt. 6a.

⁷⁰ *Infra*.

⁷¹ *Infra*.

⁷² *Infra*.

⁷³ *Infra*.

⁷⁴ *Infra*.

⁷⁵ *Infra*. "Testimonium"—the full phrase being (in the law Latin of the times) "in cujus rei testimonium sigillum meum apposui;" that is, "In testimony of which thing I have affixed my seal." It was, in reality, the sealing clause.

⁷⁶ Or the clause of "hiis testibus," meaning the clause stating that the deed was read in the presence of "these witnesses," whose names were added by the same hand which drew the deed. See Co. Litt. 6b.

⁷⁷ 2 Blk. Com. 298.

⁷⁸ 2 Blk. Com. 298. See, also, Bacon, Abr. tit. "Feoffment," for same list as Coke.

⁷⁹ See Jones, Convey. § 210.

⁸⁰ See *infra* as to the use of these terms.

⁸¹ 2 Blk. Com. 298; Shep. Touch. 52, 74.

Names of Parties

The names of the grantor and of the grantee should be stated in the deed,⁸² although some cases hold that the mere signing of the grantor's name is sufficient.⁸³ While a deed signed by one not named as a grantor is not his deed,⁸⁴ yet if the grantor's name is mentioned in the deed, his signing the deed by a wrong name will not invalidate it,⁸⁵ if it sufficiently appears that the same person is intended, or that the variance was due to clerical error. In general, if the names of any of the parties are idem sonans, the insertion of one such name for the other is immaterial. The grantee in a deed must be made certain, and therefore it is generally necessary to name him, although a description of the person will be sufficient if it clearly designates who is to take; as, for instance, where the grantee is named by his office.⁸⁶ A deed of land to a "neighborhood," however, is not sufficiently certain.⁸⁷ The grantee may be designated by an assumed name, although a deed to a fictitious person will not be good.⁸⁸ A mistake in the name of a corporation which is to take as grantee will not make the conveyance void, if the intended grantee can be ascertained.⁸⁹ Where the grantee is uncertain, evidence is admissible to show which of several persons was intended to take.⁹⁰ Parties to the deed are sufficiently designated by their first and last names, without the use of a middle name,⁹¹ although in modern times the use of a middle name, or let-

⁸² *Wunderline v. Cadogan*, 50 Cal. 613; *Chase v. Palmer*, 29 Ill. 306; *Wright v. Lancaster*, 48 Tex. 250.

⁸³ *Burge v. Smith*, 27 N. H. 332; *Elliot v. Sleeper*, 2 N. H. 525; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Lord Say & Seal's Case*, 10 Mod. 40. And see *Mardes v. Meyers*, 8 Tex. Civ. App. 542, 28 S. W. 693. A deed signed, "A. B., Executor," shows sufficiently that it is made in a representative capacity. *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503. But see *Agricultural Bank v. Rice*, 4 How. (U. S.) 225, 11 L. Ed. 949; *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Harrison v. Simons*, 55 Ala. 510; *Adams v. Medsker*, 25 W. Va. 127.

⁸⁴ *Adams v. Medsker*, 25 W. Va. 127; *Gaston v. Weir*, 84 Ala. 193, 4 South. 258. Contra, *Elliot v. Sleeper*, 2 N. H. 525.

⁸⁵ *Middleton v. Findla*, 25 Cal. 76. But cf., *Boothroyd v. Engles*, 23 Mich. 19.

⁸⁶ *Lawrence v. Fletcher*, 8 Metc. (Mass.) 153. And see *American Emigrant Co. v. Clark*, 62 Iowa, 182, 17 N. W. 483.

⁸⁷ *Thomas v. Inhabitants of Marshfield*, 10 Pick. (Mass.) 364. A deed to "A. B. Deceased Estate" is void for want of a grantee. *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130.

⁸⁸ *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640.

⁸⁹ *Ashville Division No. 15, Sons of Temperance, v. Aston*, 92 N. C. 578.

⁹⁰ *Webb v. Den*, 17 How. (U. S.) 579, 15 L. Ed. 35; *Aultman & Taylor Mfg. Co. v. Richardson*, 7 Neb. 1.

⁹¹ *Games v. Stiles*, 14 Pet. (U. S.) 322, 10 L. Ed. 476; *Dunn v. Games*, 1 McLean, 321, Fed. Cas. No. 4,176; *Banks v. Lee*, 73 Ga. 25; *Erskine v. Davis*,

ter, may be important in a chain of title.⁹² The addition of the word "Junior" and "Senior" is not necessary,⁹³ however. It is usual to make some "addition" to the names of the parties in the deed, as by giving the residence. In the case of a married woman, the name of her husband is frequently added, and where a deed is executed by an unmarried person, the fact that the grantor is "a single person" should be stated.

Recitals

In former times, recitals were used much more frequently in deeds than at the present time. Recitals were used to show the grantor's chain of title, and are still so used, more or less, particularly after the description of the property, as, for example, "the same being the property conveyed to me by John Doe" in such a deed, describing it. Recitals may also be used to show the reasons, objects, or purposes for which the conveyance is made.⁹⁴ In connection with recitals, it should be remembered that a grantee is bound by the recitals in all the deeds in his chain of title,⁹⁵ as he also is by notice of facts of which he is put on inquiry by means of such recitals.⁹⁶ On the other hand, a grantor may be estopped by his recitals as to the origin of his title,⁹⁷ or as to other matters contained in his deed.⁹⁸ Where, however, recitals do not agree with the operative part of the deed, the terms of the operative part will control.⁹⁹ An erroneous recital does not affect the validity of a deed,¹ and where land is conveyed in conformity to a judicial decree, the deed may be valid without reciting the decree.² Where parties are bound by recitals, those claiming under them and those in privity with them are likewise bound.³

25 Ill. 251; *Franklin v. Talmadge*, 5 Johns. (N. Y.) 84. A middle initial may be important when used. See *Ambs v. Railway Co.*, 44 Minn. 266, 46 N. W. 321.

⁹² *Kinney v. Harrett*, 46 Mich. 87, 8 N. W. 708.

⁹³ *Kincaid v. Howe*, 10 Mass. 203; *Cobb v. Lucas*, 15 Pick. (Mass.) 7.

⁹⁴ See *McCoy v. Fahrney*, 182 Ill. 60, 55 N. E. 61.

⁹⁵ *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. Ed. 587; *Lytle v. Turner*, 12 Lea (Tenn.) 641.

⁹⁶ *Supra*.

⁹⁷ *Supra*.

⁹⁸ *Supra*.

⁹⁹ *Miller v. Tunica County*, 67 Miss. 651, 7 South. 429; *Hammond v. Hammond*, 19 Beav. 29; *Howard v. Shrewsbury*, L. R. 17 Eq. 378.

¹ *Games v. Stiles*, 14 Pet. (U. S.) 322, 10 L. Ed. 476.

² *Games v. Stiles*, *supra*.

³ *Carver v. Jackson ex dem. Astor*, 4 Pet. (U. S.) 1, 7 L. Ed. 761; *Bowman v. Taylor*, 2 A. & E. 278; *Fisk v. Flores*, 43 Tex. 340.

The Operative Words

It is not necessary that the words of grant, or the operative words of the deed, should be inserted in the premises, since they may be placed in the habendum,⁴ or elsewhere in the deed. However, in order that any deed may be operative, it must contain certain and definite words of conveyance sufficient to transfer an estate from the grantor to the grantee.⁵ The technical words which are used in connection with the various forms of conveyances have already been mentioned,⁶ such an "enfeoff," "give," "grant," "release," "bargain," "sell," "convey," etc., and these words, or some equivalent of them, must be used. Outside of statutory forms, the most frequent phrase in modern use is, perhaps, "give, grant, bargain, sell, and convey." The word "grant," as previously explained,⁷ is now, however, of wide application, and may be used alone both for corporeal and incorporeal hereditaments.⁸ It is also held that the word "convey" is as effective as the word "grant,"⁹ and "convey" is frequently used as the sole operative word in statutory deeds.¹⁰ Where different words of conveyance are used in a deed, the dual character of common conveyances may apply, as, for example, where the words "I give, grant, bargain and sell" are used. In such a case, the deed need not be regarded as a deed of bargain and sale, requiring some valuable consideration to support it, but may be treated as a common-law feoffment, which is valid without a consideration.¹¹ A deed which contains no words of grant conveys no title,¹² and although the courts will be indulgent in helping out operative words in order to give a deed effect,¹³ yet they will not insert words and thus create deeds for the parties.¹⁴ Consequently, a deed which contains no other words of conveyance than "sign over" will not pass a title.¹⁵

⁴ Kenworthy v. Tullis, 3 Ind. 96.

⁵ Hummelman v. Mounts, 87 Ind. 178; Webb v. Mullins, 78 Ala. 111.

⁶ Ante, Ch. XXII.

⁷ See Hummelman v. Mounts, *supra*.

⁸ San Francisco & O. R. Co. v. Oakland, 43 Cal. 502.

⁹ Patterson v. Carneal's Heirs, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208; Sims v. Pierce, 157 Mass. 52, 31 N. E. 718.

¹⁰ See the statutes of the various states.

¹¹ Jones, Convey. § 312.

¹² See Davis v. Davis, 43 Ind. 561; Bell v. McDuffie, 71 Ga. 264.

¹³ Havens v. Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Jackson ex dem. Hudson v. Alexander, 3 Johns. (N. Y.) 484, 492, 3 Am. Dec. 517.

¹⁴ Hummelman v. Mounts, 87 Ind. 178.

¹⁵ McKinney v. Settles, 31 Mo. 541.

DESCRIPTION OF THE PROPERTY CONVEYED

284. For a valid deed there must be a sufficient description of the property conveyed, so that it may be identified. Such description may be made—

- (a) By reference to plats, maps, and other deeds;
- (b) By reference to monuments;
- (c) By courses and distances; and
- (d) By quantity.

A deed must contain some description of the land sought to be conveyed.¹⁶ While it is not necessary that the land be actually identified, since it is sufficient if it can be made certain or identified by the terms of the instrument,¹⁷ yet no conveyance can be operative without a description which is sufficient for the purpose of identification.¹⁸ The description, however, need not be technically accurate. It will be sufficient if a surveyor can locate the land by the description given, and therefore a mere error or misnomer will be disregarded.¹⁹ Where, moreover, there are material errors in a description, which are so gross that the deed cannot take effect, the instrument may be reformed in equity.²⁰ Latent ambiguities in the description may be explained by parol,²¹ and where such ambiguities exist, or the description is conflicting, the question is one of construction for the courts.

¹⁶ *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 931; *Bailey v. White*, 41 N. H. 337; *HOBAN v. CABLE*, 102 Mich. 206, 60 N. W. 466, *Burdick Cas. Real Property*.

¹⁷ *Works v. State*, 120 Ind. 119, 22 N. E. 127; *Miller v. Mann*, 55 Vt. 475; *Lohff v. Germer*, 37 Tex. 578; *HOBAN v. CABLE*, 102 Mich. 206, 60 N. W. 466, *Burdick Cas. Real Property*.

¹⁸ *George v. Bates*, 90 Va. 839, 20 S. E. 828; *Campbell v. Johnson*, 44 Mo. 247; *Wofford v. McKinna*, 23 Tex. 44, 76 Am. Dec. 53; *Dwyre v. Speer*, 8 Tex. Civ. App. 88, 27 S. W. 585; *HOBAN v. CABLE*, 102 Mich. 206, 60 N. W. 466, *Burdick Cas. Real Property*.

¹⁹ *Mason v. White*, 11 Barb. (N. Y.) 173; *Bosworth v. Sturtevant*, 2 Cush. (Mass.) 392; *Eggleston's Lessee v. Bradford*, 10 Ohio, 312; *Travellers Ins. Co. v. Yount*, 98 Ind. 454; *Gress Lumber Co. v. Coody*, 94 Ga. 519, 21 S. E. 217; *Denver, M. & A. Ry. Co. v. Lockwood*, 54 Kan. 586, 38 Pac. 794; *Perry v. Clark*, 157 Mass. 330, 32 N. E. 226; *Stringer v. Young*, 3 Pet. (U. S.) 320, 7 L. Ed. 693; *HOBAN v. CABLE*, 102 Mich. 206, 60 N. W. 466, *Burdick Cas. Real Property*.

²⁰ See *Canedy v. Marcy*, 13 Gray (Mass.) 373.

²¹ *Bybee v. Hageman*, 66 Ill. 519; *Clark v. Powers*, 45 Ill. 283.

How Described

No particular method or manner of describing conveyed lands is required. The local custom dominates. The principal means employed are references to surveys, public or private, as preserved by public or private records, maps, and plats, description by means of courses and distances, including reference to monuments, and description by the amount of land intended to be conveyed. In olden times, it was customary to designate the land by the name by which it was known, and such a method may be followed to-day.²² In our older states, farm lands are generally described by courses and distances, with metes and bounds, while in those states where government surveys have been made such property is generally designated by sections, or fractional parts thereof, together with the proper designation of range and township lines.²³ Urban property is usually described as being a certain number of a certain street, the dimensions and area of the lot being given, or as being such a number of such a block as platted.²⁴ Courses and distances, with metes and bounds, are also appropriate for such property.²⁵

Reference to Plats, Maps and Deeds

It is not necessary that the land should be described in the deed, if its identification can be ascertained by reference to existing deeds,²⁶ or maps and plats.²⁷ Where land is described by means of reference to a map or a plat, the map or plat referred to becomes a part of the deed for the purpose of that conveyance, and anything which appears thereon may affect the terms of the grant;²⁸ as, where land is conveyed by means of reference to a plat which shows streets as in existence at certain places, the grantor may be estopped by such fact, and the grantee would have

²² Borchard v. Eastwood, 133 Cal. xix, 65 Pac. 1047; Charles v. Patch, 87 Mo. 450; Haley v. Amestoy, 44 Cal. 132; Coleman v. Improvement Co., 94 N. Y. 229.

²³ Evans v. Gerry, 174 Ill. 595, 51 N. E. 615; Wallace v. Curtis, 29 Misc. Rep. 415, 61 N. Y. Supp. 994. See DECKER v. STANSBURY, 249 Ill. 487, 94 N. E. 940, Ann. Cas. 1912A, 187, Burdick Cas. Real Property.

²⁴ Middlebury College v. Cheney, 1 Vt. 336; Schuster v. Myers, 148 Mo. 422, 50 S. W. 103; Bowen v. Galloway, 98 Ill. 41.

²⁵ Meikel v. Greene, 94 Ind. 344. See HOBAN v. CABLE, 102 Mich. 206, 60 N. W. 466, Burdick Cas. Real Property.

²⁶ Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; United States Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S. E. 342.

²⁷ See cases in preceding note.

²⁸ Dolde v. Vodicka, 49 Mo. 100; Masterson v. Munro, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. Rep. 57.

a right to have a street as located on the plat.²⁹ So, also, if the land is described by a mere reference to another deed in which the land is conveyed, the effect is the same as when the reference is to the map.³⁰ However, where the description is clearly expressed in a deed, reference to another deed will not affect the same.³¹ When maps or deeds are referred to for purposes of description, they may be identified by parol evidence.³² The loss of the map or deed will not make void the conveyance in which they are referred to, but the contents of the lost instrument may be established by other evidence.³³

Monuments

Monuments are permanent landmarks established for the purpose of indicating boundaries.³⁴ They may be either natural or artificial.³⁵ Natural monuments are rivers, streams, ponds, lakes, shores, beaches, highways, streets, rocks, trees, and the like.³⁶ Artificial monuments are anything which may be treated as such by the parties, some visible mark or indication left on natural or other objects indicating a line or boundary.³⁷ In describing lands by means of monuments, the monuments themselves must be identified, and it is not sufficient to refer to them as, for example, "a certain tree" or "stake."³⁸

Highways and Streets

Where land is conveyed and described as bounded by highways or streets, the general rule is that the center of the highway or street is the intended boundary line, unless a contrary intention

²⁹ See *Taylor v. Hopper*, 62 N. Y. 649; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639.

³⁰ *Mardes v. Meyers*, 8 Tex. Civ. App. 542, 28 S. W. 693; *Wuestcott v. Seymour*, 22 N. J. Eq. 66; *Deacons of Cong. Church in Auburn v. Walker*, 124 Mass. 69. But see *Lovejoy v. Lovett*, 124 Mass. 270. Land may be described as bounded by land conveyed in another deed. *Probett v. Jenkinson*, 105 Mich. 475, 63 N. W. 648.

³¹ *Daniels v. Institution*, 127 Mass. 534; *Crosby v. Bradbury*, 20 Me. 61.

³² *McCullough v. Wall*, 4 Rich. (S. C.) 68, 53 Am. Dec. 715; *Penry v. Richards*, 52 Cal. 496.

³³ *New Hampshire Land Co. v. Tilton*, 19 Fed. 73.

³⁴ *Black, Law Dict. "Monuments."*

³⁵ The monuments may be erected by the parties after the conveyance is executed. *Makepeace v. Bancroft*, 12 Mass. 469; *Lerned v. Morrill*, 2 N. H. 197.

³⁶ *Washb. Real Prop. (6th Ed.)* § 2332.

³⁷ *Grier v. Coal Co.*, 128 Pa. 79-95, 18 Atl. 480. They are landmarks or signs erected by the hand of man. *Wise v. Burton*, 73 Cal. 166, 14 Pac. 678; *Abbey v. McPherson*, 1 Kan. App. 177, 41 Pac. 978; *Alshire v. Hulse, Wright (Ohio)* 170.

³⁸ *Drew v. Swift*, 46 N. Y. 204; *Bagley v. Morrill*, 46 Vt. 94.

is shown.³⁹ This rule depends, of course, upon the fact that the grantor himself owns to the middle of such street or highway.⁴⁰ Where, however, the title to the highway or street is in the state or municipality, the boundary will be the line of the land conveyed, and not the center of the highway or street.⁴¹ Where, however, the highway or street has been dedicated to the public for such purposes, the grantee does not take to the middle of the same, unless the dedication has been accepted.⁴²

Water Boundaries

Conveyances of land bounded by nonnavigable rivers or streams carry the title to the bed of such water courses to the center of the river or stream, unless a contrary intention is expressed.⁴³ The thread or center of a stream (*filum fluminis*) is the line midway between its opposite shores, at the ordinary height of the water, without regard to its main channel.⁴⁴ Boundaries on navigable waters are subject to state laws, and are also under federal control in connection with navigation and commerce,⁴⁵ and at common law the shore between the high and low water marks belongs to the state, so that a grant of land bounded by tidal waters of the ocean and sea extend to high-water mark only.⁴⁶ The same rule applies also to navigable and tidal rivers, and the boundary extends to the high-water mark.⁴⁷ Where the river is navigable, but is not tidal, the American cases are in hopeless con-

³⁹ *DODD v. WITT*, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700, *Burdick Cas. Real Property*; *Moore v. Johnston*, 87 Ala. 220, 6 South. 50; *Gear v. Barnum*, 37 Conn. 229; *Potter v. Boyce*, 73 App. Div. 383, 77 N. Y. Supp. 24.

⁴⁰ *Helmer v. Castle*, 109 Ill. 664; *DODD v. WITT*, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700, *Burdick Cas. Real Property*. And see 8 Cent. Dig. tit. Boundaries, § 99.

⁴¹ *Helm v. Webster*, 85 Ill. 116; *Dunham v. Williams*, 37 N. Y. 251.

⁴² *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96. In Kansas the fee to the land in all streets, alleys, and other public grounds which have been dedicated to public use is vested in the county and not in the abutting owners. *Randal v. Elder*, 12 Kan. 257.

⁴³ *Piper v. Connelly*, 108 Ill. 646; *Newhall v. Ireson*, 13 Gray (Mass.) 262; *Goff v. Cogle*, 118 Mich. 307, 76 N. W. 489, 42 L. R. A. 161; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

⁴⁴ *Pratt v. Lamson*, 2 Allen (Mass.) 275; *Dayton v. Hydraulic Co.*, 10 Ohio S. & C. P. Dec. 192.

⁴⁵ *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Haight v. Keokuk*, 4 Iowa, 199; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941.

⁴⁶ *Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; *De Lancey v. Peepgras*, 63 Hun, 169, 17 N. Y. Supp. 681.

⁴⁷ *Abraham v. Railroad Co.*, 16 Q. B. 586; *Dill v. Wareham*, 7 Metc. (Mass.) 438; *People v. Tibbets*, 19 N. Y. 523.

flict on the question of boundary lines. The English common-law rule is that the boundary is the thread of the stream.⁴⁸ In some of our states, however, the land of the riparian proprietor is bounded by high-water mark,⁴⁹ in other states by low-water mark,⁵⁰ while in still others he owns to the center of the stream.⁵¹ Other decisions designate the water's edge as the boundary,⁵² or the water's margin at its ordinary height.⁵³

In the cases of the smaller, navigable, natural ponds and lakes, the general rule is that the riparian owner takes to the middle line.⁵⁴ Some states hold, however, in connection with unnavigable ponds and lakes, that the low-water mark is the boundary,⁵⁵ although other jurisdictions apply the middle-line rule in such cases.⁵⁶ The body of the Great Lakes is never subjected to riparian ownership, and abutting owners take only to their edge as the water usually stands.⁵⁷

In the case of artificial waters, such as canals and ditches, the

⁴⁸ *Devonshire v. Pattinson*, 20 Q. B. D. 263. By the English common law only those rivers were deemed navigable in which the tide ebbs and flows, and "grants of land bounded on rivers, or upon the margins of the same, or along the same, above tide-water, carry the exclusive right and title to the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river." 3 Kent, Comm. 427.

⁴⁹ *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *McManus v. Carmichael*, 3 Iowa, 1; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *City of Mobile v. Eslava*, 16 Pet. (U. S.) 234, 10 L. Ed. 948.

⁵⁰ *Union Depot Street Railway & Transfer Co. of Stillwater v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *People v. Canal Appraisers*, 33 N. Y. 461; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527; *Wood v. Appal*, 63 Pa. 210; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674. And see *Handly v. Anthony*, 5 Wheat. (U. S.) 375, 5 L. Ed. 113; *Booth v. Shepherd*, 8 Ohio St. 247.

⁵¹ *Arnold v. Elmore*, 16 Wis. 509; *Jones v. Pettibone*, 2 Wis. 308; *Fuller v. Dauphin*, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; *Fletcher v. Boom Co.*, 51 Mich. 277, 16 N. W. 645; *Webber v. Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Morgan v. Reading*, 3 Smedes & M. (Miss.) 366; *Gavit's Adm'rs v. Chambers*, 3 Ohio, 496.

⁵² *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. (Mich.) 155.

⁵³ *Hess v. Cheney*, 83 Ala. 251, 3 South. 791.

⁵⁴ *Webber v. Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

⁵⁵ *Trustees of Schools v. Scholl*, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614; *Indiana v. Milk*, 11 Fed. 389, 11 Biss. 197.

⁵⁶ *Ridgway v. Ludlow*, 58 Ind. 248; *Gouverneur v. Ice Co.*, 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669.

⁵⁷ *Seaman v. Smith*, 24 Ill. 521; *Sloan v. Biemiller*, 34 Ohio St. 492.

boundary lines usually go to their center,⁵⁸ and the same rule applies to land bounded by an artificial pond.⁵⁹

Designated Points

When points on the banks of a river or side of a street or road are named in describing land, the cases are in conflict as to the boundary, whether it is in the center or at the side of the highway or river.⁶⁰ If an intention is expressed that the grantee shall not take to the center, as, for example, where the land is described as bounding "on the side or banks" of the highway or river, the line, of course, will be along the edge.⁶¹ In the absence, however, of an expressed intention, where the usual rule as to the middle line exists, the grantee takes to the center, subject to the easement of the highway or stream.⁶²

Islands in Rivers

The title to islands in rivers is governed by the same rules as apply to the bed of the river. The title to soil covered by navigable rivers is, however, in the state, rather than in the United States.⁶³ Where islands appear, or are formed, in a navigable river, the title, therefore, to such islands is usually in the state.⁶⁴ An island in an unnavigable river, not otherwise legally appropriated, if on one side of the dividing line, belongs to the owner of the bank

⁵⁸ *Boston v. Richardson*, 13 Allen (Mass.) 146; *Goodyear v. Shanahan*, 43 Conn. 204.

⁵⁹ *Phinney v. Watts*, 9 Gray (Mass.) 269, 69 Am. Dec. 288; *Wheeler v. Spinola*, 54 N. Y. 377.

⁶⁰ 1 *Dembitz, Land Tit.* 72. And see *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. Rep. 311; *Arnold v. Elmore*, 16 Wis. 509; *Watson v. Peters*, 26 Mich. 508. See *DODD v. WITT*, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700, *Burdick Cas. Real Property*. And, as to artificial streams, see *Warner v. Southworth*, 6 Conn. 471; *Agawam Canal Co. v. Edwards*, 36 Conn. 476. Cf. *Buck v. Squiers*, 22 Vt. 484.

⁶¹ *Halsey v. McCormick*, 13 N. Y. 296; *Child v. Starr*, 4 Hill (N. Y.) 369, reversing 20 Wend. (N. Y.) 149; *Murphy v. Copeland*, 58 Iowa, 409, 10 N. W. 786, 43 Am. Rep. 118; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164. See *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671.

⁶² *Town of Old Town v. Dooley*, 81 Ill. 255; *Fisher v. Rochester*, 6 Lans. (N. Y.) 225; *West Covington v. Freking*, 8 Bush (Ky.) 121.

⁶³ See *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. Ed. 565; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 23 Sup. Ct. 170, 47 L. Ed. 266; *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

⁶⁴ *Tracy v. Railroad Co.*, 39 Conn. 382; *People v. Warner*, 116 Mich. 228, 74 N. W. 705; *Wainwright v. McCullough*, 63 Pa. 66. And see *Dana v. Hurst*, *supra*.

TITLE IN COUNTY.—In Missouri, the title to islands formed in navigable streams is in the county. *Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493.

on that side. If it is in the middle of the river, the opposite owners hold it in severalty, according to the original dividing line, as if there were no island in the river. If there are several borderers, the island is apportioned according to their lines on the river.⁶⁵

Courses and Distances

Land is said to be described by courses and distances when an identified starting point is given, and the boundaries are traced from that point as so many rods or feet in a certain direction, thence, successively, in other directions, until a return to the starting point.⁶⁶ When such descriptions are given the lines are presumed to be straight lines,⁶⁷ and directions expressed as "northerly," "easterly," etc., mean due north and due east,⁶⁸ unless controlled by qualifying words.⁶⁹ When monuments and courses and distances are both given, the monuments control, and the distances must be accordingly lengthened or shortened,⁷⁰ although the courses and distances will control where such an intention clearly appears in the deed.⁷¹ In case of conflicts between monuments, the monument or mark that best fits the description should be followed.⁷² When lands are described in terms of the government survey of public lands, and the corners on town or range lines are lost, the courses and distances called for by the maps and field notes of the surveyor general will control.⁷³ Difficulties have arisen, however, from the fact that the chains used in making the surveys were often stretched by use, and so more land will be included in the descrip-

⁶⁵ *McCullough v. Wall*, 4 Rich. (S. C.) 68, 53 Am. Dec. 715; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276.

⁶⁶ See *HOBAN v. CABLE*, 102 Mich. 206, 60 N. W. 466, *Burdick Cas. Real Property*. As to the use of the words "more or less" in giving courses and distances, see *Blaney v. Rice*, 20 Pick. (Mass.) 62, 32 Am. Dec. 204; *Howell v. Merrill*, 30 Mich. 283; *Williamson v. Hall*, 62 Mo. 405.

⁶⁷ *Campbell v. Branch*, 49 N. C. 313.

⁶⁸ *Jackson ex dem. Clark v. Reeves*, 3 Caines (N. Y.) 295; *Abbey v. McPherson*, 1 Kan. App. 177, 41 Pac. 978; *Palmer v. Montgomery*, 59 Mich. 338, 26 N. W. 535.

⁶⁹ *Brandt ex dem. Walton v. Ogden*, 1 Johns. (N. Y.) 156; *Bosworth v. Danzein*, 25 Cal. 296.

⁷⁰ *KAISER v. DALTO*, 140 Cal. 167, 73 Pac. 828, *Burdick Cas. Real Property*; *Preston v. Bowmar*, 6 Wheat. (U. S.) 580, 5 L. Ed. 336; *Bowman v. Farmer*, 8 N. H. 402; *Knowles v. Toothaker*, 58 Me. 172; *White v. Williams*, 48 N. Y. 344; *Miles v. Barrows*, 122 Mass. 579. Cf. *Hall v. Eaton*, 139 Mass. 217, 29 N. E. 660.

⁷¹ *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348. And see *Hall v. Eaton*, 139 Mass. 217, 29 N. E. 660.

⁷² *Zeibold v. Foster*, 118 Mo. 349, 24 S. W. 155.

⁷³ *Major v. Watson*, 73 Mo. 661.

tion than would be indicated by the courses and distances. In the federal courts, and in some of the states, it is held, in conformity with the United States statutes,⁷⁴ that the lost corner shall be established by locating it at a proportionate distance from the nearest known corners.⁷⁵ In this way the surplus land is divided among the several owners.⁷⁶ In some states, however, a different rule prevails, and the lost corner is located by measuring the distance which it ought, by an accurate survey, to be from the eastern corner of the township. By this rule the surplus land all goes to the owners on the western side.⁷⁷

Quantity

Under a clearly expressed intention to convey a specific quantity of land, the quantity thus conveyed will control the boundaries, which should be made to conform to such a positive intention.⁷⁸ As a rule, however, courses or distances will control any statement in a deed as to the quantity of land conveyed, where such quantity is mentioned by way of description.⁷⁹ Likewise, in locating boundaries, lines marked or surveyed,⁸⁰ natural⁸¹ and artificial monuments,⁸² maps and plats,⁸³ as well as metes and bounds,⁸⁴ will, in cases of conflict, control calls for quantity. In other words, although positive intention as to quantity conveyed may control, and while, in absence of other description, quantity may govern, yet quantity, in itself, is of the least weight as a means of description.

The words "more or less" are not conclusive as to the exact quantity of land conveyed,⁸⁵ and may, even in a case of wide discrepancy, be regarded merely as an estimate.⁸⁶ Such words, however,

⁷⁴ Rev. St. § 2396 (U. S. Comp. St. 1901, p. 1473).

⁷⁵ O'Hara v. O'Brien, 107 Cal. 309, 40 Pac. 423; Moreland v. Page, 2 Iowa, 139.

⁷⁶ Jones v. Kimble, 19 Wis. 429; Moreland v. Page, 2 Iowa, 139.

⁷⁷ Major v. Watson, 73 Mo. 665; Vaughn v. Tate, 64 Mo. 491; Knight v. Elliott, 57 Mo. 317.

⁷⁸ Moore v. Jackson, 4 Wend. (N. Y.) 58; Craghan v. Nelson, 3 How. (U. S.) 187, 11 L. Ed. 554.

⁷⁹ Kruse v. Scripps, 11 Ill. 98; Wilcox v. Bread, 92 Hun, 9, 37 N. Y. Supp. 867.

⁸⁰ Robinson v. Kime, 70 N. Y. 147; Ogden v. Porterfield, 34 Pa. 191.

⁸¹ Root v. Puff, 3 Barb. (N. Y.) 353; Miller v. Cramer, 190 Pa. 315, 42 Atl. 690.

⁸² Cottingham v. Parr, 93 Ill. 233; Allerton v. Johnson, 3 Sandf. Ch. (N. Y.) 72.

⁸³ Wadhams v. Swan, 109 Ill. 46; Hathaway v. Power, 6 Hill (N. Y.) 453.

⁸⁴ Petts v. Gaw, 15 Pa. 218; Thayer v. Finton, 108 N. Y. 394, 15 N. E. 615.

⁸⁵ Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

⁸⁶ Pierce v. Faunce, 37 Me. 63, where one deed in a chain of title described

will ordinarily be construed to allow merely for slight and immaterial variances.⁸⁷ When the quantity is given, and the words "more or less" are added, no more is meant than what the law would imply, namely, that the grantee takes the risk as to the amount.⁸⁸ The addition, however, of the words "more or less," will not prevent an action for fraud, when there has been a misrepresentation as to the amount.⁸⁹

Appurtenances

All things which are appurtenant to the land conveyed pass with it.

The word "appurtenances" means the things that belong to another thing as principal, things used with and related to another thing.⁹⁰ Applied to land, it means the incidents belonging to the land, and essential to its use and enjoyment, such, for example, as rights of way, water courses, rights to light, and air, and rights of subjacent and adjacent support.⁹¹ It is not uncommon to find in a deed, after the description of the lands or tenements conveyed, words like the following: "With all the privileges and appurtenances thereto belonging or in any way appertaining," or simply, "With the appurtenances." It is doubtful, however, whether these general words in any case enlarge the effect of deeds,⁹² since it is a general rule that whatever easements or hereditaments will pass under the general description of "privileges and appurtenances" will also pass by implication as mere incidents to the land, unless the intention to reserve such rights, and to detach them from the land, is apparent.⁹³ It is a general principle that "land cannot pass as

the land as a tract "containing sixty-seven (67) acres, more or less," and a subsequent deed described the tract as "containing twenty-five acres, more or less." It was held that the latter deed conveyed the whole lot, which in fact contained sixty-seven acres.

⁸⁷ *Brady v. Hennion*, 8 Bosw. (N. Y.) 528; *Regan v. Hatch*, 91 Tex. 616, 45 S. W. 386.

⁸⁸ *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 209; *Williamson v. Hall*, 62 Mo. 405.

⁸⁹ *McCoun v. Delany*, 3 Bibb (Ky.) 46, 6 Am. Dec. 635.

⁹⁰ *Badger Lumber Co. v. Water Supply Co.*, 48 Kan. 182, 184, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; *Gullman v. Sharp*, 81 Hun, 462, 465, 30 N. Y. Supp. 1036.

⁹¹ *Denver v. Clements*, 3 Colo. 472; *Simmons v. Cloonan*, 81 N. Y. 557; *Foote v. Yarlott*, 238 Ill. 54, 87 N. E. 62.

⁹² See *Crosby v. Parker*, 4 Mass. 110; *Nicholas v. Chamberlain*, Cro. Jac. 121.

⁹³ 1 Dembitz, Land Tit. 55.

an appurtenance to land,"⁹⁴ and it has been said that even the necessity of enjoyment cannot make one parcel of land pass as an appurtenance to another parcel.⁹⁵ The term may, however, be so used in connection with the peculiar character of the land granted that it may be construed to be the intention of the grantor to convey land, as, for example, necessary land for a playground, in connection with the conveyances of land for "purpose of a school-house with the appurtenances."⁹⁶ The sale of a house, mill, factory, or barn, however, will carry with it not only the soil actually covered by the building, but the "curtilage"; that is, the yard and garden that are habitually occupied with a dwelling house, and certain small parcels, with or without outbuildings, without which the mill, factory, or barn cannot be enjoyed.⁹⁷ Nevertheless, where the word "appurtenances" is added to the designation of a dwelling house or other building, it is not a mere empty phrase, but means what is habitually occupied with it, even though it be an unfenced lot.⁹⁸ When land is conveyed, the buildings thereon pass with it, without additional words,⁹⁹ as does, also, standing timber.¹ Timber, however, which has been cut and is lying upon the ground, does not pass, unless such an intention is expressly declared.²

General Rules of Construction

A description of property will be presumed to be made with reference to the property as it existed at the time, and changes subsequent to the conveyance will not affect it.³ Moreover, to give ef-

⁹⁴ *Geneva v. Henson*, 195 N. Y. 447, 88 N. E. 1104; *Woodhull v. Rosenthal*, 61 N. Y. 382.

⁹⁵ *Armstrong v. Dubois*, 90 N. Y. 95; *Ogden v. Jennings*, 62 N. Y. 526; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; *Wilson v. Beckwith*, 117 Mo. 61, 22 S. W. 639. A tree in the adjoining street will pass as an appurtenance. *Gorham v. Electric Co. (Co. Ct.)* 29 N. Y. Supp. 1094.

⁹⁶ *Missouri Pac. R. Co. v. Maffitt*, 94 Mo. 56, 6 S. W. 600; *Ogden v. Jennings*, 66 Barb. (N. Y.) 301; *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241.

⁹⁷ *Jeffery v. Winter*, 190 Mass. 90, 76 N. E. 282; *Allen v. Scott*, 21 Pick. (Mass.) 25, 32 Am. Dec. 238; *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595. For the right to use a drain as appurtenant to a house, see *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 37 Am. Dec. 85.

⁹⁸ *Ammidown v. Ball*, 8 Allen (Mass.) 293; *Cunningham v. Webb*, 69 Me. 92. But see *Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 19; *Archer v. Bennett*, 1 Lev. 131.

⁹⁹ *Isham v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361; *Meyer v. Betz*, 3 Rob. (N. Y.) 172.

¹ *Plumer v. Plumer*, 30 N. H. 558; *French v. Freeman*, 43 Vt. 93.

² *Longino v. Webster* (Tex. Civ. App.) 88 S. W. 445; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

³ *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.

fect to the deed, the situation of the parties at the time of its execution is to be considered, and their intention at that time is the test.⁴ For the purpose of showing such intention, contemporaneous writings by the parties may be used.⁵ Where the terms of the description are clear, however, no question of construction arises, and the intention of the parties will not be allowed to control, though it is shown to be different from that expressed in the deed.⁶ In construing a deed, grammatical construction and punctuation are given little effect, although they may be of value, in connection with other things.⁷ All parts of the deed are to be construed together, and that description will be adopted which will give effect to the deed, rather than one which would render it void for uncertainty.⁸ Where there is an adequate description of the land, a subsequent erroneous description will not vitiate it, the maxim, "*falsa demonstratio non nocet*," being applied in such a case.⁹ Nevertheless, general expressions in the deed are controlled by more specific ones.¹⁰ Surplusage, however, is to be rejected.¹¹ All presumptions are taken most strongly against the grantor,¹² and where the deed contains two conflicting descriptions the grantee will, on this principle, be permitted to elect under which he will hold.¹³

Exceptions

In this country, we have so interchanged the technical terms, "exceptions" and "reservations,"¹⁴ that they have unfortunately lost their distinctive meaning.¹⁵ They are, in fact, quite different. An exception in a deed is something which is not included in the grant, a part of the land which, as expressly stated in the deed, is not conveyed, as, for example, where the grantor excepts from the conveyance the trees growing upon the land, or the crops, or certain buildings, or a part of the land itself, as, by way

⁴ Long v. Wagoner, 47 Mo. 178; Stanley v. Green, 12 Cal. 148.

⁵ Putzel v. Van Brunt, 40 N. Y. Super. Ct. 501.

⁶ Kimball v. Semple, 25 Cal. 449.

⁷ Martind. Conv. (2d Ed.) § 98.

⁸ Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; City of Alton v. Transportation Co., 12 Ill. 38, 52 Am. Dec. 479; Gano v. Aldridge, 27 Ind. 294.

⁹ Miller v. Travers, 8 Bing. 224; Llewellyn v. Earl of Jersey, 11 M. & W. 183; Shep. Touch. marg. p. 247; Hamm v. San Francisco, 17 Fed. 119.

¹⁰ Hannibal & St. J. R. Co. v. Green, 68 Mo. 169; Wade v. Deray, 50 Cal. 376.

¹¹ Jackson v. Clark, 7 Johns. (N. Y.) 223; Kruse v. Wilson, 79 Ill. 235.

¹² Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 589, 9 L. Ed. 773; Cocheco Mfg. Co. v. Whittier, 10 N. H. 305.

¹³ Armstrong v. Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545.

¹⁴ See *infra*, The Reddendum—Reservations.

¹⁵ Engel v. Ayer, 85 Me. 453, 27 Atl. 352; White v. Railroad Co., 156 Mass. 181, 30 N. E. 612.

of illustration, "all that lot of land conveyed to the said grantor by B., except a strip ten feet wide upon the entire northern side." The property covered by an exception in a deed does not pass to the grantee,¹⁶ but remains in the grantor, with all incidental rights, as if no deed had been made.¹⁷ For a valid exception, however, the thing excepted must be described with as much particularity as is required in the description of the land conveyed,¹⁸ since a deed will be void if the excepted land cannot be located or identified.¹⁹ Thus, in absence of proof of what had been previously conveyed, a deed purporting to convey all of a certain tract of land "not heretofore conveyed by the grantor" to a third party will be insufficient.²⁰

285. THE HABENDUM, TENENDUM, AND CONCLUSION

The habendum of a deed is that formal part of a conveyance which commences with the words "to have."²¹ It is usually associated with the "tenendum" clause; the phrase "habendum et tenendum" meaning "to have and to hold." It is not an essential part of a deed, and is frequently omitted. "Originally, under the feudal system, the office of the habendum and tenendum clauses was to define the quantity of interest or the estate which the grantee was to have in the property granted, and the tenure upon or under which it was to be held. Since the practical abolition of feudal tenures, the only object of the clause is to state the character of the grantee's estate."²²

The grantee's estate is designated, at common law, as previously considered, by such words as "to him and to his heirs," "to him and to the heirs of his body," etc., according to the nature of the estate desired to be created.²³ These words, however, are frequently in-

¹⁶ *Craig v. Wells*, 11 N. Y. 315; *Thompson v. Gregory*, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; *Whitaker v. Brown*, 46 Pa. 197; *Ashcroft v. Railroad Co.*, 126 Mass. 197, 30 Am. Rep. 672; *Stockbridge Iron Co. v. Iron Co.*, 107 Mass. 290; *Wiley v. Sirdorus*, 41 Iowa, 224; *Sloan v. Furnace Co.*, 29 Ohio St. 568.

¹⁷ *Munn v. Worrall*, 53 N. Y. 44, 13 Am. Rep. 470; *Whitaker v. Brown*, 46 Pa. 197.

¹⁸ *Thompson v. Gregory*, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; *Torrey v. Thayer*, 37 N. J. Law, 339. But see *Wells v. Dillard*, 93 Ga. 682, 20 S. E. 263. No words of limitation are necessary. *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307. Cf. *Achorn v. Jackson*, 86 Me. 215, 29 Atl. 989.

¹⁹ *Dwyre v. Speer*, 8 Tex. Civ. App. 88, 27 S. W. 585.

²⁰ *Maier v. Joslin*, 46 Minn. 228, 48 N. W. 909. But see *Cornwell v. Thurs-ton*, 59 Mo. 156.

²¹ Latin, *habendum*.

²² Judge Sterrett in *Karchner v. Hoy*, 151 Pa. 383, 25 Atl. 20. And see *Wager v. Wager*, 1 Serg. & R. (Pa.) 374; *Mitchell v. Wilson*, 3 Cranch, C. C. 242, Fed. Cas. No. 9,672.

²³ *Supra*.

serted in the granting clause of the deed, that is, in the premises, and, consequently, there is no necessity of repeating them in the habendum, or in such cases of using a habendum clause at all.²⁴ Where, however, the granting clause contains no words of limitation, the habendum clause becomes essential for this purpose.²⁵ While the habendum may enlarge, restrict, explain, or qualify the estate granted in the premises,²⁶ yet, if it is repugnant to the granting clause, the habendum is void.²⁷ Nor can the habendum be made to include lands which are not in the description.²⁸ The habendum usually repeats the names of the grantees, and one may be named in the habendum who is not in the granting clause, for instance, a remainderman.²⁹ The habendum, however, will not be permitted to change the nature of the ownership, as by making owners in severalty joint owners.³⁰

The habendum clause is also frequently employed to define the uses (if any) declared of the estate created, the trusts (if any) imposed on the person taking the legal estate under the deed, and also the covenants (if any) entered into by the grantor or grantee.³¹ As previously stated, in connection with the subject of consideration,³² after the statute of uses, it became necessary, in a feoffment, either that there should be a consideration, or that the grant should be made not merely "unto," but "unto and to

²⁴ *Shep. Touch.* 75; *Goodtitle v. Gibbs*, 5 B. & C. 717; *Major v. Buckley*, 51 Mo. 227; *Kenworthy v. Tullis*, 3 Ind. 96.

²⁵ *Mitchell v. Wilson*, 3 Cranch C. C. 242, Fed. Cas. No. 9,672; *Havens v. Land Co.*, 47 N. J. Eq. 365, 371, 20 Atl. 497.

²⁶ *Jackson ex dem. Bird v. Ireland*, 3 Wend. (N. Y.) 99; *Watters v. Bredin*, 70 Pa. 237; *Whitby v. Duffy*, 135 Pa. 620, 19 Atl. 1065. As where, by the granting clause, a fee simple absolute would pass, the habendum may show an intention to convey a less estate. *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159, 168; *Riggin v. Love*, 72 Ill. 553; *Montgomery v. Sturdivant*, 41 Cal. 290.

²⁷ *HUGHES v. HAMMOND*, 136 Ky. 694, 125 S. W. 144, 26 L. R. A. (N. S.) 808, *Burdick Cas. Real Property*; *Major v. Buckley*, 51 Mo. 227; *Ratcliffe v. Marrs*, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Budd v. Brooke*, 3 Gill (Md.) 198, 43 Am. Dec. 321; *Co. Litt.* 299a; *Tyler v. Moore*, 42 Pa. 386; *Watters v. Bredin*, 70 Pa. 235.

²⁸ *Manning v. Smith*, 6 Conn. 289.

²⁹ *Riggin v. Love*, 72 Ill. 553; *Tyler v. Moore*, 42 Pa. 374; *Irwin's Heirs v. Longworth*, 20 Ohio, 581.

³⁰ *Greenwood v. Tyler*, Hob. 314. In ascertaining the intention of the parties, "the entire instrument, the habendum as well as the premises, is to be considered." *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

³¹ *Laws of Eng.* vol. 10, p. 381; *Williams, Real Prop.* (20th Ed.) 600, 601.

³² *Supra.*

the use of," the feoffee.³³ This, or a similar, clause is usually inserted in a formal habendum clause at the present time.³⁴

The Tenendum

The tenendum clause, as explained in connection with the habendum,³⁵ was used in feudal times to signify the tenure by which the estate granted was to be held.³⁶ The clause at the present time is of no practical value, and the phrase "to hold," attached to the habendum clause, "to have," is retained in some modern conveyances only by custom.

The Reddendum—Reservations

The reddendum,³⁷ or the reservation clause, is generally used, in modern times, to create a rent to the grantor,³⁸ or, in this country, to reserve an easement or other right to the grantor, out of the land granted.³⁹ In feudal times, it was regularly used in conveyances for the purpose of declaring the services, generally military, which were "to be returned" to the lord granting the land. As previously stated, however, the terms "reservations" and "exceptions" have become so confused in this country that they are often used interchangeably. Exceptions have been previously explained.⁴⁰ A reservation, at common law, arises when the grantor reserves or creates some new thing out of what he has previously granted; that is, something not before in existence, as, for example, a rent.⁴¹ The idea of reserving easements in lands

³³ Supra; Williams, Real Prop. (17th Internat. Ed.) p. 179.

³⁴ For example: "To have and to hold the said lot or piece of ground hereinbefore described and the hereditaments and premises hereby granted, with the appurtenances, unto the said (John Doe), his heirs and assigns, to and for the only proper use and behoof of the said (John Doe), his heirs and assigns forever."

³⁵ Supra.

³⁶ 2 Blk. Comm. 298, 299; Shep. Touch. 52, 79. See *Hejngley v. Harris*, 1 Ky. Law Rep. 55. Tenendum, from Latin *tenere*, to hold.

³⁷ *Eysaman v. Eysaman*, 24 Hun (N. Y.) 430; *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477.

³⁸ This is the English use of the reddendum clause, where leases at a rent contain a reddendum specifying the rent reserved. *Laws of Eng.* vol. 10, p. 381.

³⁹ *Pettee v. Hawes*, 13 Pick. (Mass.) 323; *Hurd v. Curtis*, 7 Metc. (Mass.) 94; *Choate v. Burnham*, 7 Pick. (Mass.) 274; *Lacy v. Comstock*, 55 Kan. 86, 39 Pac. 1024. And see *BLAIR v. MUSE*, 83 Va. 238, 2 S. E. 31, *Burdick Cas. Real Property*. When a right of way is reserved, the fee in the whole land passes subject to the easement. *Moffitt v. Lytle*, 165 Pa. 173, 30 Atl. 922. As to the English rule, see *infra*.

⁴⁰ Supra.

⁴¹ *Doe v. Lock*, 2 Ad. & E. 743; *Durham, etc., R. Co. v. Walker*, 2 Q. B. 940. And see *BLAIR v. MUSE*, 83 Va. 238, 2 S. E. 31, *Burdick Cas. Real Property*.

conveyed, so frequently employed in our American methods of conveyancing, is not contained in the English common-law notion of a reservation. The "reservation" of an easement by the grantor is, strictly speaking, an exception; that is, it is a right in the land, owned by the grantor and in existence at the time of the grant, which he "excepts" from the general grant. It is due to this use of the word "reservation" that practically no difference exists, with us, between an exception and a reservation. In England, however, an easement cannot be created by a reservation on the part of the grantor alone. The grantee must either sign the original deed (that is, an indenture), or else must give a second deed, a regrant, to his grantor.⁴² The contrary rule obtains, however, in this country, and an easement may be retained by the grantor in the form of a reservation, in a deed executed by himself.⁴³ The word "reservation," however, need not be used if the intention is otherwise clear,⁴⁴ and an exception, so called in the deed, will be construed to be a reservation if such was the intention of the parties; and a reservation will be held an exception if that was the purpose.⁴⁵ A reservation, however, can be made only in favor of the grantor, not for a stranger.⁴⁶ In creating a reservation the same words of limitation are necessary as in the creation of an estate,⁴⁷ and one cannot, by way of reservation, secure to himself a title to real property of which he was not seised at the time of making the grant.⁴⁸

By an express reservation, a life estate may be created in favor of the grantor,⁴⁹ with absolute control of the property.⁵⁰ Such a reservation is not void for inconsistency, since it does not author-

⁴² *Durham, etc., R. Co. v. Walker*, 2 Q. B. 940; *Wickham v. Hawker*, 7 M. & W. 63; *Corporation of London v. Riggs*, 13 Ch. Div. 798.

⁴³ *Simpson v. Railroad Co.*, 176 Mass. 359, 57 N. E. 674; *Borst v. Emple*, 5 N. Y. 33; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307.

⁴⁴ *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81; *Barnes v. Burt*, 38 Conn. 541.

⁴⁵ *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307.

⁴⁶ *Illinois Cent. R. Co. v. Railroad Co.*, 85 Ill. 211; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 74. But see *West Point Iron Co. v. Reymert*, 45 N. Y. 703. And see *BLAIR v. MUSE*, 83 Va. 238, 2 S. E. 31, *Burdick Cas. Real Property*. A reservation to the grantor and a stranger to the deed for the lives of both has been upheld. *Martin v. Cook*, 102 Mich. 267, 60 N. W. 679.

⁴⁷ *Ashcroft v. Railroad Co.*, 126 Mass. 198, 30 Am. Rep. 672. But see *Denis v. Wilson*, 107 Mass. 591.

⁴⁸ *Hathaway v. Payne*, 34 N. Y. 92.

⁴⁹ *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281; *Haines v. Weirick*, 155 Ind. 548, 58 N. E. 712, 80 Am. St. Rep. 251.

⁵⁰ *Haines v. Weirick*, 155 Ind. 548, 58 N. E. 712, 80 Am. St. Rep. 251.

ize the life tenant to destroy the remainderman's title by another conveyance.⁵¹ There may be also a reservation of a power.⁵²

Warranties—Conditions—Covenants

Clauses of warranty, conditions, and covenants, have been named as being among the formal parts of a deed. In order, however, that these important matters may be considered more at length, they are treated in a subsequent chapter.⁵³

Reading the Deed

In ancient times, in order to give publicity to the conveyance, a deed was read, as a part of the ceremony, to certain witnesses. The witnesses were called, the deed read, and then their names, not signatures, were entered upon the parchment. This custom was observed in connection with the "testibus clause," mentioned by Coke as one of the formal parts of a deed.⁵⁴ It is not essential, however, that the deed be read by or to one who executes it, even though he be illiterate or blind, since, if he does not choose thus to be informed of its contents, he will be estopped from alleging that it is not his deed.⁵⁵ A party, moreover, to a deed, who can read, is conclusively presumed to know the contents of the instrument, though he did not actually read it before it was executed.⁵⁶ If, however, the grantor is blind, illiterate, or for any other reason unable to read, the deed must be read to him, if he requests it, and an incorrect reading will invalidate the deed.⁵⁷ Where, however, the deed is correctly read, it will be binding, although it may have been misunderstood.⁵⁸

The Conclusion

The last formal part of a modern deed has been called "the conclusion."⁵⁹ The conclusion means the execution of the deed, and includes the date of the deed and its signing, and also, when necessary for its validity, its sealing, attesting, and acknowledgment.

⁵¹ Haines v. Weirick, *supra*.

⁵² Varner v. Rice, 44 Ark. 236; Van Ohlen's Appeal, 70 Pa. 57.

⁵³ See, post, Ch. XXVIII.

⁵⁴ Co. Litt. 6a. See *supra*.

⁵⁵ Laws of Eng. vol. 10, p. 386 (f).

⁵⁶ School Committee of Providence Tp. v. Kesler, 67 N. C. 443; Kimball v. Baton, 8 N. H. 391.

⁵⁷ Jackson ex dem. Tracy v. Hayner, 12 Johns. (N. Y.) 469; Morrison v. Morrison, 27 Grat. (Va.) 190; Lyons v. Van Riper, 26 N. J. Eq. 337.

⁵⁸ 2 Blk. Comm. 304; Thoroughgoods' Case, 2 Co. 9; School Committee in Providence Tp. v. Kesler, 67 N. C. 443.

⁵⁹ *Supra*.

The Date

Coke⁶⁰ and Blackstone⁶¹ mention the date of a deed as one of its formal parts.⁶² While deeds are usually dated, yet a date is not necessary for the validity of a deed,⁶³ and, when used, may be placed in any part of the instrument. Moreover, since a date is no material part of a deed, a false or impossible date will not invalidate it, where the real date can be proved, and the deed will take effect from the date of its delivery.⁶⁴ Prima facie, the date given in the instrument is the date of delivery,⁶⁵ although this presumption may be rebutted,⁶⁶ and a party to a deed is not estopped by force of any expressed date in the deed from proving that it was delivered at some other time.⁶⁷ Filling in, after execution, a blank for the date will not amount to an alteration avoiding the deed,⁶⁸ and although a deed is dated prior to a patent of the same land, this will not affect its validity.⁶⁹

Signing

At common law, it was not necessary that a deed should be signed, since the seal, which was a requisite to a deed, took the place of a personal signature, and because, further, few Englishmen, in ancient times, even the great lords, could sign their names. It became a custom, however, long before the statute of frauds (1676), for grantors to sign their deeds, and since that statute it has been held, in this country, that the signing of a deed is necessary.⁷⁰ It is held, however, in England, that it is not essential that a deed shall be signed as well as sealed; the great weight of authority being that the statute of frauds affects only assurances

⁶⁰ Co. Litt. 6a.

⁶¹ 2 Blk. Comm. 298.

⁶² "The date of the deed many times antiquity omitted, because the law there was that a deed bearing date before the limited time of prescription could not be pleaded. Therefore they made their deeds without date that they might allege them within the time of prescription. The date of deeds was commonly added in the reign of Edward II, and so ever since." Co. Litt. 6a.

⁶³ *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

⁶⁴ *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Jackson ex dem. Hardenberg v. Schoonmaker*, 2 Johns. (N. Y.) 230.

⁶⁵ *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355; *Ellsworth v. Railroad Co.*, 34 N. J. Law, 93; *Ford v. Gregory's Heirs*, 10 B. Mon. (Ky.) 175.

⁶⁶ *Blake v. Fash*, 44 Ill. 302; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Henderson v. Baltimore*, 8 Md. 353.

⁶⁷ *Laws of Eng.* vol. 10, p. 382 (o).

⁶⁸ *Keane v. Smallbone*, 17 C. B. 179, 25 L. J. C. P. 72.

⁶⁹ *Bledsoe v. Doe*, 4 How. (Miss.) 13.

⁷⁰ 1 Devl. Deeds, § 231; *Goodman v. Randall*, 44 Conn. 321; *Wright v.*

formerly made by parol, and does not affect transactions carried out by deed.⁷¹ Even there, however, it is stated that it is highly advisable that all deeds should be signed according to the regular practice.⁷² Where the statute requires the deed to be subscribed, the signature must be written at the end; but, in the absence of such a provision, the signing may be at any other place.⁷³ When a seal is used, the name should be signed near the seal as an acknowledgment that the seal is his who thus signs.⁷⁴ If the party signing the deed is unable to write, he may sign it by a mark, and this would probably be true, even though he could write.⁷⁵ The name of the grantor may be written at his request, by another for him, in his presence,⁷⁶ although, if the grantor is absent, the power to sign his name must be in writing.⁷⁷ Where a deed is signed by another for the grantor without his authority, he may adopt the signature as his own, and ratify the execution.⁷⁸ Holding or guiding one's hand, so that he may more readily write, does not affect the signature.⁷⁹ One who signs a deed by an assumed name will, nevertheless, be bound,⁸⁰ and the misspelling of one's name as signed to a deed will not be ground for its avoidance by him.⁸¹ When a grantee accepts a deed, he is bound thereby, and it will be regarded as the deed of both parties, although not signed by him.⁸² A deed

Wakeford, 17 Ves. 454a; *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; *JACKSON ex dem. GOUCH v. WOOD*, 12 Johns. (N. Y.) 73, Burdick Cas. Real Property.

⁷¹ See Laws of Eng. vol. 10, pp. 385, 395.

⁷² Id.

⁷³ 1 Dembitz, Land Tit. 345.

⁷⁴ Laws of Eng. vol. 10, p. 385.

⁷⁵ *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; *Baker v. Dening*, 8 Adol. & E. 94.

⁷⁶ *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; *Schmitt v. Schmitt*, 31 Minn. 106, 16 N. W. 543; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Pierce v. Hakes*, 23 Pa. 231; *Loyd v. Oates*, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39.

⁷⁷ *McMurtry v. Brown*, 6 Neb. 368; *Doe ex dem. Evans v. Richardson*, 76 Ala. 329; *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; *Letourneau v. Carbonneau*, 35 Can. S. Ct. 110.

⁷⁸ *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *McAllen v. Raphael* (Tex. Civ. App.) 96 S. W. 760.

⁷⁹ *Harris v. Harris*, 59 Cal. 620; *Kyte v. Kyte*, 8 Kulp (Pa.) 1.

⁸⁰ *Middleton v. Findla*, 25 Cal. 76; *Hommel v. Devinney*, 39 Mich. 522.

⁸¹ *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *O'Meara v. Mining Co.*, 2 Nev. 112.

⁸² *Finley v. Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556. But see *Dawson v. R. Co.*, 107

by a corporation should be signed by the proper officers of the corporation, and the statutes applicable should be consulted.

Sealing

At common law a seal is necessary in the execution of a valid deed,⁸³ but in many states this requirement has been abolished by express provisions of statute.⁸⁴ A seal is defined to be "an impression on wax or wafer or some other tenacious substance capable of being impressed";⁸⁵ but it may be a wafer, or it may be simply impressed on the deed.⁸⁶ In many states a seal may be supplied by a mere scroll made with the pen.⁸⁷ In such cases, however, the instrument must declare that a seal is attached.⁸⁸ Corporations usually have their own distinctive seals, although they may adopt any other in executing a deed.⁸⁹ The seal of a corporation can be attached, however, only by some one having authority.⁹⁰ One may seal a deed with another man's seal,⁹¹ and where there are several parties to a deed, although it is the usual practice to use as many seals as there are persons, all may seal the deed with one and the

Md. 70, 68 Atl. 301, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

⁸³ *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759; *Owen v. Frink*, 24 Cal. 171; *Comley v. Ford*, 65 W. Va. 429, 64 S. E. 447; *JACKSON ex dem. GOUCH v. WOOD*, 12 Johns. (N. Y.) 73, *Burdick Cas. Real Property*; *Davis v. Brandon*, 1 How. (Miss.) 154; *Grandin v. Hernandez*, 29 Hun (N. Y.) 399. But see *Moss v. Anderson*, 7 Mo. 337.

⁸⁴ *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759; *Harris v. Seonce*, 66 Mo. App. 345; *Atlanta, K. & N. R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215; *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567; 1 *Stim. Am. St. Law*, §§ 420, 1564. Such statutes are not retroactive.

⁸⁵ *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359, 364; *Bradford v. Randall*, 5 Pick. (Mass.) 496.

⁸⁶ *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254. *National Bank of England v. Jackson* (1886) 33 Ch. D. 1, 11, 14, C. A. But see *Farmers' & Manufacturers' Bank v. Haight*, 3 Hill (N. Y.) 493. The printed device "[L. S.]" has been held sufficient. *Williams v. Starr*, 5 Wis. 534, 549.

⁸⁷ 1 *Stim. Am. St. Law*, § 1565; *Lore's Heirs' Lessee v. Truman*, 1 Ohio Dec. 510; *Cosner v. McCrum*, 40 W. Va. 339, 21 S. E. 739. But see *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Perrine v. Cheeseman*, 11 N. J. Law, 174, 19 Am. Dec. 388.

⁸⁸ *Jenkins v. Hurt's Com'rs*, 2 Rand. (Va.) 446. An instrument containing the words "sealed with my seal," but having no seal on it, is not a technical deed. *Deming v. Bullitt*, 1 Blackf. (Ind.) 241.

⁸⁹ *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, 428; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27, 34.

⁹⁰ See *Jackson v. Campbell*, 5 Wend. (N. Y.) 572.

⁹¹ *Laws of Eng. vol. 10*, p. 383.

same seal.⁹² In England, the modern practice of sealing a deed is for the party to place his finger or thumb upon the attached seal, saying at the same time, "I deliver this as my act and deed."⁹³ When a seal is required, it must be attached to the deed before or at the time of its delivery.⁹⁴

ATTESTATION OF DEEDS

286. In some states, disinterested witnesses to a deed are required by statute—

- (a) Either for the validity of a deed; or,
- (b) In the absence of acknowledgment, to entitle it to record.

Coke gives as one of the formal parts of a deed of conveyance the "hiis testibus" clause, by which was meant that certain persons were called in to witness (not to sign) the execution of the deed by the grantor, and that "to these witnesses" (hiis testibus) the deed was read, and in their presence delivered. When ability to write became more general, it became the custom for these witnesses to sign their names to the deed.⁹⁵ No signatory witnesses to a deed are required, however, at common law,⁹⁶ although by statute in many states they are necessary.⁹⁷ In some states witnesses are necessary to the validity of a deed, even between the parties, while others are required only when there is no acknowledgment.⁹⁸ In some states only one witness is required, although in others two are necessary.⁹⁹ The witnesses must be such persons as are competent to testify,¹ and they must not be interested in the conveyance at the time they act as witnesses,² although an interest subsequently acquired will not disqualify them.³ Under some

⁹² Laws of Eng. vol. 10, p. 383; *Lunsford v. Lead Co.*, 54 Mo. 426; *Yale v. Flanders*, 4 Wis. 96; *Compton v. Crossman*, 1 Pr. Edw. Isl. 174.

⁹³ Laws of Eng. vol. 10, p. 383; *Williams*, Real Prop. (20th Ed.) 150.

⁹⁴ Laws of Eng. vol. 10, p. 384 (m).

⁹⁵ *Dundy v. Chambers*, 23 Ill. 369.

⁹⁶ Laws of Eng. vol. 10, p. 386 (l); 2 Blk. Comm. 307; *Dundy v. Chambers*, 23 Ill. 369; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62.

⁹⁷ *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739; *Lewis v. Herrera*, 10 Ariz. 74, 85 Pac. 245.

⁹⁸ See *Jones*, Convey. § 1085; 1 Stim. Am. St. Law, §§ 1565, 1566. And see *Price v. Haynes*, 37 Mich. 487; *Genter v. Morrison*, 31 Barb. (N. Y.) 155.

⁹⁹ See *Jones*, Convey. § 1085; *Carson v. Thompson*, 10 Wash. 295, 38 Pac. 1116.

¹ *Frink v. Pond*, 46 N. H. 125; *Winsted Sav. Bank & Bldg. Ass'n v. Spencer*, 26 Conn. 195; *Third Nat. Bank of Chattanooga v. O'Brien*, 94 Tenn. 38, 28 S. W. 293.

² *Winsted Sav. Bank & Bldg. Ass'n v. Spencer*, 26 Conn. 195.

³ *Carter v. Corley*, 23 Ala. 612.

of the statutes, however, a witness need not be competent to testify at the time he signs.⁴ Where there are several grantors of a joint estate, they are not competent witnesses for each other.⁵ The witnesses must sign at the grantor's request,⁶ and are competent to testify as to his mental soundness at the time the deed was executed.⁷ A witness who merely makes his mark is sufficient,⁸ unless the statute prescribes that he shall write his name.⁹ It has been held that, by reason of his interest, a stockholder in a corporation is not a qualified witness to a deed to the corporation.¹⁰

ACKNOWLEDGMENT OF DEEDS

287. A deed must be acknowledged by the grantor to be his voluntary act, before some officer designated by the statute:

- (a) Generally, to entitle it to record.
- (b) In some cases, to give it validity.

Acknowledgment

The acknowledgment of a deed is the act of the grantor in going before a competent officer, designated by statute, and declaring that the instrument he produces is his voluntary act and deed.¹¹ The term also means the official certificate that such a declaration was made.¹² Provisions for acknowledgment do not exist at common law, being purely statutory. In some states statutes have been passed requiring the acknowledgment of certain kinds of deeds, as, for example, sheriff's deeds,¹³ tax deeds,¹⁴ homestead deeds,¹⁵ and deeds by married women,¹⁶ in order to give such

* See Jones, Convey. § 1098.

⁵ Townsend v. Downer, 27 Vt. 119.

⁶ Pritchard v. Palmer, 88 Hun, 412, 34 N. Y. Supp. 787; Tate v. Lawrence, 11 Heisk. (Tenn.) 503. But see Clements v. Pearce, 63 Ala. 284.

⁷ Brand v. Brand, 39 How. Prac. (N. Y.) 193. And see generally, as to statutes requiring attestation, 1 Dembitz, Land Tit. 348.

⁸ Devereux v. McMahon, 102 N. C. 284, 9 S. E. 635; Stewart v. Beard, 69 Ala. 470; Harrison v. Simons, 55 Ala. 510.

⁹ Id.

¹⁰ See Jones, Convey. § 1100.

¹¹ Anderson, Law Dict.; Short v. Conlee, 28 Ill. 228.

¹² Rogers v. Pell, 154 N. Y. 518, 49 N. E. 75.

¹³ Adams v. Buchanan, 49 Mo. 64; Storch v. Carr, 28 Pa. 135.

¹⁴ Goodykoontz v. Olsen, 54 Iowa, 174, 6 N. W. 263; Tilson v. Thompson, 10 Pick. (Mass.) 359.

¹⁵ West v. Krebaum, 88 Ill. 263; Horbach v. Tyrrell, 48 Neb. 514, 67 N. W. 485, 489, 37 L. R. A. 434.

¹⁶ Whalen v. Land Co., 65 N. J. Law, 206, 47 Atl. 443; Evans v. Dickenson, 114 Fed. 284, 52 C. C. A. 170.

instruments validity between the parties. Likewise some states provide that statutory deeds shall be acknowledged.¹⁷ In the absence, however, of such express cases it is universally held that an acknowledgment is no part of a deed,¹⁸ and that, as between the parties, acknowledgment is not necessary in order to give it validity.¹⁹ The general object of acknowledgment, under the statutes, is to give such solemn avowal of the genuineness of the instrument as will admit it to public record.²⁰ Moreover, it is provided, in many states, that a deed properly acknowledged may be read in evidence without further proof of the genuineness of its execution,²¹ and this is true, in some states, even though the deed has not been recorded.²² Other courts, however, hold to the contrary, under some of the statutes, and in such jurisdictions the deed must be recorded as well as acknowledged in order to make it admissible.²³ As a general rule, an unacknowledged deed cannot be introduced in evidence without proof of its execution,²⁴ although some courts have admitted an unacknowledged deed as against the grantor and his heirs.²⁵ In states where an unacknowledged deed cannot legally be recorded, if an unacknowledged or a defectively acknowledged deed is actually spread upon the records, it does not constitute constructive notice,²⁶ although it may be actual notice to one who has examined the record.²⁷ No one has power to acknowledge a deed except the grantor, or one to whom

¹⁷ For example, the Kansas statute (Gen. St. 1909, § 1652) provides that they shall be "duly signed and acknowledged."

¹⁸ *Stephenson v. Thompson*, 13 Ill. 186; *Miner v. Graham*, 24 Pa. 491.

¹⁹ *Rullman v. Barr*, 54 Kan. 643, 39 Pac. 179; *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; *Carleton v. Byington*, 18 Iowa, 482.

²⁰ *Boyd v. Slayback*, 63 Cal. 493; *Blain v. Stewart*, 2 Iowa, 378; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

²¹ *Krom v. Vermillion*, 143 Ind. 75, 41 N. E. 539; *Andrews v. Reed* (Kan.) 48 Pac. 29; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73.

²² *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516; *Keichline v. Keichline*, 54 Pa. 75.

²³ *Griesler v. McKennon*, 44 Ark. 517; *Falls Land & Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479.

²⁴ *Reed v. Kemp*, 16 Ill. 445; *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa, 101, 4 N. W. 842.

²⁵ *Dundas v. Biddle*, 2 Pa. 160; *Jackson ex dem. Ramson v. Shepard*, 2 Johns. (N. Y.) 77; *Brown v. Manter*, 22 N. H. 468; *Gibbs v. Swift*, 12 Cush. (Mass.) 393. In some states the grantor can be compelled to acknowledge a deed executed and delivered. *Sullivan v. Chambers*, 18 R. I. 799, 31 Atl. 167.

²⁶ *Blood v. Blood*, 23 Pick. (Mass.) 80; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Dussaume v. Burnett*, 5 Iowa, 95. Contra, *Reed v. Kemp*, 16 Ill. 445; *Simpson v. Mundee*, 3 Kan. 181.

²⁷ *Bass v. Estill*, 50 Miss. 300; *Manaudas v. Mann*, 14 Or. 450, 13 Pac. 449.

he has given a power of attorney.²⁸ When husband and wife have joined in a conveyance of the wife's land, both, under some of the statutes, must acknowledge the deed, as, likewise, when a wife joins in her husband's deed.²⁹ If, however, the husband's acknowledgment is not expressly required by the statute, his interest in his wife's property will pass without it.³⁰ As a rule, a married woman, in order to release her dower, must acknowledge the deed,³¹ and, in some states, although in less than formerly, this acknowledgment must be separate and apart from her husband.³² The object of this private acknowledgment of the wife is to enable her to act voluntarily, free from the possible restraint and coercion of the husband. Relative, however, to the acknowledgment of married women's deeds, in general, it should be stated that, when the statute authorizes married women to convey their property as if unmarried, an acknowledgment is no longer requisite to the validity of the deed.³³ Usually an acknowledgment may be made at any time before the deed is placed upon record, or used in evidence,³⁴ and, where not essential to the validity of the deed, the acknowledgment will relate back to the time of execution.³⁵ When, however, a deed must be acknowledged in order to make it valid, the instrument takes effect only from the time of its acknowledgment.³⁶ A deed may be acknowledged after its delivery, yet, if so, according to the general rule, its delivery will,

²⁸ *Talbert v. Stewart*, 39 Cal. 602; *Cochran v. Improvement Co.*, 127 N. C. 386, 37 S. E. 496; 1 Devl. Deeds, § 468. For method of proving deed where grantor is dead or refuses to acknowledge it, see 1 Stim. Am. St. Law, art. 159.

²⁹ *Southerland v. Hunter*, 93 N. C. 310; *Ferguson v. Kingsland*, 93 N. C. 337; *Bartlett v. O'Donoghue*, 72 Mo. 563.

³⁰ *Curtiss v. Follett*, 15 Barb. (N. Y.) 337; *Reynolds v. Clark, Wright* (Ohio) 656; *Knapper v. Wooster, Brayton* (Vt.) 50.

³¹ *Westfall v. Lee*, 7 Iowa, 12; *Kirk v. Dean*, 2 Binn. (Pa.) 341; *Shoptaw v. Ridgway's Adm'r*, 60 S. W. 723, 22 Ky. Law Rep. 1495.

³² *Hodges v. Winston*, 95 Ala. 514, 11 South. 200, 36 Am. St. Rep. 241; *Lyon v. Kain*, 36 Ill. 362; *Elwood v. Klock*, 13 Barb. (N. Y.) 50; *Spencer v. Reese*, 165 Pa. 158, 30 Atl. 722; *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510, 134 Am. St. Rep. 948; *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

³³ *Bradshaw v. Atkins*, 110 Ill. 323; *Lake v. Gray*, 30 Iowa, 415; *Linton v. Cooper*, 53 Neb. 400, 73 N. W. 731.

³⁴ *Hood v. Powell*, 73 Ala. 171; *Smith v. Porter*, 10 Gray (Mass.) 66. *Pierce v. Brown*, 24 Vt. 165; *Johnson v. McGehee*, 1 Ala. 186. An acknowledgment bearing date earlier than the date of the deed is good. *Gest v. Flock*, 2 N. J. Eq. 108.

³⁵ *Speed's Lessee v. Brooks*, 7 J. J. Marsh. (Ky.) 119; *Hall v. Bunker*, 47 N. C. 440.

³⁶ *Chadwick v. Carson*, 78 Ala. 116; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497.

nevertheless, be presumed to have been made on the day of its execution.³⁷ Certain officers are designated before whom acknowledgments may be taken; and if taken by an unauthorized person, the acknowledgment is of no effect.³⁸ If the person, however, who takes the acknowledgment is a de facto officer, the acknowledgment is sufficient.³⁹ An officer taking an acknowledgment must not, however, be a party to the deed,⁴⁰ though he may be a relative of one of the parties without invalidating the acknowledgment.⁴¹ An acknowledgment must, in some states, show the place where it is taken,⁴² and, under some statutes, an officer can take an acknowledgment of a deed of conveyance only when the lands conveyed are in his county or district.⁴³ Generally, however, an acknowledgment may be made anywhere in the state⁴⁴ in which the land is located,⁴⁵ or, under the statutes, even in a different state and in accordance with the laws of such foreign state.⁴⁶ The certificate of acknowledgment should show the official character of the officer taking it.⁴⁷ The certificate must also, in general, contain the name of the grantor,⁴⁸ and must state the facts which constitute the acknowledgment,⁴⁹ and a mere certificate that the deed was "acknowledged" is not sufficient.⁵⁰ In some states, an officer taking an acknowledgment may correct the certificate at

³⁷ *Hardin v. Crate*, 78 Ill. 533; *People v. Snyder*, 41 N. Y. 397; *Renick v. Ludington*, 20 W. Va. 511.

³⁸ *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602; *Clink v. Circuit Judge*, 58 Mich. 242, 25 N. W. 175; *Ridabock v. Levy*, 8 Paige (N. Y.) 197, 35 Am. Dec. 682; *Tully v. Lewitz*, 50 Misc. Rep. 350, 98 N. Y. Supp. 829.

³⁹ *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Kottman v. Ayer*, 3 Strob. (S. C.) 92; *Building & Loan Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222; *Woodruff v. McHarry*, 56 Ill. 218; *Brown v. Lunt*, 37 Me. 423.

⁴⁰ *Groesbeck v. Seeley*, 13 Mich. 329; *Withers v. Baird*, 7 Watts (Pa.) 227, 32 Am. Dec. 754; *Wilson v. Traer*, 20 Iowa, 231.

⁴¹ *Lynch v. Livingston*, 6 N. Y. 422; *Kimball v. Johnson*, 14 Wis. 674.

⁴² *Willard v. Cramer*, 36 Iowa, 22; *Hardin v. Osborne*, 60 Ill. 93.

⁴³ *Hedger v. Ward*, 15 B. Mon. (Ky.) 106; *Musick v. Barney*, 49 Mo. 458.

⁴⁴ *Van Cortlandt v. Tozer*, 17 Wend. (N. Y.) 338.

⁴⁵ *McFerran v. Powers*, 1 Serg. & R. (Pa.) 102; *Campbell v. Moon*, 16 S. C. 107; *Tarrant v. Core*, 106 Va. 161, 56 S. E. 228.

⁴⁶ *Humphreys v. Mooney*, 5 Colo. 282; *Southerin v. Mendum*, 5 N. H. 420.

⁴⁷ *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355; *Final v. Backus*, 18 Mich. 218; *Johnston's Lessee v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533.

⁴⁸ *Martind. Conv.* (2d Ed.) § 259. But see *Wilcoxon v. Osborn*, 77 Mo. 621; *Dail v. Moore*, 51 Mo. 589.

⁴⁹ *Carpenter v. Dexter*, 8 Wall. (U. S.) 513, 19 L. Ed. 426; *Calumet & C. Canal & Dock Co. v. Russell*, 68 Ill. 426; *Myers v. Boyd*, 96 Pa. 427.

⁵⁰ *Gill v. Fauntleroy's Heirs*, 8 B. Mon. (Ky.) 177; *Flanagan's Lessee v. Young*, 2 Har. & McH. (Md.) 38. But see *McCormack v. James*, 36 Fed. 14.

any time while he remains in office, to make it conform to the actual facts of the acknowledgment;⁵¹ but, by weight of authority, no such corrections or changes can be made by him, the only remedy being a new acknowledgment.⁵² In some states, by force of statute, the certificate of the officer is merely *prima facie* evidence of the facts stated therein,⁵³ although, in the absence of such a statute, it is the rule that the certificate is conclusive, and is impeachable only for fraud.⁵⁴

RECORDING OF DEEDS

288. A deed need not be registered or recorded to give it validity as between the parties, unless some statute requires it.

It was observed, in connection with deeds of bargain and sale, that in order to give notoriety to such conveyances, which became the usual form for the transfer of lands, the statute of enrollments⁵⁵ required that such deeds must be enrolled within six months after their execution, in order to give them validity as conveyances under the statute of uses.⁵⁶ The English statute of enrollments remains in force in England to-day, and in that country bargains and sales of any estate of inheritance or freehold in any manors, lands, tenements, or hereditaments are required to be made by deed indented, and must also be enrolled, as provided by that statute.⁵⁷ This English statute, which is confined to deeds of bargain and sale, has no application, however, in this country, where all deeds of lands are governed by the recording statutes alike.⁵⁸

⁵¹ *Camp v. Buxton*, 34 Hun (N. Y.) 511; *Cook v. Pittman*, 144 N. C. 530, 57 S. E. 219, 119 Am. St. Rep. 985; *Hanson v. Cochran*, 9 Houst. (Del.) 184, 31 Atl. 880; *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516. But see *Newman v. Samuels*, 17 Iowa, 528.

⁵² *Wedel v. Herman*, 59 Cal. 507; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128; *Elliott v. Peirsoll*, 1 McLean, 11, 8 Fed. Cas. No. 4,395.

⁵³ *Drury v. Foster*, 1 Dill. 461, Fed. Cas. No. 4,096; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804; *Jackson ex dem. Hardenberg v. Schoonmaker*, 4 Johns. (N. Y.) 161; *Edgerton v. Jones*, 10 Minn. 429 (Gil. 341); *Lennon v. White*, 61 Minn. 150, 63 N. W. 620; *Hutchison v. Rust*, 2 Grat. (Va.) 394.

⁵⁴ *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Saginaw Bldg. & Loan Ass'n v. Tennant*, 111 Mich. 515, 69 N. W. 1118; *Mutual Life Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. 1095.

⁵⁵ 27 Hen. VIII, c. 16. And see *JACKSON ex dem. GOUCH v. WOOD*, 12 Johns. (N. Y.) 73, *Burdick Cas. Real Property*.

⁵⁶ *Supra*.

⁵⁷ *Laws of Eng.* vol. 10, § 656.

⁵⁸ *Chandler v. Chandler*, 55 Cal. 267; *Givan v. Doe*, 7 Blackf. (Ind.) 210;

Where a statute requires that all conveyances must be recorded for the purpose of passing title, such a step becomes, of course, a requisite to a valid deed, and until the recording takes place the title remains in the grantor.⁵⁹ While such general statutes are very rare, yet statutes providing that the deeds of married women must be recorded in order to give them validity have not been uncommon,⁶⁰ and, as said in a Virginia case, "all the requirements of the statute, including recordation, must be complied with, or else the wife's title does not pass." Also, in some states, a tax deed must be recorded within a limited time in order to make it valid.⁶¹

As a general rule, however, as between the parties, the recording of a deed is not essential to its validity.⁶² The object of recording deeds is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded.⁶³ For this purpose recording or registration laws exist in all the states. The discussion of this subject is taken up elsewhere in this volume.⁶⁴

DELIVERY AND ACCEPTANCE OF DEEDS

289. A deed does not become operative until it is delivered and accepted. The delivery, however, may be as an escrow.

As a final essential to the validity of a deed, it must be delivered.⁶⁵ No special form or observance is necessary, however, for its

Trafton v. Hawes, 102 Mass. 533, 541, 3 Am. Rep. 494; *Welsh v. Foster*, 12 Mass. 93.

⁵⁹ So held in *Nickel v. Brown*, 75 Md. 172, 23 Atl. 736, under a Maryland statute requiring the recording of deeds.

⁶⁰ See *Sewall v. Haymaker*, 127 U. S. 719, 8 Sup. Ct. 1348, 32 L. Ed. 299; *Christy v. Burch*, 25 Fla. 942, 2 South. 258; *Rorer's Heirs v. Bank*, 83 Va. 589, 4 S. E. 820.

⁶¹ Consult the local statutes. And see *Humphrey v. Yost*, 10 Kan. App. 324, 62 Pac. 550; *St. Paul v. Lumber Co.*, 116 La. 585, 40 South. 906; *Halsted v. Silberstein*, 196 N. Y. 1, 89 N. E. 443.

⁶² *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*; *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578; *Baker v. Insurance Co.*, 133 App. Div. 496, 117 N. Y. Supp. 1104.

SHERIFF'S DEEDS.—As against the execution defendant, and his heirs and devisees, a sheriff's deed is valid, though not recorded. *Dixon v. Doe*, 5 Blackf. (Ind.) 106; *Houghton v. Bartholomew*, 10 Metc. (Mass.) 138.

⁶³ *Williams, Real Prop.* p. 251; *Jones, Convey.* § 1383; *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*.

⁶⁴ See Ch. XX, ante.

⁶⁵ *Hoy v. Hubbell*, 125 App. Div. 60, 109 N. Y. Supp. 301; *Mills v. Gore*, 20 Pick. (Mass.) 28; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Johnson*

delivery, and it may be made in words or by conduct.⁶⁶ A manual delivery, an actual delivery of the paper, is not necessary;⁶⁷ the question of delivery being generally one of the intention of the parties,⁶⁸ and a question of fact for the jury.⁶⁹ As a general rule, the instrument must pass out of the control of the grantor,⁷⁰ yet the mere fact of the retention of the possession of the document by the grantor, where it is the intention to consider the deed delivered, will not change the fact of delivery,⁷¹ as is likewise true, where the grantor merely holds the deed as the agent or depositary for the grantee.⁷² A deed retained for security is not, however, delivered.⁷³ While there is a well-established rule that, where a grantee is in possession of a deed, there is a presumption that it was duly delivered,⁷⁴ yet, on the other hand, the mere fact of the possession of the deed by the grantee does not necessarily amount to a delivery,

v. Farley, 45 N. H. 505; Paddock v. Potter, 67 Vt. 360, 31 Atl. 784; Boyd v. Slayback, 63 Cal. 493. Cf. Exton v. Scott, 6 Sim. 31. A statute expressly providing that a deed shall become effective upon being recorded may make a delivery unnecessary. See Betts v. Bank, 1 Har. & G. (Md.) 175, 18 Am. Dec. 283.

⁶⁶ Laws of Eng. vol. 10, p. 385s; Kneeland v. Cowperthwaite, 138 Iowa, 193, 115 N. W. 1026; Atkins v. Atkins, 195 Mass. 124, 80 N. E. 806, 11 L. R. A. (N. S.) 273, 122 Am. St. Rep. 221; MILLER v. MEERS, 155 Ill. 284, 40 N. E. 577, Burdick Cas. Real Property.

⁶⁷ Balin v. Osoba, 76 Kan. 234, 91 Pac. 57; Chastek v. Souba, 93 Minn. 418, 101 N. W. 618; Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445; Dayton v. Newman, 19 Pa. 194; Farrar v. Bridges, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439; Doe v. Knight, 5 Barn. & C. 671.

⁶⁸ MILLER v. MEERS, 155 Ill. 284, 40 N. E. 577, Burdick Cas. Real Property; Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775; Connor v. Rivard, 144 Mich. 177, 107 N. W. 897; Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. Supp. 911; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Hill v. McNichol, 80 Me. 209, 13 Atl. 883. But see Hinchliff v. Hinman, 18 Wis. 139.

⁶⁹ MILLER v. MEERS, 155 Ill. 284, 40 N. E. 577, Burdick Cas. Real Property; Abrams v. Beale, 224 Ill. 496, 79 N. E. 671; Felt v. Felt, 155 Mich. 237, 118 N. W. 953; Fisher v. Hall, 41 N. Y. 416; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106.

⁷⁰ Zeitlow v. Zeitlow, 84 Kan. 713, 115 Pac. 573; Holbrook v. Truesdell, 100 App. Div. 9, 90 N. Y. Supp. 911; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972.

⁷¹ Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Farrar v. Bridges, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439.

⁷² Id.

⁷³ Gudgen v. Besset, 6 El. & Bl. 986.

⁷⁴ Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Mercantile Safe Deposit Co. v. Huntington, 89 Hun, 465, 35 N. Y. Supp. 390; Wright v. Wright, 77 Fed. 795; SCHURTZ v. COLVIN, 55 Ohio St. 274, 45 N. E. 527, Burdick Cas. Real Property.

since the deed may have been obtained by theft or fraud,⁷⁵ or the grantee may hold it as agent of the grantor,⁷⁶ or it may have been handed over to the grantee merely for the purpose of examination.⁷⁷ If the deed is taken by the grantee without the consent of the grantor, there is no delivery, and the grantee cannot pass title to a subsequent purchaser⁷⁸ unless the grantor is estopped by his negligence from setting up his title against an innocent third person.⁷⁹

Time of Delivery

As a rule, a deed must be delivered during the lifetime of the grantor; otherwise, it is void.⁸⁰ Consequently, a grantor cannot pass title after his death by executing a deed and retaining the same, intending it to take effect after his decease.⁸¹ A delivery, however, to a third person, the deed being absolute, without reservation of power to recall the same, the deed to be delivered to the grantee upon the death of the grantor, is a valid delivery.⁸²

Delivery to Third Person

It is not essential that the deed should be delivered to the grantee in person, since it may be delivered to his agent⁸³ or

⁷⁵ *Sauter v. Dollman*, 46 Minn. 504, 49 N. W. 258. A delivery obtained by fraud is ineffectual. *Golden v. Hardesty*, 93 Iowa, 622, 61 N. W. 913.

⁷⁶ *Dietz v. Farish*, 44 N. Y. Super. Ct. 190.

⁷⁷ *Comer v. Baldwin*, 16 Minn. 172 (Gil. 151); *Graves v. Dudley*, 20 N. Y. 76; *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613.

⁷⁸ *Tisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546.

⁷⁹ *Id.* And see *Gage v. Gage*, 36 Mich. 229; *Carusi v. Savary*, 6 App. Cas. (D. C.) 330.

⁸⁰ *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*; *Mortgage Trust Co. of Pennsylvania v. Moore*, 150 Ind. 465, 50 N. E. 72; *Burnham v. Burnham*, 58 Misc. Rep. 385, 111 N. Y. Supp. 252; *Jackson ex dem Hopkins v. Leek*, 12 Wend. (N. Y.) 107. A deed found among the grantor's papers after his death is of no effect, though it is fully executed and acknowledged since there must be a delivery in the grantor's lifetime. *Wiggins v. Lusk*, 12 Ill. 132; *Miller v. Lullman*, 81 Mo. 311. But see *Cummings v. Glass*, 162 Pa. 241, 29 Atl. 848.

⁸¹ *Hayden v. Collins* 1 Cal. App. 259, 81 Pac. 1120; *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638; *Alward v. Lobingier*, 87 Kan. 106, 123 Pac. 867.

⁸² *Hoagland v. Beckley*, 158 Mich. 565, 128 N. W. 12; *Joslin v. Goddard*, 187 Mass. 165, 72 N. E. 948; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Belden v. Carter*, 4 Day (Conn.) 66, 4 Am. Dec. 185; *Hathaway v. Payne*, 34 N. Y. 92; *Latham v. Udell*, 38 Mich. 238; *Stephens v. Rinehart*, 72 Pa. 434; *Dinwiddie v. Smith*, 141 Ind. 318, 40 N. E. 748. The grantor must not reserve power to recall the deed, or the delivery is ineffectual. *Cook v. Brown*, 34 N. H. 460; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

⁸³ *Blackwell v. Blackwell*, 196 Mass. 186, 81 N. E. 910, 12 Ann. Cas. 1070; *Long v. McHenry*, 45 Pa. Super. Ct. 530.

to any third person for the grantee's use.⁸⁴ Where, however, there is a delivery to a third person for the grantee, such a delivery must be absolute, without the power of control or recall on the part of the grantor.⁸⁵ Thus it is held that delivery to a father, the deed conveying land to his infant son, is good.⁸⁶ To constitute a delivery to a grantee, however, the deed must be delivered to the third person with the intention of delivering it to the grantee; a delivery, for example, to a third person, without any instruction or authority to deliver it to the grantee, is not a valid delivery.⁸⁷ Where there are several grantees in a deed, delivery to one is sufficient,⁸⁸ and delivery of a deed in which a corporation is grantee must be made to some one authorized to accept it for the corporation.⁸⁹

✓ Ratification of Delivery

An unauthorized delivery to a third person may be subsequently ratified by the grantor.⁹⁰ Likewise the grantee may ratify the

⁸⁴ *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351; *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050; *Stephens v. Huss*, 54 Pa. 20. A deed may become operative by being delivered to the recording officer, if so intended by the parties. *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507; *Cooper v. Jackson*, 4 Wis. 537; *Stevenson v. Kaiser* (Super. N. Y.) 29 N. Y. Supp. 1122; *Kemp v. Walker*, 16 Ohio, 118; *Laughlin v. Dock Co.*, 13 C. C. A. 1, 65 Fed. 441. The presumption that a deed which has been recorded was delivered may be rebutted, for instance, by showing that the grantee had no knowledge of the existence of the deed. *Union Mut. Life Ins. Co. v. Campbell*, 95 Ill. 268, 35 Am. Rep. 166; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482; *Russ v. Stratton*, 11 Misc. Rep. 565, 32 N. Y. Supp. 767.

⁸⁵ *Burnham v. Burnham*, 58 Misc. Rep. 385, 111 N. Y. Supp. 252; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146. The return or cancellation of a deed after it has become operative by execution and delivery will not divest the estate conveyed, or restore the grantor to his former position. *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591; *National Union Bldg. Ass'n v. Brewer*, 41 Ill. App. 223; *Jackson ex dem Simmons v. Chase*, 2 Johns. (N. Y.) 84; *Botsford v. Morehouse*, 4 Conn. 550. But see *Albright v. Albright*, 70 Wis. 532, 36 N. W. 254; *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39.

⁸⁶ *Parker v. Salmons*, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291. See, also, *Chapin v. Nott*, 203 Ill. 341, 67 N. E. 833. And see *MILLER v. MEERS*, 155 Ill. 284, 40 N. E. 577, *Burdick Cas. Real Property*.

⁸⁷ *Fitzpatrick v. Brigran*, 130 Ala. 450, 30 South. 500; *Elsev v. Metcalf*, 1 Denio (N. Y.) 323; *Carr v. Hoxie*, Fed. Cas No 2,438, 5 Mason, 60.

⁸⁸ *Strickland v. Griswold* 149 Ala. 325, 43 South. 105; *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. 146. But see *Hannah v. Swarner*, 8 Watts (Pa.) 9, 34 Am. Dec. 442.

⁸⁹ *Western R. Corp. v. Babcock*, 6 Metc. (Mass.) 346.

⁹⁰ *Westlake v. Dunn*, 184 Mass. 260, 68 N. E. 212, 100 Am. St. Rep. 557; *McNulty v. McNulty*, 47 Kan. 208, 27 Pac. 819.

receipt of a deed by a third person for him, and may accept it as a delivery.⁹¹

Delivery as an Escrow

A deed may be delivered to a third person, not as a deed, but as an escrow (or scroll); that is, as a simple writing, not to be delivered to the grantee, or to become the deed of the expressed grantor, until some condition shall have been performed.⁹² As in the delivery of a deed, no particular form is required,⁹³ since either words or conduct will suffice, the essential thing being that it was the intention to deliver as an escrow.⁹⁴ Although it is said that title does not pass to the grantee until the delivery to him,⁹⁵ yet where there is a delivery as an escrow, and the condition is performed,⁹⁶ the deed may become effectual from the time of the delivery in escrow, unless intervening rights, such, for example, as those of the grantor's attaching creditors, have arisen.⁹⁷ In fact, it is the general rule that, immediately the condition is fulfilled, the escrow takes effect as a deed, without any further delivery, and its delivery as a deed relates back, if necessary, to the time of its delivery as an escrow.⁹⁸ The death of the grantor, for instance, before the second delivery, does not prevent the deed from becoming effectual by the performance of the condition.⁹⁹ There can be no delivery in escrow to the grantee himself,¹ nor

⁹¹ *Rhea v. Insurance Co.*, 77 Ark. 57, 90 S. W. 850; *Morrison v. Kelly*, 22 Ill. 619, 74 Am. Dec. 169.

⁹² *MATHESON v. MATHESON*, 139 Iowa, 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167, *Burdick Cas. Real Property*; *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*; *Arnold v. Patrick*, 6 Paige (N. Y.) 310; *Johnson v. Branch*, 11 Humph. (Tenn.) 521; *Loubat v. Kipp*, 9 Fla. 60.

⁹³ *White v. Bailey*, 14 Conn. 271; *State v. Peck*, 53 Me. 293; *Shoenberger's Ex'rs v. Hackman*, 37 Pa. 87.

⁹⁴ *Laws of Eng.* vol. 10, p. 387.

⁹⁵ *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 297; *Everts v. Agnes*, 4 Wis. 351, 65 Am. Dec. 314.

⁹⁶ See *Johnson v. Baker*, 4 Barn. & Ald. 440.

⁹⁷ *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 297; *Hall v. Harris*, 40 N. C. 303; *Price v. Railroad Co.*, 34 Ill. 13; *Foster v. Mansfield*, 3 Metc. (Mass.) 414, 37 Am. Dec. 154; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; *Stephens v. Rinehart*, 72 Pa. 434; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26.

⁹⁸ *Laws of Eng.* vol. 10, p. 390 (k).

⁹⁹ *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405. But see *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*.

¹ *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638; *Flagg v. Mann*, Fed. Cas. No. 4,847, 2 Summ. 486; *Whyddon's Case*, Cro. Eliz. 520; *Williams v. Green*, Id.

to his agent or attorney, unless the agent or attorney agrees to hold in that way;² otherwise, the deed, if absolute in form, would take effect as if no condition had been attached.³ A deed may, however, be delivered as an escrow to an attorney acting for all the parties,⁴ and it may be passed through the hands of the grantee to another person to hold in escrow.⁵

For a valid delivery as an escrow, the grantor must be without power to recall the deed,⁶ and when a deed has been delivered as an escrow it is of no effect or validity until the condition subject to its delivery, or to its taking effect, is actually performed, even though it may have been delivered to the grantee through the mistake or wrongful act of the depository.⁷

Acceptance

The grantee must accept the deed in order to make it binding,⁸ and, in the absence of fraud, acceptance will be implied from the fact of delivery,⁹ and also presumed from the fact of the grantee's possession of the deed;¹⁰ also there may be a presumption of

884. See *Degory v. Roe*, 1 Leon. 152. Contra, *Hawksland v. Gatchel*, Cro. Eliz. 835.

² *Parrish v. Steadham*, 102 Ala. 615, 15 South. 354; *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124; *Cincinnati, W. & Z. R. Co. v. Liff*, 13 Ohio St. 235; *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359; *Watkins v. Nash*, L. R. 20 Eq. 262.

³ *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Miller v. Fletcher*, 27 Grat. (Va.) 403, 21 Am. Rep. 356.

⁴ *Laws of Eng.* vol. 10, p. 388 (c, d).

⁵ *Gilbert v. Insurance Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543.

⁶ *James v. Vanderheyden*, 1 Paige (N. Y.) 385; *MATHESON v. MATHE-SON*, 139 Iowa, 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167, *Burdick Cas. Real Property*.

⁷ *Y. B. 9 Hen. VI*, 37, pl. 12; *Lloyds Bank v. Bullock* (1896) 2 Ch. 192, 197; *Everts v. Agnes*, 6 Wis. 453; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 170; *Smith v. Bank*, 32 Vt. 341, 76 Am. Dec. 179. But see *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478; *Wallace v. Harris*, 32 Mich. 380. And see *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*.

⁸ *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Day v. Mooney*, 4 Hun (N. Y.) 134; *Jackson ex dem. Eames v. Phipps*, 12 Johns. (N. Y.) 418; *Thompson v. Leach*, 3 Lev. 284; *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272; *Derry Bank v. Webster*, 44 N. H. 264; *Johnson v. Farley*, 45 N. H. 505; *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726. But see *Wilt v. Franklin*, 1 Bin. (Pa.) 502, 2 Am. Dec. 474; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315. And cf. *Moore v. Hazleton*, 9 Allen (Mass.) 102.

⁹ *Whitcomb v. Boston*, 192 Mass. 211, 78 N. E. 407; *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139.

¹⁰ *Tunison v. Chamblin*, 88 Ill. 379; *Tuttle v. Turner*, 28 Tex. 759; *SCHURTZ v. COLVIN*, 55 Ohio St. 274, 45 N. E. 527, *Burdick Cas. Real Property*.

acceptance from the beneficial character of the instrument,¹¹ although this presumption does not obtain unless the grantee has knowledge of the existence of the deed.¹² The presumption of acceptance may, however, be rebutted.¹³ When the actual delivery and acceptance of the deed consists of a number of connected acts, these acts may all be taken as having occurred together, and the date of the first of them be treated as the time when the deed takes effect and the title passes.¹⁴ This is known as the doctrine of relation. When a conveyance is beneficial to the grantee, it is held that a father may accept for an infant child, or a husband for a wife.¹⁵ Until a deed has been accepted by the grantee, it may be recalled, though there has been a delivery by the grantor. This is not possible, however, after there has been an acceptance.¹⁶ Delivery and acceptance are, in each case, matters that may be proved by parol evidence.¹⁷ As in the case of delivery, no particular form, or any express words, are necessary to constitute an acceptance.¹⁸ Acceptance may be shown by the conduct of the grantee, as where, for example, he exercises acts of ownership over the property.¹⁹

¹¹ *Church v. Gilman*, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; *Jones v. Swayze*, 42 N. J. Law, 279; *Stewart v. Weed*, 11 Ind. 92; *DECKER v. STANSBURY*, 249 Ill. 487, 94 N. E. 940, Ann. Cas. 1912A, 187, *Burdick Cas. Real Property*; *MATHESON v. MATHESON*, 139 Iowa, 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167, *Burdick Cas. Real Property*.

¹² *Jackson ex dem. Eames v. Phipps*, 12 Johns. (N. Y.) 418; *Younge v. Guilbeau*, 3 Wall. (U. S.) 636, 18 L. Ed. 262; *Fisher v. Hall*, 41 N. Y. 416. But see *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Myrover v. French*, 73 N. C. 609.

¹³ *Hulick v. Scovil*, 4 Gilman (Ill.) 159; *Stewart v. Weed*, 11 Ind. 92.

¹⁴ *Johnson v. Stagg*, 2 Johns. (N. Y.) 520. But the application of this doctrine will not be permitted to work an injury to third persons. *Jackson ex dem. Griswold v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267.

¹⁵ *DECKER v. STANSBURY*, 249 Ill. 487, 94 N. E. 940, Ann. Cas. 1912A, 187, *Burdick Cas. Real Property*; *Cowell v. Daggett*, 97 Mass. 434; *Bryan v. Wash*, 2 Gilman (Ill.) 557. And see *Douglas v. West*, 140 Ill. 455, 31 N. E. 403.

¹⁶ *Warren v. Tobey*, 32 Mich. 45; *Souverby v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Albert v. Burbank*, 25 N. J. Eq. 404.

¹⁷ *Jackson ex dem. Webb v. Roberts*, 1 Wend. (N. Y.) 478; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347.

¹⁸ *Atkins v. Atkins*, 195 Mass. 124, 80 N. E. 806, 11 L. R. A. (N. S.) 273, 122 Am. St. Rep. 221; *Stonehill v. Hastings*, 135 App. Div. 48, 119 N. Y. Supp. 897.

¹⁹ *Shepley v. Leidig*, 189 Ill. 197, 59 N. E. 579; *Taylor v. Smith*, 61 App. Div. 623, 71 N. Y. Supp. 160.

CHAPTER XXVIII

CONDITIONS, COVENANTS, AND WARRANTIES IN DEEDS

- 290. Conditions in General.
- 291. Condition or Covenant.
- 292. Building Restrictions.
- 293. Remedies for Breach of Condition.
- 294. Covenants in General.
- 295. Modern Covenants of Title.
- 296. Covenant of Seisin.
- 297. How Broken.
- 298. Covenant of Right to Convey.
- 299. Covenant against Incumbrances.
- 300. Covenant for Quiet Enjoyment.
- 301. Covenant of Warranty.
- 302. How Broken.
- 303. Special Warranty.

CONDITIONS IN GENERAL

290. A deed may or may not contain a condition. No particular words, however, are required to create a condition, providing the intention of the grantor is shown by apt and proper language. A condition may be either precedent or subsequent.

As previously stated,¹ clauses of conditions, covenants, and warranties have, from early times, been recognized as formal parts of a deed.² These clauses, moreover, while not essential to the validity of a conveyance,³ become, in many cases, of great and even paramount importance.

Conditions have already been explained in the consideration of "Estates on Condition,"⁴ and in that connection some general principles relating to void conditions, and the termination of estates on condition, were set forth. When a deed contains a condition, the clause containing it is known technically as the contingency clause, or the clause of condition. In an orderly deed, this clause usually follows the *reddendum*, or reservation clause.⁵ A condition may, however, be created by the *habendum*,⁶ or may be placed anywhere

¹ Chapter XXVII.

² *Id.*

³ *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58.

⁴ Ante, Ch. XIII.

⁵ 2 Blk. Comm. 299.

⁶ In *re Xander's Estate*, 7 Pa. Co. Ct. R. 482; *Laberee v. Carleton*, 53 Me.

else in the deed.⁷ In a mortgage deed, the condition usually follows the covenants for title. A condition may also be contained in a separate instrument, and incorporated in the deed by way of reference.⁸

A deed may contain a condition precedent,⁹ or a condition subsequent;¹⁰ the former marking the beginning, the latter the end of the estate.¹¹ In illustration of a condition precedent, the grant of an estate may be conditional upon the payment of the purchase price on or before a certain day,¹² or upon the release from a certain liability,¹³ or an easement may be granted only upon the performance of some specified thing.¹⁴ In such cases, the title does not vest, or the easement cannot be enjoyed, until strict compliance with such condition.¹⁵ On the other hand, a deed containing a condition subsequent passes the title immediately upon the delivery; the title being subject to divestiture upon the failure of the grantee to perform the condition.¹⁶ The most familiar illustration of a condition subsequent, and one of the oldest, is the condition found in a mortgage deed. Littleton describes a mortgage as a feoffment upon condition that, if the feoffor pay to the feoffee on a certain day a certain sum of money, then the feoffor may re-enter.¹⁷ A condition that the grantee shall pay annually a portion of the crops to the grantor during his life,¹⁸ or that upon the death

211, per Danforth, J.; *Packard v. Ames*, 16 Gray (Mass.) 327, per Bigelow, C. J.; *First Methodist Episcopal Church of Columbia v. Public Ground Co.*, 103 Pa. 608, 614.

⁷ *Barker v. Cobb*, 36 N. H. 344; *Whitney v. French*, 25 Vt. 663; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655.

⁸ *Merritt v. Harris*, 102 Mass. 326; *Bear v. Whisler*, 7 Watts (Pa.) 144.

⁹ *Van Horne v. Dorrance*, 2 Dall. (U. S.) 304, 1 L. Ed. 391; *Brannan v. Mesick*, 10 Cal. 95.

¹⁰ *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531; *Laberee v. Carleton*, 53 Mo. 211.

¹¹ Civ. Code Cal. §§ 708, 1110; Rev. St. Idaho, 1887, § 2932; Comp. Laws Dak. 1887, §§ 2713, 3429.

¹² *Brannan v. Mesick*, 10 Cal. 95; *Borst v. Simpson*, 90 Ala. 373, 7 South. 814. See *Rutland v. Chesson*, 98 Ala. 435, 13 South. 606.

¹³ *Lusk v. McNamer*, 24 Miss. 58.

¹⁴ *Long v. Swindell*, 77 N. C. 176. And see *Lake Erie & W. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N. E. 256.

¹⁵ Civ. Code Cal. § 1436; Code Ga. 1882, § 2295, Comp. Laws Dak. 1887, § 3429; St. Okl. 1893, art. 1, c. 82, § 10; *Borst v. Simpson*, 90 Ala. 373, 7 South. 814; *City Bank of Baltimore v. Smith*, 3 Gill & J. (Md.) 265, 281.

¹⁶ *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621; *Shattuck v. Hastings*, 99 Mass. 23; *Gulf, C. & S. F. Ry. Co. v. Dunman*, 74 Tex. 265, 11 S. W. 1094.

¹⁷ Litt. § 332 et seq.; *Williams*, Real Prop. (17th Ed.) 602. And see, in general, *Mortgages*, ante, Ch. XVIII.

¹⁸ *Drew v. Baldwin*, 48 Wis. 529, 4 N. W. 576.

of the grantor the grantee shall pay a third person a sum of money,¹⁹ are further illustrations of conditions subsequent. Whether, however, a condition is precedent or subsequent depends upon the construction of the whole instrument, as determined by the intention therein expressed; there being no technical words by which they are distinguished.²⁰ Conditions subsequent, however, involving forfeitures for nonperformance, are not favored by the courts, and are taken most strongly against the grantor.²¹

While the words ordinarily used in creating a condition are "upon condition," "provided that," "so that," and the like, nevertheless, in order to create a condition, the use of the word "condition" is not necessary, neither will this word, nor any other word, create of itself a condition, where the intention appears to be otherwise.²² In fact, no particular or technical words are required at all; the only requisites being that the intention of the grantor to create a condition must be shown by apt and proper language, or that a right of re-entry upon breach of the condition must be reserved.²³

¹⁹ Weinreich v. Weinreich, 18 Mo. App. 364.

²⁰ Brown v. State, 5 Colo. 496; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Van Horn v. Mercer, 29 Ind. App. 277, 64 N. E. 531; Laberee v. Carleton, 53 Me. 211.

²¹ Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Ayer v. Emery, 14 Allen (Mass.) 67; Blanchard v. Railroad Co., 31 Mich. 43, 18 Am. Rep. 142; Post v. Weil, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809; Wier v. Simmons, 55 Wis. 637, 13 N. W. 873.

²² Ayling v. Kramer, 133 Mass. 12; Baker v. Mott, 78 Hun (N. Y.) 141, 28 N. Y. Supp. 968; Post v. Weil, 155 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809.

²³ Raley v. Umatilla County, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142; Underhill v. Railroad Co., 20 Barb. (N. Y.) 455; Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; FRANK v. STRATFORD-HANDCOCK, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, Burdick Cas. Real Property. Sheppard (Touchstone, p. 121) says: "Know therefore that, for the most part, conditions have conditional words for their frontispiece, and do begin therewith; and that amongst these words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso*, *ita quod*, and *sub conditione*. * * * But there are other words, as *si*, *si contingat*, and the like, that will make an estate conditional also; but then they must have other words joined with them, and added to them in the close of the condition; as, that the grantor shall re-enter, or the like." He further says (page 125): "If the words in the close or conclusion of a condition be thus, that the land shall return to the feoffor, etc., or that he shall take it again, and turn it to his own profit, or that the land shall revert, or that the feoffor shall *recipere* the land—these are either of them good words in a condition to give a re-entry, as good as the word 're-enter'; and by these words the estate will be made conditional."

CONDITION OR COVENANT

291. Whether the language employed in a deed creates a condition or only a covenant depends upon the intention of the parties as construed by the courts.

Covenants and conditions in deeds may be created by the same words, and whether the words employed create a condition or a covenant must depend upon what was the intention of the parties.²⁴ Conditions involving forfeitures are, however, not favored, and, if it is doubtful whether a clause in a deed imports a condition or a covenant, the courts will construe the clause as a covenant rather than as a condition.²⁵ A covenant is a contract, and for its breach the violator must respond in damages. On the other hand, the consequence of the nonfulfillment of a condition is a forfeiture of the estate, and the grantor may re-enter at his will.²⁶ Where, however, the language of a deed is plain, and the settled legal significance of the words used imports a condition, nothing is left for construction.²⁷

Illustrations of Conditions

Since the owner of land is not obliged to transfer it at all, he may impose almost any condition in connection with its transfer, provided the condition is not illegal, unreasonable, or contrary to public policy.²⁸ Thus, for example, deeds may contain conditions that intoxicating liquors shall not be manufactured, kept, or sold upon the premises;²⁹ that the land shall not be sold to a particular person;³⁰ that the property shall be used for some spe-

²⁴ *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809. See *Paschall v. Passmore*, 15 Pa. 295.

²⁵ *Peden v. Railway Co.*, 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680. See *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. See, also, *Hornback v. Railroad Co.*, 20 Ohio St. 81; *Palmer's Ex'r v. Ryan*, 63 Vt. 227, 22 Atl. 574. And see note 93, *infra*.

²⁶ *Woodruff v. Power Co.*, 10 N. J. Eq. 489; *Warner v. Bennett*, 31 Conn. 468; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455; *Carpenter v. Graber*, 66 Tex. 465, 1 S. W. 173.

²⁷ *Adams v. Valentine*, 33 Fed. 1; *Sharon Iron Co. v. City of Erie*, 41 Pa. 341; *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. 606.

²⁸ *Gray v. Blanchard*, 8 Pick. (Mass.) 284, 290. And see, *ante*, *Vold Conditions*, Ch. XIII.

²⁹ *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420; *Plumb v. Tubbs*, 41 N. Y. 442; *Lehigh Coal & Navigation Co. v. Gluck*, 5 Pa. Co. Ct. R. 662; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547.

³⁰ *Langdon v. Ingram's Guardian*, 28 Ind. 360; *McWilliams v. Nisly*, 2 Serg.

cific purpose,³¹ as, for example, religious³² or educational;³³ that the grantor shall have the use of the property during his life;³⁴ that he shall be supported or maintained;³⁵ that a public building shall be erected upon the land;³⁶ and that various restrictions as to the erection of buildings shall be observed.³⁷

Persons Affected

Only the grantor, or his heirs³⁸ or personal representatives,³⁹ can re-enter upon breach of condition subsequent. This right does not, at common law, exist in favor of any stranger, or third person, to the deed,⁴⁰ because, at common law, a right of entry is not assignable.⁴¹ Neither can it be assigned or transferred with a grant of the reversion.⁴² Under statutes, however, the right of re-entry

& R. (Pa.) 507, 7 Am. Dec. 654. See, also, *Hill v. Hill*, 43 Pa. 528. Compare *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668.

³¹ See cases in following notes.

³² *Board of Education of Normal School Dist. v. Church*, 63 Ill. 204. See, also, *Branch v. Association*, 11 Ohio Cir. Ct. R. 185, 5 O. C. D. 326; *Strong v. Doty*, 32 Wis. 381.

³³ *Mead v. Ballard*, 7 Wall. (U. S.) 290, 19 L. Ed. 190. See, also, *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10. When no condition subsequent exists under a grant for school or educational purposes, see *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442.

³⁴ A condition subsequent may be one which provides for the use and occupation, during life, by the grantors, or by the grantor. *Bank of Suisun v. Stark*, 106 Cal. 202, 39 Pac. 531; *Hefner v. Yount*, 8 Blackf. (Ind.) 455; *Taitman v. Snow*, 35 Me. 342.

³⁵ *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Mott v. Richtmyer*, 57 N. Y. 49; *Jackson ex dem. Reeves v. Topping*, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; *Hubbard v. Hubbard*, 12 Allen (Mass.) 586. And see *Oard v. Oard*, 59 Ill. 46.

³⁶ *Harris v. Shaw*, 13 Ill. 456; *Dishon v. Smith*, 10 Iowa, 212; *Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. 254.

³⁷ *Gray v. Blanchard*, 8 Pick. (Mass.) 284. See, *infra*, Building Restrictions.

³⁸ *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Board of Education of Normal School Dist. v. Church*, 63 Ill. 204; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442; *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Uppington v. Corrigan*, 79 Hun, 488, 29 N. Y. Supp. 1002.

³⁹ *Inhabitants of Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Reiff v. Reiff*, 12 Montg. Co. Law Rep'r (Pa.) 26. See, also, *McKissick v. Pickle*, 16 Pa. 140; *Stearns v. Harriss*, 8 Allen (Mass.) 597.

⁴⁰ *Boyer v. Tressler*, 18 Ind. 260; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170; *Illinois Cent. R. Co. v. Railway Co.*, 85 Ill. 211; *Pierce v. Keator*, 9 Hun (N. Y.) 532.

⁴¹ *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Guild v. Richards*, 16 Gray (Mass.) 309; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455. See *Civ. Code Cal.* § 1046; also *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528.

⁴² *Vermont v. Society*, 2 Paine, 545, Fed. Cas. No. 16,920; *Rice v. Railroad Corp.*, 12 Allen (Mass.) 141; *Nicoll v. Railroad Co.*, 12 N. Y. 121; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455.

may be transferred.⁴³ Although a condition may be merely personal,⁴⁴ yet conditions subsequent usually run with the land, and in such cases they bind the grantee, his heirs, and assigns.⁴⁵ The successors of a corporation may enforce a forfeiture,⁴⁶ and in connection with conditions imposed upon lands sold by the state, the state alone may re-enter.⁴⁷

SAME—BUILDING RESTRICTIONS

292. Building restrictions are generally construed as covenants, and not as conditions.

Restrictions upon the use and enjoyment of granted land are generally regarded as covenants, and not as conditions.⁴⁸ A restriction may, of course, if such be the intention of the parties, be so expressed as to make it a condition;⁴⁹ but where the restriction is a covenant, and not a condition, its breach occasions no forfeiture.⁵⁰ In connection with general building plans for an entire locality, or for the individual comfort or enjoyment of the grantor, the owners of real property may impose restrictions upon their grantees in the use of the same to practically any extent, providing such restrictions do not amount to illegal restraints.⁵¹ For example, the land conveyed may be restricted to residence pur-

⁴³ Civ. Code Cal. § 1046; Gen. St. Conn. 1888, § 1053; P. L. N. J. 1851, p. 282.

⁴⁴ *Sicotte v. Martin*, 20 Quebec Super. Ct. 36; *Emerson v. Simpson*, 43 N. H. 475, 80 Am. Dec. 184, 82 Am. Dec. 168; *Barker v. Cobb*, 36 N. H. 344.

⁴⁵ *O'Brien v. Wetherell*, 14 Kan. 616; *Langley v. Chapin*, 134 Mass. 82; *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794; *Jackson ex dem. Reeves v. Topping*, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

⁴⁶ *Cross v. Carson*, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742; *Southard v. Railroad Co.*, 26 N. J. Law, 13, 21.

⁴⁷ See *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. Ed. 551; *Towle v. Palmer*, 1 Rob. (N. Y.) 437.

⁴⁸ *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655. See, also, *Rawson v. School Dist.*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Sohier v. Church*, 109 Mass. 1.

⁴⁹ *Adams v. Valentine*, 33 Fed. 1; *Dana v. Wentworth*, 111 Mass. 291; *McKissick v. Pickle*, 16 Pa. 140; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785.

⁵⁰ *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655.

⁵¹ *Whitney v. Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

poses only;⁵² and buildings may be restricted to certain heights,⁵³ size,⁵⁴ and distances from street or other lines.⁵⁵ Such restrictions may be enforced by the original grantors,⁵⁶ by their grantees,⁵⁷ and by the owners or grantees of adjoining lots when the restriction was for their benefit.⁵⁸ They may be enforced against the grantee or his assigns.⁵⁹ Courts of equity may, in proper cases, enforce restrictions by injunction or other appropriate remedy.⁶⁰

REMEDIES FOR BREACH OF CONDITION

293. At common law, re-entry is the remedy afforded the grantor upon a breach of a condition. Under the statutes, various remedies are possible; the action of ejectment being the more common.

The breach of a condition does not of itself work a forfeiture, but gives the grantor, or his heirs, an option to terminate the estate.⁶¹ Some act is necessary on the part of some one authorized to take advantage of the breach, either a re-entry, or some other

⁵² *McMurtry v. Investment Co.*, 103 Ky. 308, 45 S. W. 96, 19 Ky. Law Rep. 2021, 40 L. R. A. 489. See, also, *Sonn v. Heilberg*, 38 App. Div. 515, 56 N. Y. Supp. 341; *Ivarson v. Mulvey*, 179 Mass. 141, 60 N. E. 477; *RIVERBANK IMPROVEMENT CO. v. BANCROFT*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450, *Burdick Cas. Real Property*.

⁵³ *Hobson v. Cartwright*, 93 Ky. 368, 20 S. W. 281, 14 Ky. Law Rep. 293. See, also, *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14.

⁵⁴ *Ivarson v. Mulvey*, 179 Mass. 141, 60 N. E. 477; *Gillis v. Bailey*, 17 N. H. 18; *Id.*, 21 N. H. 149.

⁵⁵ *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. Law Rep. 502; *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854. See, also, *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14; *Tobey v. Moore*, 130 Mass. 448.

⁵⁶ See *Jeffries v. Jeffries*, 117 Mass. 184.

⁵⁷ *Raynor v. Lyon*, 46 Hun (N. Y.) 227.

⁵⁸ *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122; *Tobey v. Moore*, 130 Mass. 448; *RIVERBANK IMPROVEMENT CO. v. BANCROFT*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450, *Burdick Cas. Real Property*.

⁵⁹ *Whitney v. Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715.

⁶⁰ See *RIVERBANK IMPROVEMENT CO. v. BANCROFT*, *supra*.

⁶¹ It is not necessary that any damage to the grantor has been caused by the breach. *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554. The grantee cannot insist that he has forfeited his estate by a breach. *Davenport v. Reg.*, 3 App. Cas. 115; *Rede v. Farr*, 6 Maule & S. 121. As to what constitutes a breach, see *Razor v. Razor*, 142 Ill. 375, 31 N. E. 678; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335, *City of Quincy v. Attorney General*, 160 Mass. 431, 35 N. E. 1066; *Hurts v.*

act equivalent thereto, as, for example, an action in ejectment.⁶² Where, however, the grantor is in possession at the time of the breach, the forfeiture is complete without any act on his part,⁶³ unless he elects otherwise.⁶⁴ At common law, the method of enforcement was only by entry,⁶⁵ or, if entry was impossible, as in case of things not susceptible of livery of seisin, like a remainder or a reversion, then the demandant was required to make a claim.⁶⁶

In modern times, various remedies, under the statutes, are possible, such as trespass to try title,⁶⁷ an action for damages,⁶⁸ or the more common remedy of ejectment.⁶⁹ The remedy of ejectment may usually be brought without previous entry or demand.⁷⁰ In some states, the statute may provide for a reconveyance of the land by deed to the grantor.⁷¹ While equity will not, as a rule, en-

Grant, 90 Iowa, 414, 57 N. W. 899; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Madigan v. Burns*, 67 N. H. 319, 29 Atl. 454.

⁶² *Board of Education of Normal School Dist. v. Church*, 63 Ill. 204; *Preston v. Bosworth*, 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Morris v. Hoyt*, 11 Mich. 9; *Vail v. Railroad Co.*, 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449. See *Adams v. Copper Co.*, 7 Fed. 634, 4 Hughes, 589.

⁶³ *Sheaffer v. Sheaffer*, 37 Pa. 525; *President, etc., of Lincoln & K. Bank v. Drummond*, 5 Mass. 322; *Rollins v. Riley*, 44 N. H. 9; *Willard v. Olcott*, 2 N. H. 120; *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901; *Andrews v. Senter*, 32 Me. 394. But see *Stone v. Ellis*, 9 Cush. (Mass.) 95.

⁶⁴ *Andrews v. Senter*, 32 Me. 394; *Willard v. Henry*, 2 N. H. 120.

⁶⁵ *Warner v. Bennett*, 31 Conn. 468; *Bowen v. Bowen*, 18 Conn. 535; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Guild v. Richards*, 16 Gray (Mass.) 309; *Adams v. Lindell*, 5 Mo. App. 197; *Kenner v. Contract Co.*, 9 Bush (Ky.) 202; *Tallman v. Snow*, 35 Me. 342; *Sperry v. Sperry*, 8 N. H. 477; *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Phelps v. Chesson*, 34 N. C. 194. But see *Schlesinger v. Railroad Co.*, 152 U. S. 444, 14 Sup. Ct. 647, 38 L. Ed. 507. A right of entry need not be expressly reserved. *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500.

⁶⁶ *Litt. § 414*; *Co. Litt. 218a*; *Shep. Touch. 153*; *Co. Litt. 214b*.

⁶⁷ *Alford v. Alford*, 1 Tex. Civ. App. 245, 21 S. W. 283. Where trespass does not lie, see *Young v. Clement*, 81 Me. 512, 17 Atl. 707.

⁶⁸ *Stuyvesant v. New York*, 11 Paige (N. Y.) 414. See, also, *De Kay v. Bliss*, 120 N. Y. 91, 24 N. E. 300. But see *Close v. Railway Co.*, 64 Iowa, 149, 19 N. W. 886.

⁶⁹ *Moore v. Wingate*, 53 Mo. 398; *Reformed Church of Gallupville v. Schoolcraft*, 65 N. Y. 134; *Ringrose v. Ringrose*, 170 Pa. 593, 33 Atl. 129; *Schnyder v. Orr*, 149 Pa. 320, 24 Atl. 306; *Martin v. Railroad Co.*, 37 W. Va. 349, 16 S. E. 589.

⁷⁰ *Ritchie v. Railway Co.*, 55 Kan. 36, 39 Pac. 718; *Sioux City & St. P. R. Co. v. Davis*, 49 Minn. 308, 51 N. W. 907; *Plumb v. Tubbs*, 41 N. Y. 442; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547.

⁷¹ California: Where a grant is made upon a condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person

force forfeitures for breaches of conditions,⁷² yet remedies may be found in equity where the legal remedy is not adequate.⁷³ Equity may, for example, compel a reconveyance in a proper case,⁷⁴ or the grantor may have his title quieted.⁷⁵ Equity may also relieve from forfeiture, where the breach is due to accident, and leave the grantor to compensation in damages.⁷⁶

Waiver of Conditions

The grantor may waive a condition imposed upon a grant,⁷⁷ and a waiver may arise by express agreement,⁷⁸ or by conduct showing an intention not to take advantage of the nonperformance.⁷⁹ Thus, a waiver may result from the grantor's failure to re-enter within a reasonable time,⁸⁰ from a failure on the grantor's part to assert his rights when he is in possession at the time of the breach,⁸¹ or from any act of the grantor recognizing the rights of the grantee after condition broken.⁸² Accepting performance of the conditions at a subsequent time is also a waiver.⁸³ Mere delay to enforce the for-

otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record. Civ. Code, § 1109. Same statutory provisions as California in Idaho (Rev. St. 1887, § 2931); likewise Oklahoma (St. 1893, c. 82, art. 1, § 10).

⁷² Smith v. Jewett, 40 N. H. 530. See, also, Chute v. Washburn, 44 Minn. 312, 46 N. W. 555; Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200.

⁷³ Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200.

⁷⁴ Cooper v. Gum, 152 Ill. 471, 39 N. E. 267; Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Rexford v. Schofield, 101 Mich. 480, 59 N. W. 837; Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458.

⁷⁵ Richter v. Richter, 111 Ind. 456, 12 N. E. 698; Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153.

⁷⁶ Rogan v. Walker, 1 Wis. 527; Sanborn v. Woodman, 5 Cush. (Mass.) 36; Hancock v. Carlton, 6 Gray (Mass.) 39; Carpenter v. Westcott, 4 R. I. 225; Henry v. Tupper, 29 Vt. 358.

⁷⁷ Cammeyer v. Churches, 2 Sandf. Ch. (N. Y.) 186; Doe ex dem. Commyns v. Latimer, 2 Fla. 71.

⁷⁸ Carbon Block Coal Co. v. Murphy, 101 Ind. 115; Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 125; Maginnis v. Ice Co., 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833; Barrie v. Smith, 47 Mich. 130, 10 N. W. 168; Sharon Iron Co. v. City of Erie, 41 Pa. 341; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Pennant's Case, 3 Coke, 64a.

⁷⁹ Carbon Block Coal Co. v. Murphy, 101 Ind. 115; Sharon Iron Co. v. City of Erie, 41 Pa. 341; Adams v. Copper Co., 7 Fed. 634, 4 Hughes, 589; Ludlow v. Railroad Co., 12 Barb. (N. Y.) 440; Duryee v. City of New York, 96 N. Y. 477.

⁸⁰ Ludlow v. Railroad Co., 12 Barb. (N. Y.) 440.

⁸¹ Willard v. Henry, 2 N. H. 120.

⁸² Bowling v. Crook, 104 Ala. 130, 16 South. 131; Duryee v. City of New York, 96 N. Y. 477; Deaton v. Taylor, 90 Va. 219, 17 S. E. 944.

⁸³ An acceptance of rent accruing after the breach is a waiver, Jackson ex dem. Blanchard v. Allen, 3 Cow. (N. Y.) 220; Goodright v. Davids, 2 Cowp.

feiture will not constitute a waiver, however,⁸⁴ and acquiescence in one breach will not bar the right to a forfeiture for a subsequent breach.⁸⁵ When a condition has once been waived, it is extinguished and cannot be revived.⁸⁶ Although the claim to a forfeiture is cut off by a waiver, yet a right to an action for a breach of a covenant may remain.⁸⁷

COVENANTS IN GENERAL

294. In a deed of conveyance, covenants have been defined as agreements whereby either party stipulates for the truth of certain facts, or binds himself to perform or give something to the other.

Covenants are variously classified as express and implied; real and personal; independent and dependent; absolute or qualified; joint and several; collateral and auxiliary; and alternative and disjunctive.

At common law, covenants in general are promises or contracts under seal.⁸⁸ In a deed of conveyance they have been defined as agreements whereby either party stipulates for the truth of certain facts, or binds himself to perform or give something to the other.⁸⁹ Where a seal is not required in the execution of a deed, none is, of course, required for any covenant it may contain. While a deed of conveyance requires no covenant for its validity,⁹⁰ nevertheless many deeds contain covenants known as covenants for title.⁹¹ Although these are the most important of all covenants, yet they con-

803; or a demand for rent so accruing, *Camp v. Scott*, 47 Conn. 366; or bringing an action for it, *Dendy v. Nicholl*, 4 C. B. (N. S.) 376.

⁸⁴ But may be strong evidence of it. *Ludlow v. Railroad Co.*, 12 Barb. (N. Y.) 440; *Hooper v. Cummings*, 45 Me. 359.

⁸⁵ *Doe v. Jones*, 5 Exch. 498; *Doe v. Bliss*, 4 Taunt. 735; *Ambler v. Woodbridge*, 9 Barn. & C. 376; *Flower v. Peck*, 1 Barn. & Adol. 428; *Bleecker v. Smith*, 13 Wend. (N. Y.) 530; *Price v. Norwood*, 4 Hurl. & N. 512; *Crocker v. Society*, 106 Mass. 489; *Gillis v. Bailey*, 21 N. H. 149.

⁸⁶ *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743; *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178; *Berenbroick v. Hospital*, 23 App. Div. 339, 48 N. Y. Supp. 363.

⁸⁷ *Dickey v. McCullough*, 2 Watts & S. (Pa.) 88.

⁸⁸ *Petty v. Church*, 70 Ind. 290, 297; *Greenleaf v. Allen*, 127 Mass. 248; *Johnson v. Hollensworth*, 48 Mich. 140, 142, 11 N. W. 843; *Kelley v. Palmer*, 42 Neb. 423, 426, 60 N. W. 924.

⁸⁹ 2 Blk. Comm. 300-304; 2 Bouvler, Inst. (Ed. 1851) pp. 399, 400, art. 6, §§ 2036, 2039.

⁹⁰ *Nixon v. Hyserott*, 5 Johns. (N. Y.) 53.

⁹¹ *Infra*.

stitute but one kind of covenants, and a conveyance may contain covenants for almost anything.⁹² As previously stated, in connection with conditions, where doubt arises as to the nature of various provisions and restrictions in deeds, they will be construed as covenants, rather than as conditions, in order to avoid forfeitures.⁹³ Covenants may be binding on either the grantor or the grantee; the former being illustrated by the well-known covenants for title, and the latter by restrictions placed upon the grantee relative to the use and enjoyment of the property.

Early Covenants

Covenants of various kinds are found in very early English deeds. For example, a common covenant, in the thirteenth century, was a covenant wholly or partially restricting alienation.⁹⁴ In early demises for life or years are found covenants relating to the cultivation of the land,⁹⁵ and also for the performance of various duties in return for the grant.⁹⁶

In ancient deeds, we also find the old clause of warranty, which in later times developed into a covenant. This clause of warranty appears soon after the Norman Conquest, and may have been analogous to the Anglo-Saxon custom of warranty connected with the sale of movables.⁹⁷ After the enactment of the statute of uses, in the sixteenth century, we find, in deeds taking effect under that statute, covenants of seisin and of good right to convey; but it is said that it was not until the restoration of Charles II that modern covenants for title, in their present form, were introduced into general practice.⁹⁸

Express and Implied Covenants

No particular or technical words are necessary for the creation of a covenant.⁹⁹ Express words of agreement, such as "covenant,"

⁹² *Church v. Brown*, 15 Ves. Jr. 258, 33 Eng. Reprint, 752.

⁹³ *Peden v. Railway Co.*, 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680; *Wheeler v. Dascomb*, 3 Cush. (Mass.) 285; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *McKnight v. Kreutz*, 51 Pa. 232; *Hale v. Finch*, 104 U. S. 261, 26 L. Ed. 732.

⁹⁴ *Madox*, Forms Nos. 327, 329, 470.

⁹⁵ *Madox*, Forms Nos. 225, 226.

⁹⁶ *Madox*, Form No. 243.

⁹⁷ *Holds. Hist. Eng. Law*, II, 67, 100-102; III, 195. And see *infra*, Covenant of Warranty.

⁹⁸ *Rawle*, Covenants for Title (4th Ed.) 17.

⁹⁹ *Levitzky v. Canning*, 33 Cal. 299; *Newcomb v. Presbrey*, 8 Metc. (Mass.) 406; *Johnson v. Hollensworth*, 48 Mich. 140, 11 N. W. 843; *Graves v. Deterling*, 3 N. Y. St. Rep. 128; *Lehman v. Given*, 177 Pa. 580, 35 Atl. 864; *Hale v. Finch*, 104 U. S. 261, 270, 26 L. Ed. 732.

"agree," or "engage," may be used;¹ but any words that, taking the whole deed together, indicate an agreement, may amount to a covenant.² Moreover, covenants may be implied; that is, without express words of covenant an agreement may be made out by construction from the entire instrument.³ In case a deed contains both express and implied covenants, the express covenants will control any inconsistent implied covenants.⁴ If there be no conflict between them, effect will be given, of course, to both.⁵ Express covenants can be created only by deed;⁶ consequently, if the deed is void, the covenant is void.⁷ In a common-law deed of feoffment, the use of the words "give" or "grant" operated as a warranty of title.⁸ This was so in England up to October 1, 1845.⁹ Since that time, however, these words, by virtue of the English Real Property Act, do not imply any covenant, unless so expressly provided by statute.¹⁰ Implied covenants are also raised at common law by the use of the words "grant and demise" in a lease. So in the common-law exchange of lands there are implied covenants of warranty by each party to the conveyance.¹¹ Deeds operating, however, under the statute of uses, as do most modern deeds, and which are generally deeds of bargain and sale, raise no implied covenants of title.¹² In many states, however, implied covenants of title are ex-

¹ Laws of Eng. vol. 10, 476, notes g, h. *

² Laws of Eng. vol. 10, 476 d.

³ *Jobbins v. Gray*, 34 Ill. App. 208; *Booth v. Mill Co.*, 73 N. Y. 15; *Penn v. Preston*, 2 Rawle (Pa.) 14.

⁴ *Glenn v. Baltimore*, 67 Md. 390, 10 Atl. 70; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Burr v. Stenton*, 43 N. Y. 462; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122. But see *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

⁵ *Roebuck v. Duprey*, 2 Ala. 535; *Jones v. Waggoner's Adm'r*, 7 J. J. Marsh. (Ky.) 144; *Gates v. Caldwell*, 7 Mass. 68; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266.

⁶ *Hord v. Village of Montgomery*, 26 Ill. App. 41; *Boston & A. R. Co. v. Briggs*, 132 Mass. 24; *Fitch v. Seymour*, 9 Metc. (Mass.) 462; *Scott v. Scott*, 70 Pa. 244.

⁷ *Gordon v. Goodman*, 98 Ind. 269; *Howe v. Walker*, 4 Gray (Mass.) 318; *Scott v. Scott*, 70 Pa. 244.

⁸ *Mack v. Patchin*, 29 How. Prac. (N. Y.) 20; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Rickets v. Dickens*, 5 N. C. 343, 4 Am. Dec. 555.

⁹ St. 8 & 9 Vict. c. 106.

¹⁰ See Laws of Eng. vol. 10, 481, notes m, n.

¹¹ *Brandt v. Foster*, 5 Iowa, 287; *Grimes v. Redmon*, 14 B. Mon. (Ky.) 234. But see *Dean v. Shelly*, 57 Pa. 427, 98 Am. Dec. 235; *Walker v. Renfro*, 26 Tex. 142.

¹² *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Dow v. Lewis*, 4 Gray (Mass.) 468; *Frost v. Raymond*, 2 Caines (N. Y.) 188, 2 Am. Dec. 228; *Cadwalader v. Tryon*, 37 Pa. 318; *Lamb v. Kamm*, Fed. Cas. No. 8,017, 1 Sawy. 238.

pressly provided for by statute; for instance, it is provided that the words "grant, bargain, and sell" raise implied covenants of seisin, against incumbrances, of warranty, and for quiet enjoyment.¹³ Other statutes provide that other words, such as "convey and warrant,"¹⁴ "grant and convey,"¹⁵ shall have the same effect. It is held, however, that the words of the statute must be strictly followed; the use of less than all the statutory words being insufficient.¹⁶

Real and Personal Covenants

Covenants are either real or personal. Real covenants are so connected with the realty that their benefits or burdens pass with it, or "run with the land."¹⁷ Personal covenants are those which bind only the covenantor and his personal representatives.¹⁸

Independent and Dependent Covenants

Sometimes the question arises whether a party to a covenant can sue without alleging and proving that he has performed some agreed stipulation on his part. In this respect covenants are classed as independent¹⁹ and dependent.²⁰ Independent covenants are those which one may enforce without first performing the obligations to

¹³ *Heflin v. Phillips*, 96 Ala. 561, 11 South. 729; *McDonough v. Martin*, 88 Ga. 675, 16 S. E. 59, 60, 18 L. R. A. 343; *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542; *Schnelle & Querl Lumber Co. v. Barlow*, 34 Fed. 853.

¹⁴ *Dalton v. Taliaferro*, 101 Ill. App. 592; *Jackson v. Green*, 112 Ind. 341, 14 N. E. 89; *Keiper v. Klein*, 51 Ind. 316.

¹⁵ *Cruger v. Ginnuth*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 24. See *GEORGE A. LOWE CO. v. SIMMONS WAREHOUSE CO.*, 39 Utah, 395, 117 Pac. 874, Ann. Cas. 1913E, 246, *Burdick Cas. Real Property*.

¹⁶ *Finley v. Steele*, 23 Ill. 56; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Claunch v. Allen*, 12 Ala. 159; *Fields v. Squires*, 9 Fed. Cas. No. 4,776, *Deady*, 366.

¹⁷ *CONDUITT v. ROSS*, 102 Ind. 166, 26 N. E. 198, *Burdick Cas. Real Property*; *Davis v. Lyman*, 6 Conn. 249; *Fowler v. Kent*, 71 N. H. 388, 52 Atl. 554; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *Thomas v. Bland*, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95. Building restrictions may run with the land. *Muzzarelli v. Hulshizer*, 163 Pa. 643, 30 Atl. 291.

¹⁸ *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. 72; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Lyford v. Railroad Co.*, 92 Cal. 93, 28 Pac. 103; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Townsend v. Morris*, 6 Cow. (N. Y.) 123; *Divan v. Loomis*, 68 Wis. 150; 31 N. W. 760; *CONDUITT v. ROSS*, *supra*.

¹⁹ *Boone v. Eyre*, 1 H. Bl. 273, note a, 2 W. Bl. 1312, quoted in *Bean v. Atwater*, 4 Conn. 3, 15, 10 Am. Dec. 91. See *McCrelish v. Churchman*, 4 Rawle (Pa.) 26, 34. See, also, *White v. Atkins*, 8 Cush. (Mass.) 367.

²⁰ *DEPENDENT COVENANT*.—Has been defined to be "an agreement, to do, or

which he is bound.²¹ Dependent covenants are those which cannot be enforced without the performance by the covenantee of some condition precedent.²² Whether covenants are independent or dependent of each other is a question of construction of the meaning of the parties from the whole instrument.²³ Wherever possible, courts construe covenants to be dependent, rather than independent, and will not permit a plaintiff to recover damages for the breach of a covenant without first showing performance on his part of all the obligations resting upon him.²⁴

Further Classes of Covenants

Covenants are further classified as absolute or qualified; joint and several; collateral and auxillary; and alternative and disjunctive. A covenant is said to be qualified, as distinguished from absolute, when it contains words which limit in some way the liability of the covenantor.²⁵ With reference to parties to covenants, two or more covenantors may be bound jointly or severally, or jointly and severally. Where two or more persons are named as covenantors, the law presumes that they are bound jointly, and words of severance are necessary to overcome such a presumption.²⁶ As to covenantees, however, the insertion of words of severance does not affect their rights, since the established rule is that a covenant will, if possible, be construed as joint or several according to their interests.²⁷ Collateral covenants have been defined as being covenants that do not directly affect the land, yet are beneficial to

to omit to do, something which respects the thing on which it depends, and to which it relates." *Bally v. Wells*, Wilm. 341, 347, 3 Wils. C. P. 25 [quoted in *Norman v. Wells*, 17 Wend. (N. Y.) 136, 148]. See *Bailey v. White*, 3 Ala. 330, 331.

²¹ *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Couch v. Ingersoll*, 2 Pick. (Mass.) 300; *Cook v. Johnson*, 3 Mo. 239; *Obermyer v. Nichols*, 6 Binn. (Pa.) 159, 6 Am. Dec. 439; *Duvall v. Craig*, 2 Wheat. (U. S.) 45, 4 L. Ed. 180.

²² *Gibson v. Gibson*, 15 Mass. 106, 8 Am. Dec. 94; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812; *Tompkins v. Elliot*, 5 Wend. (N. Y.) 496; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332; *Tileston v. Newell*, 13 Mass. 410; *McCrelish v. Churchman*, 4 Rawle (Pa.) 26.

²³ *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233; *Powers v. Ware*, 2 Pick. (Mass.) 451; *Eldridge v. Bliss*, 20 Mich. 269; *Tompkins v. Elliot*, 5 Wend. (N. Y.) 496; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768.

²⁴ *Nesbitt v. McGehee*, 26 Ala. 748; *McCrelish v. Churchman*, 4 Rawle (Pa.) 26; *Bowen v. Van Nortwick*, 38 Wis. 279; *Mecum v. Railroad Co.*, 21 Ill. 533; *Clopton v. Bolton*, 23 Miss. 78.

²⁵ *Laws of England*, vol. 10, 482, notes.

²⁶ *Donahoe v. Emery*, 9 Metc. (Mass.) 63; *City of Philadelphia v. Reeves*, 48 Pa. 472; *Fields v. Squires*, Fed. Cas. No. 4,776, Deady, 366.

²⁷ *Buckner v. Hamilton*, 16 Ill. 487; *Comings v. Little*, 24 Pick. (Mass.) 266; *Westcott v. King*, 14 Barb. (N. Y.) 32; *Calvert v. Bradley*, 16 How. (U. S.) 580, 14 L. Ed. 1066.

the individual, regardless of his connection with the land.²⁸ They consequently are purely personal, and do not run with the land.²⁹ Auxiliary covenants, as the name implies, support or aid some other principal covenant.³⁰ Alternative and disjunctive covenants give an election to the party bound, permitting the covenantor or covenantee to choose between the performance of the specified things.³¹

SAME—MODERN COVENANTS OF TITLE

295. Covenants of title are agreements whereby the grantor binds himself to the grantee as to the truth of certain facts in connection with the title to the land conveyed. The most common covenants of title in this country are:

- (a) Of seisin.
- (b) Of right to convey.
- (c) Against incumbrances.
- (d) For quiet enjoyment.
- (e) Of warranty.

Modern Covenants of Title

In England, the usual covenants for title in case of a sale of land are those of good right to convey, for quiet enjoyment, against incumbrances, and for further assurance.³² In this country, while the local usage varies in different states, the covenants most commonly inserted are covenants of seisin, of right to convey, against incumbrances, for quiet enjoyment, and of warranty. The covenant of warranty, however, usually takes the place of the covenant for quiet enjoyment.³³ The covenant for further assurance is also sometimes used.³⁴ In some states, there is found also another covenant, called the covenant of nonclaim, a covenant to the effect that neither the grantor nor any other person shall ever claim any right or title to the premises. It is practically a covenant of war-

²⁸ Clark v. Devoe, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652; Wil-
murt v. McGrane, 16 App. Div. 412, 45 N. Y. Supp. 32.

²⁹ Bouvier, Law Dict.; Wade v. Merwin, 11 Pick. (Mass.) 280; Grigg v.
Landis, 21 N. J. Eq. 494; Worthington v. Hewes, 19 Ohio St. 66.

³⁰ Bouvier, Law Dict.; Wade v. Merwin, 11 Pick. (Mass.) 280.

³¹ Harmony v. Bingham, 1 Duer (N. Y.) 209, 230; White v. Stretch, 22 N.
J. Eq. 76. See, also, Benson v. Dunn, 23 L. T. Rep. N. S. 848.

³² Rawle, Cov. (4th Ed.) 25. "It seems to be customary in English modern
conveyances to omit the covenant for seisin." Id.

³³ Rawle, Cov. (4th Ed.) 27.

³⁴ Foote v. Burnet, 10 Ohio, 317, note 36 Am. Dec. 90. See Armstrong v.
Darby, 26 Mo. 517.

ranty,³⁵ although some cases hold that it will not operate as an estoppel, since there was never any right of action upon it.³⁶ Covenants for title are usually inserted just before the conclusion, or execution clause. It is not necessary, however, that covenants should be placed there, or in any other particular part of the deed. Formerly, covenants usually followed the reddendum clause, or even the warranty clause.³⁷ Now, the covenants for title are usually inserted after the habendum clause, or, the habendum being omitted, after the premises. The covenant of warranty is generally placed last, although, of course, there is no requirement as to the order of arrangement.³⁸ In mortgage deeds, the clause of condition, or the defeasance clause, generally follows the covenants for title; while the covenants peculiarly applicable to such a deed, as, for example, the covenant to keep the property insured, follow the condition.

296. COVENANT OF SEISIN—A covenant of seisin is generally defined as an assurance that the grantor has the very estate in quantity and in quality which he purports to convey.

In most states, the covenant of seisin is regarded as a covenant for title. This is usually understood to be an assurance that the grantor is the owner of the property, and that he has the very es-

³⁵ *Claunch v. Allen*, 12 Ala. 159; *Gee v. Moore*, 14 Cal. 472; *Holbrook v. Debo*, 99 Ill. 372; *Porter v. Sullivan*, 7 Gray (Mass.) 441.

³⁶ *Pike v. Galvin*, 29 Me. 185. See *Ham v. Ham*, 14 Me. 355; *Loomis v. Pingree*, 43 Me. 314. See, also, *Jackson ex dem. Thurman v. Bradford*, 4 Wend. (N. Y.) 622.

³⁷ *Holds. Hist. Eng. Law*, III, 194, 2 Blk. Comm. 300-304.

³⁸ A short form of a warranty deed, with full covenants, is presented in *Devlin on Deeds*, vol. 3, § 2856, as follows: "Know all men by these presents, that A. B., of ———, in the county of ——— and state of ——— (and C. B., his wife), of the first part, for and in consideration of ——— dollars to him (or them) paid by E. F., of ———, the receipt whereof is hereby acknowledged, do grant, bargain, sell and confirm unto the said E. F., his heirs and assigns, forever, all that lot, piece or parcel of ———, described as follows: [Insert description.] With the appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, dower and right of dower, possession, claim and demand whatsoever, both at law and in equity, of the said party (or parties) of the first part of, in and to the above granted premises and every part and parcel thereof, with the appurtenances (hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state). And the said A. B. does, for himself, his heirs, executors and administrators, covenant with the said E. F., his heirs and assigns, that at the time of making this conveyance

tate in quantity and quality that he purports to convey.³⁹ In some states, however, the early common-law meaning of seisin is applied to this covenant, namely, actual seisin or possession, under a claim of a freehold estate, and it does not import that the grantor is the owner.⁴⁰ In other words, it does not require that the grantor should have an indefeasible title; it being sufficient if he is in lawful possession under color of title.⁴¹ This explains the origin of words of ownership not infrequently found in connection with the covenant of seisin, as, for example, "the said grantor (for himself and for his heirs) covenants and agrees that at the delivery hereof he is the lawful owner of the premises herein granted and seised of a good and indefeasible estate of inheritance therein." The insertion of this clause of ownership, which is also found in some of the forms used in states where it is not at all necessary, is due to the narrow construction given, in some states, to the term "seisin." Under this view of seisin, the grantor is sufficiently seised if, at the time he executed the deed, he had exclusive possession of the premises, and claimed them adversely to the true owner.⁴² In such states, the covenant of seisin is equivalent to the covenant of right to convey.⁴³ At common law, one who had been disseised of his land had no right to convey it, although the one who had disseised him did have.⁴⁴ In some states, however, a disseisee now has power to convey.⁴⁵

When Broken

As to when the covenant of seisin is broken the cases are conflicting; most courts holding that it is broken, if at all, at the time the deed is delivered,⁴⁶ and others holding that it may be broken

he is well seised of the premises, as of a good and indefeasible estate in fee simple, and has good right to bargain and sell the same, as aforesaid, and that the same are free from all incumbrances whatsoever; and the above granted premises, in the quiet and peaceable possession of the said E. F., and his heirs and assigns, he will warrant and forever defend. In witness whereof, etc. Signed, sealed and delivered in the presence of ——."

³⁹ *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; *Griffin v. Fairbrother*, 10 Me. 91, 95; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416, 421; *Peters v. Bowman*, 98 U. S. 56, 61, 25 L. Ed. 91.

⁴⁰ *Watts v. Parker*, 27 Ill. 224; *Axtel v. Chase*, 77 Ind. 74; *Follett v. Grant*, 5 Allen (Mass.) 174; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91.

⁴¹ *Id.*

⁴² *Montgomery v. Reed*, 69 Me. 510; *Breck v. Young*, 11 N. H. 485; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004.

⁴³ *Supra*, notes 39, 40.

⁴⁴ *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Loud v. Darling*, 7 Allen (Mass.) 205.

⁴⁵ 1 Stim. Am. St. Law, § 1401.

⁴⁶ *Sayre v. Coal Co.*, 106 Ala. 440, 18 South. 101; *Salmon v. Vallejo*, 41 Cal.

at any time.⁴⁷ This latter ruling is the law also in Canada and England, where all covenants for title run with the land.⁴⁸ Under the former ruling, the covenant is construed as a covenant of lawful seisin, while the other ruling would make it the same as one of indefeasible seisin,⁴⁹ which would be practically the same as a covenant of warranty. The covenant may, of course, be expressly made one of lawful seisin or one of indefeasible seisin. If the covenant of seisin is construed as for a lawful seisin only, it does not run with the land, and, if not broken when the conveyance is made, there can be no subsequent breach.⁵⁰ In some states, it is provided by statute that the covenant of seisin shall run with the land, thus enabling an assignee of the grantee to sue for its breach.⁵¹

297. SAME—HOW BROKEN—In some states, a covenant of seisin is broken if the grantor is not in lawful possession at the time of the conveyance. A covenant of indefeasible seisin is broken by acts which would be a breach of a covenant of warranty.

In other states, however, an actual seisin, a seisin in fact, will not satisfy a covenant of seisin. It is construed as a covenant of indefeasible seisin.

In some states, the covenant for seisin is satisfied if the grantor be in possession of the land at the time of the conveyance, either himself or by another for him. Mere possession by the grantor

481; *Tone v. Wilson*, 81 Ill. 529; *Scoffins v. Grandstaff*, 12 Kan. 467; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Abbott v. Allen*, 14 Johns. (N. Y.) 248; *McCarty v. Leggett*, 3 Hill (N. Y.) 135; *Wilson v. Cochran*, 46 Pa. 229; *Baker v. Hunt*, 40 Ill. 265, 89 Am. Dec. 346; *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993; 82 Am. St. Rep. 659, *Burdick Cas. Real Property*.

⁴⁷ *Wright v. Nipple*, 92 Ind. 310; *Boon v. McHenry*, 55 Iowa, 202, 7 N. W. 503; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142; *Schofield v. Homestead Co.*, 32 Iowa, 317, 7 Am. Rep. 197; *Coleman v. Lyman*, 42 Ind. 289; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585. And see *Dickson v. Desire's Adm'r*, 23 Mo. 151, 66 Am. Dec. 661. This is the English doctrine. *Kingdon v. Nottle*, 4 Maule & S. 53.

⁴⁸ *Salman v. Bradshaw*, Cro. Jac. 304; *Paynter v. Williams*, 1 H. & N. 810, 26 L. J. Exch. 117, 5 Wkly. Rep. 351; *Lucy v. Levington*, 2 Lev. 26, 1 Vent. 175. And see *GEISZLER v. DE GRAAF*, supra.

⁴⁹ *Garfield v. Williams*, 2 Vt. 327.

⁵⁰ *Sherwood v. Landon*, 57 Mich. 219, 23 N. W. 778; *Coit v. McReynolds*, 2 Rob. (N. Y.) 655; *Wilson v. Cochran*, 46 Pa. 229; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; *Bickford v. Page*, 2 Mass. 455; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453. But see *Kimball v. Bryant*, 25 Minn. 496.

⁵¹ *Littlefield v. Pinkham*, 72 Me. 369; *Trask v. Wilder*, 50 Me. 450; *Hall v.*

under a claim of right is sufficient, even though his title is good against all the world. All that is required is a seisin in fact.⁵² A covenant of seisin is consequently broken when the grantor does not have immediate possession of the land, when his estate is in remainder,⁵³ when there is a deficiency in the amount of land conveyed,⁵⁴ or when the land described in the conveyance does not exist.⁵⁵ It is broken, also, if there are fixtures on the land which may be removed by a third person who owns them,⁵⁶ or where there is a failure of title to any of the appurtenances to the land conveyed.⁵⁷ If the grantor was not solely seised, but a joint owner was in possession with him, the covenant is broken,⁵⁸ as it is also by adverse possession by another.⁵⁹ The covenant is not broken, however, by the existence of a highway or other easement,⁶⁰ by a mortgage on the land,⁶¹ by an outstanding dower,⁶² or by other existing incumbrances. An existing lease of the premises conveyed is no breach of the covenant of seisin, if the lease is known to the grantee.⁶³ Moreover, if the grantee is seised himself, he cannot claim a breach of the covenant of seisin.⁶⁴ By great weight of authority, an eviction is not necessary to constitute a breach of this covenant,⁶⁵ although it has been so held in Ohio

Plaine, 14 Ohio St. 417. See, also, *Clarke v. Priest*, 18 Misc. Rep. 501, 42 N. Y. Supp. 766.

⁵² *Follett v. Grant*, 5 Allen (Mass.) 175; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Scott v. Twiss*, 4 Neb. 133; *Axtel v. Chase*, 77 Ind. 74; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91.

⁵³ *Mills v. Catlin*, 22 Vt. 106. See *Wilder v. Ireland*, 53 N. C. 90.

⁵⁴ *Martind. Conv.* (2d Ed.) § 165. But see *McArthur v. Morris*, 84 N. C. 405.

⁵⁵ *Bacon v. Lincoln*, 4 Cush. (Mass.) 212, 50 Am. Dec. 765.

⁵⁶ *Van Wagner v. Van Nostrand*, 19 Iowa, 422.

⁵⁷ *Mott v. Palmer*, 1 N. Y. 564; *Traster v. Snelson's Adm'r*, 29 Ind. 96; *Walker v. Wilson*, 13 Wis. 522.

⁵⁸ *Downer's Adm'r v. Smith*, 38 Vt. 464; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376.

⁵⁹ *Lindsey v. Veasy*, 62 Ala. 421; *Thomas v. Perry*, 23 Fed. Cas. No. 13,908, Pet. C. C. 49; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004. See *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

⁶⁰ *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941; *Lewis v. Jones*, 1 Pa. 336, 44 Am. Dec. 138; *Blondeau v. Sheridan*, 81 Mo. 545; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; *Vaughn v. Stuzaker*, 16 Ind. 338.

⁶¹ *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *Reasoner v. Edmundson*, 5 Ind. 393; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376.

⁶² *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139; *Tuite v. Miller*, 10 Ohio, 383.

⁶³ *Lindley v. Dakin*, 13 Ind. 388; *Hebler v. Brown*, 18 Misc. Rep. 395, 41 N. Y. Supp. 441. But see *Langenberg v. Dry Goods Co.*, 74 Mo. App. 12.

⁶⁴ *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

⁶⁵ *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Zent v. Picken*, 54 Iowa,

and Nebraska.⁶⁶ On the other hand, in many states a mere actual seisin, a seisin in fact, will not support a covenant of seisin. It is necessary that the title itself should be conveyed. The covenant thus becomes practically a covenant of warranty, and is broken by acts which would be a breach of such a covenant.⁶⁷ In an action for a breach, the value of the land at the time of the sale is the general measure of damages.⁶⁸

298. COVENANT OF RIGHT TO CONVEY—In some jurisdictions, a covenant of right to convey amounts to a warranty that the grantor has absolute capacity to convey the very estate he purports to convey. In other jurisdictions, it amounts only to an assurance of lawful possession.

The covenant of right to convey has been defined to be "an assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey."⁶⁹ In states, however, where the covenant of seisin is satisfied with a mere actual seisin, the covenant of right to convey does not imply a warranty of absolute title, but only of lawful possession.⁷⁰ While, generally speaking, the covenant of right to convey is practically synonymous with the covenant of seisin,⁷¹ and while this covenant usually accompanies the covenant of seisin,⁷² yet it is not necessarily synonymous with it. Where, for example, a conveyance is made under a power, the covenant of right to convey, and not the covenant of seisin, is the proper covenant.⁷³ As to the breach of this covenant, the same general rules apply as in case of the breach of the covenant of seisin. If broken, it is, by general rule, broken when made, and an eviction is

535, 6 N. W. 750; *Akerly v. Vilas*, 21 Wis. 88; *Le Roy v. Beard*, 8 How. (U. S.) 451, 12 L. Ed. 1151.

⁶⁶ *Scott v. Twiss*, 4 Neb. 133; *Great Western Stock Co. v. Saas*, 24 Ohio St. 542; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 535.

⁶⁷ *Frazer v. Peoria County*, 74 Ill. 282; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83.

⁶⁸ *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545; *Hodges v. Thayer*, 110 Mass. 286; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230.

⁶⁹ Black, Law Dict.

⁷⁰ *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61.

⁷¹ *Slater v. Rawson*, 1 Metc. (Mass.) 450; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416, 421.

⁷² *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 342, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Rawle* (4th Ed.) 87.

⁷³ *Sugden on Vendors* (13th Ed.) 462.

not necessary.⁷⁴ The prevailing American rule is, therefore, that this covenant does not run with the land.⁷⁵ In England and Canada, however, the contrary obtains.⁷⁶ In an action for breach of the covenant, the general measure of damages is the consideration paid by the grantee, together with interest.⁷⁷ In case no consideration was paid, it is held that the amount of recovery should be the value of the land, with interest from the date of the deed.⁷⁸

299. COVENANT AGAINST INCUMBRANCES—A covenant against incumbrances is a covenant that there is no right to or interest in the land subsisting in third persons to the prejudice of the value of the estate, although consistent with the passing of the fee.

A covenant against incumbrances has been defined to be: "One which has for its object security against those rights to, or interest in, the land granted, which may subsist in third persons to the diminution in value of the estate, though consistent with the passing of the fee of the estate."⁷⁹ What, however, amounts to an "incumbrance" has not always been certain, since the word "incumbrance" has no technical meaning at common law.⁸⁰ The scope of the covenant is, however, a matter of the intention of the parties, to be construed from the deed.⁸¹ Moreover, as observed by high authority,⁸² "there is a distinction between a covenant that the premises are free from incumbrances, or that the purchaser shall enjoy them free from incumbrances." In England,

⁷⁴ *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 85; *Bickford v. Page*, 2 Mass. 455; *Fowler v. Poling*, 2 Barb. (N. Y.) 300; *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*.

⁷⁵ *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531; *Salmon v. Vallejo*, 41 Cal. 481; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91. And see *GEISZLER v. DE GRAAF*, *supra*.

⁷⁶ *Salmon v. Bradshaw*, Cro. Jac. 304; *Paynter v. Williams*, 1 H. & N. 810, 26 L. J. Exch. 117, 5 Wkly. Rep. 351; *Lucy v. Levington*, 2 Lev. 26, 1 Vent. 175.

⁷⁷ *Lockwood v. Sturdevant*, 6 Conn. 373; *Bickford v. Page*, 2 Mass. 455; *Collins v. Clamorgan's Adm'r*, 6 Mo. 169; *Nutting v. Herbert*, 35 N. H. 120; *Id.*, 37 N. H. 346.

⁷⁸ *Byrnes v. Rich*, 5 Gray (Mass.) 518. See, also, *Staples v. Dean*, 114 Mass. 125; *Hodges v. Thayer*, 110 Mass. 286.

⁷⁹ *Carter v. Denman's Ex'rs*, 23 N. J. Law, 273; *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Mitchell v. Warner*, 5 Conn. 527; *Scott v. Twiss*, 4 Neb. 133, 137, quoting *Bouvier*, Law Dict.; *Greenl. Ev.* II, § 242.

⁸⁰ *Rawle, Cov. Tit.* (4th Ed.) 94.

⁸¹ *Shearer v. Ranger*, 22 Pick. (Mass.) 447, 448; *Baring v. Bohn*, 64 Ill. App. 196; *Duvall v. Craig*, 2 Wheat. (U. S.) 45, 4 L. Ed. 180.

⁸² *Rawle, Cov. Tit.* (4th Ed.) 92.

the covenant against incumbrances is regularly made a part of the covenant for quiet enjoyment, the words employed being usually to the effect that the grantee shall have the quiet enjoyment of the lands free and clear of all incumbrances.⁸³ Likewise, in this country, the covenant may assume a similar form, being incorporated in a covenant for quiet enjoyment, or for further assurance, and in such cases the covenant against incumbrances would, in consequence, run with the land, accruing to the benefit of even a remote grantee.⁸⁴ The same result would follow, of course, where the deed showed that it was the intention to create a continuing covenant, one in futuro.⁸⁵ Generally, however, in this country, the covenant against incumbrances stands alone; that is, it is a separate and distinct covenant, and, therefore, is regarded as a covenant in præsentī,⁸⁶ broken, if at all, when made, and not passing with the land.⁸⁷

How Broken

Where the covenant is that the grantee shall have the enjoyment of the premises free from incumbrances, it is not broken, even if incumbrances do or may exist, provided there is no disturbance of the possession.⁸⁸ Under the doctrine of a covenant in præsentī, however, the covenant against incumbrances is broken by a paramount title,⁸⁹ according to the weight of authority; by the existence of a right of dower, even if inchoate;⁹⁰ by existing liens upon the land, as, for example, a mechanic's lien,⁹¹ or special assess-

⁸³ Rawle, Cov. Tit. (4th Ed.) 89.

⁸⁴ Post v. Campau, 42 Mich. 90, 3 N. W. 272; Clarke v. Priest, 21 App. Div. 174, 47 N. Y. Supp. 489; Andrews v. Appel, 22 Hun (N. Y.) 429.

⁸⁵ Rawle, Cov. Tit. (4th Ed.) 89.

⁸⁶ Scoffins v. Grandstaff, 12 Kan. 467; Kramer v. Carter, 136 Mass. 504; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; Lamb v. Kamm, Fed. Cas. No. 8,017, 1 Sawy. 238.

⁸⁷ McPike v. Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335; Smith v. Richards, 155 Mass. 79, 28 N. E. 1132; Guerin v. Smith, 62 Mich. 369, 28 N. W. 906; GEISZLER v. DE GRAAF, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, Burdick Cas. Real Property; Fuller v. Jillett, 2 Fed. 30, 9 Biss. 296.

⁸⁸ Williams v. Fowle, 132 Mass. 385; S. C. Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616; Ardesco Oil Co. v. Mining Co., 66 Pa. 375. See Van Slyck v. Kimball, 8 Johns. (N. Y.) 198.

⁸⁹ Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246.

⁹⁰ Dower is an incumbrance, whether initiate or consummate. Bigelow v. Hubbard, 97 Mass. 195; Walker's Adm'r v. Deaver, 79 Mo. 664; Smith v. Ackerman, 5 Blackf. (Ind.) 541; Jones v. Gardner, 10 Johns. (N. Y.) 266. See Bitner v. Brough, 11 Pa. 127.

⁹¹ Thomas v. Church, 86 Ala. 138, 5 South. 508. See Duffy v. Sharp, 73 Mo. App. 316; Redmon v. Insurance Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830.

ments when made liens;⁹² by attachments;⁹³ by an outstanding mortgage, unless the grantee is bound to pay it,⁹⁴ or unless the mortgage is excepted from the covenant;⁹⁵ by an unexpired lease;⁹⁶ by an outstanding judgment;⁹⁷ or by unpaid taxes which constitute a lien on the land.⁹⁸ The existence of an easement which diminishes the value of the land is also a breach of the covenant against incumbrances.⁹⁹ Even when the easement is known to the grantee at the time he takes the conveyance, most cases hold that it is a breach of the covenant.¹ Thus a public highway over the land,² or a private right of way,³ or water rights in the land,⁴ or a railroad right of way,⁵ may operate as a breach of the

⁹² *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554; *Lindsay v. Eastwood*, 72 Mich. 336, 40 N. W. 455; *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Lafferty v. Milligan*, 165 Pa. 534, 30 Atl. 1030.

⁹³ *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Johnson v. Collins*, 116 Mass. 392.

⁹⁴ *Snyder v. Lane*, 10 Ind. 424; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

⁹⁵ *King v. Sea*, 6 Ill. App. 189; *Monell v. Douglass* (Com. Pl.) 17 N. Y. Supp. 178. Or unless the mortgage is excepted from the operation of the covenant. *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 445.

⁹⁶ *Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94.

⁹⁷ *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Jones v. Davis*, 24 Wis. 229.

⁹⁸ *Robinson v. Murphy*, 33 Ind. 482; *Eaton v. Chesebrough*, 82 Mich. 214, 46 N. W. 365; *Fuller v. Jillett*, 2 Fed. 30, 9 Biss. 296; *GEORGE A. LOWE CO. v. SIMMONS WAREHOUSE CO.*, 39 Utah, 395, 117 Pac. 874, Ann. Cas. 1913E, 246, *Burdick Cas. Real Property*; *Lafferty v. Milligan*, 165 Pa. 534, 30 Atl. 1030; *Hill v. Bacon*, 110 Mass. 388; *Mitchell v. Pillsbury*, 5 Wis. 407; *Campbell v. McClure*, 45 Neb. 608, 63 N. W. 920; *Long v. Moler*, 5 Ohio St. 271. But not when they have not become a lien. *Bradley v. Dike*, 57 N. J. Law, 471, 32 Atl. 132.

⁹⁹ *Schaeffler v. Miebling*, 13 Misc. Rep. 520, 34 N. Y. Supp. 693; *Morgan v. Smith*, 11 Ill. 194; *Isele v. Bank*, 135 Mass. 142. But see *Dunklee v. Railroad Co.*, 24 N. H. 489.

¹ *Teague v. Whaley*, 20 Ind. App. 26, 50 N. E. 41; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; *Beach v. Miller*, 51 Ill. 207, 2 Am. Rep. 290; *Barlow v. McKinley*, 24 Iowa, 69; *Yancey v. Tatlock*, 93 Iowa, 386, 61 N. W. 997; *Kellogg v. Malin*, 62 Mo. 429. Contra, *Patterson v. Arthurs*, 9 Watts (Pa.) 152.

² *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Parish v. Whitney*, 3 Gray (Mass.) 516; *Kellogg v. Ingersoll*, 2 Mass. 97; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

³ *Sherwood v. Johnson*, 28 Ind. App. 277, 62 N. E. 645; *Wilson v. Cochran*, 46 Pa. 229; *Russ v. Steele*, 40 Vt. 310.

⁴ *Morgan v. Smith*, 11 Ill. 194; *Isele v. Bank*, 135 Mass. 142; *Huyck v. Andrews*, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

⁵ *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Purcell v. Railroad Co.*, 50 Mo. 504; *Farrington v. Tourtelott*, 39 Fed. 738.

covenant against incumbrances. The covenant may also be broken by the premises being subject to covenants that run with the land,⁶ and by conditions and restrictions which affect the use of the property.⁷

In actions for breach of this covenant, the general rule for the measure of damages is the loss actually sustained by the grantee.⁸ This may be merely nominal, where there has been no actual injury.⁹ In case of easements, the diminution in the value of the premises is the criterion.¹⁰ If the title utterly fails, the grantee may recover the purchase price, with interest.¹¹

300. COVENANT FOR QUIET ENJOYMENT—A covenant for quiet enjoyment is a covenant that a grantee or a lessee shall have peaceable, undisturbed possession of the land, and that he shall be permitted to enjoy the use of the land without molestation.

The covenant for quiet enjoyment is equivalent to a covenant of warranty,¹² and it is the covenant regularly employed in England for that purpose. In this country, the covenant for quiet enjoyment is usually confined to leases, and in conveyances the covenant of warranty generally takes its place. It is a covenant that the pur-

⁶ Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335.

⁷ Locke v. Hale, 165 Mass. 20, 42 N. E. 331; Foster v. Foster, 62 N. H. 46; Doctor v. Darling, 68 Hun (N. Y.) 70, 22 N. Y. Supp. 594; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550. But a condition which may defeat the estate is not a breach. Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 445.

⁸ Wetmore v. Green, 11 Pick. (Mass.) 462; Kellogg v. Malin, 62 Mo. 429; Lockwood v. Nichols, 14 Daly (N. Y.) 182, 6 N. Y. St. Rep. 220; Cathcart v. Bowman, 5 Pa. 317; GEORGE A. LOWE CO. v. SIMMONS WAREHOUSE CO., 39 Utah, 395, 117 Pac. 874, Ann. Cas. 1913E, 246, Burdick Cas. Real Property.

⁹ Willets v. Burgess, 34 Ill. 494; Newcomb v. Wallace, 112 Mass. 25; Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. 490; Funk v. Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

¹⁰ Mitchell v. Stanley, 44 Conn. 312, Richmond v. Ames, 164 Mass. 467, 41 N. E. 671; Herb v. Dispensary, 80 App. Div. 145, 80 N. Y. Supp. 552; Kellogg v. Malin, 62 Mo. 429.

¹¹ Jenkins v. Hopkins, 8 Pick. (Mass.) 346; Patterson v. Stewart, 6 Watts & S. (Pa.) 527, 40 Am. Dec. 586; Daggett v. Reas, 79 Wis. 60, 48 N. W. 127; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384.

¹² Copeland v. McAdory, 100 Ala. 553, 13 South. 545; Mitchell v. Warner, 5 Conn. 497; Bostwick v. Williams, 36 Ill. 65, 85 Am. Dec. 385; Rea v. Minkler, 5 Lans. (N. Y.) 196.

chaser shall not be disturbed in his possession,¹³ an assurance against eviction upon a defective title.¹⁴ The covenant will be construed upon the real intention of the parties as shown by the whole instrument.¹⁵ It is a covenant that runs with the land,¹⁶ and is broken by eviction,¹⁷ or by any actual disturbance of the possession which amounts to an eviction, by one having a lawful and paramount title at the time the covenant was made.¹⁸ A disturbance by a trespasser,¹⁹ even by the covenantor, without claim of title,²⁰ does not amount, however, to a breach. The covenant may be so expressed, however, as to show an intention to extend the assurance to all acts of disturbance, even those committed by trespassers.²¹ The usual measure of damages in an action upon the covenant is the same as in breach of warranty, to which the reader is referred.²²

301. COVENANT OF WARRANTY—A covenant of warranty is an assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title.

302. SAME—HOW BROKEN—A covenant of warranty is broken by a lawful eviction from all or part of the premises.

¹³ *Ludwell v. Newman*, 6 T. R. 458.

¹⁴ *Cumberland v. Kearns*, 17 Ont. App. 281. See *Cassada v. Stabel*, 98 App. Div. 600, 90 N. Y. Supp. 533.

¹⁵ *Ingersoll v. Hall*, 30 Barb. (N. Y.) 392; *Midgett v. Brooks*, 34 N. C. 145, 55 Am. Dec. 405; *Lamb v. Starr*, 14 Fed. Cas. No. 8,022, Deady, 447.

¹⁶ *Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Fisher v. Parry*, 68 Ind. 465; *Baker v. Bradt*, 168 Mass. 58, 46 N. E. 409; *Ely v. Hergesell*, 46 Mich. 325, 9 N. W. 435; *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Clarke v. Priest*, 21 App. Div. 174, 47 N. Y. Supp. 489; *Whitehill v. Gotwalt*, 3 Pen. & W. (Pa.) 313; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91.

¹⁷ *Bedell v. Christy*, 62 Kan. 760, 64 Pac. 629; *GEISZLER v. DE GRAAF*, supra; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381; *Falkner v. Woodard*, 104 Wis. 608, 80 N. W. 940.

¹⁸ *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Beebe v. Swartwout*, 3 Gilman (Ill.) 162; *Sprague v. Baker*, 17 Mass. 586; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Brown v. Dickerson*, 12 Pa. 372.

¹⁹ *Branger v. Manciet*, 30 Cal. 624; *Barry v. Guild*, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334; *Folliard v. Wallace*, 2 Johns. (N. Y.) 395; *Andrus v. Refining Co.*, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054.

²⁰ *Claunch v. Allen*, 12 Ala. 159; *Penn v. Glover*, Cro. Eliz. 421.

²¹ *Chaplin v. Southgate*, 10 Mod. 384.

²² *Infra*.

303. SAME—SPECIAL WARRANTY—A covenant of warranty may be restricted to certain persons or claims.

The covenant of warranty is not used in England; the covenant for quiet enjoyment being there used as the sweeping covenant against eviction.²³ In this country, however, it is the most important of our covenants for title, and gives the name to the deed most frequently used by us. As previously observed,²⁴ modern personal covenants in deeds came into general use in England during the reign of Charles II. At that period, moreover, emigration from England to this country was well established, and these covenants soon became common in colonial conveyances. In time, England entirely dropped the old common-law clause of warranty, while our ancestors made a personal covenant of it, and added it to the clause of covenants.²⁵ With us, the covenant of warranty is an assurance that the grantee, his heirs and assigns, shall not be evicted from the land, or deprived of its possession, by force of a paramount title. In its practical effects, therefore, it is equivalent to the covenant for quiet enjoyment,²⁶ and a "warranty deed" is merely a deed containing a covenant of warranty²⁷—either of general²⁸ or of special warranty.²⁹ While the modern covenant of warranty is evolved from the common-law warranty, nevertheless warranty at common law was entirely different from the present-day covenant. Under the feudal law, it was the duty of the vassal to render homage for the fief received, and the corresponding duty of the lord to protect and defend his vassal in its enjoyment. Consequently, if the title was disputed, it was the lord's place, upon voucher (i. e. if called upon, from Latin, *vocare*, to call) by his vassal, to appear and to warrant or defend the same. Should he fail to do so, it was his duty to give his vassal another fief of equal value.³⁰ This recovery in value could

²³ Supra.

²⁴ Supra.

²⁵ Foote v. Burnet, 10 Ohio, 322, note, 36 Am. Dec. 90; Rawle, Cov. Tit. (4th Ed.) 207.

²⁶ Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Bostwick v. Williams, 36 Ill. 65, 85 Am. Dec. 385; Peck v. Houghtaling, 35 Mich. 127; Rea v. Minkler, 5 Lans. (N. Y.) 196; Wright v. Phipps, 90 Fed. 556.

²⁷ Kinney, L. Dict., quoted in State Sav. Bank v. Gregg, 67 Mo. App. 303, 307.

²⁸ Allen v. Hazen, 26 Mich. 142, 146.

²⁹ Payne v. Echols (Pa. 1888) 15 Atl. 895; Withers v. Baird, 7 Watts (Pa.) 227, 229, 32 Am. Dec. 754. As a term of common understanding, a "warranty deed" means a perfect title, and when parties contract for such a deed they must be understood to mean a title paramount to all others. Tupy v. Koucorek, 66 Ark. 433, 51 S. W. 69; Pomeroy v. Drury, 14 Barb. (N. Y.) 418, 424.

³⁰ Gilbert's Tenures, 139, Rawle, Cov. Tit. (4th Ed.) 2.

only be had upon voucher, or *warrantia chartæ*,⁸¹ its substitute, which was an ancient writ brought against the warrantor of a title to compel him to assist the tenant with a good defense, or else to render unto him land of equal value.⁸² The recovery, moreover, could be only in lands or tenements; consequently, if the warrantor had no lands or tenements, either at the time of his entering into warranty (that is, upon appearing on the voucher, and taking upon himself to warrant by defending the suit), or at the time of suing out the writ of *warrantia chartæ*, or if the tenant failed to vouch, or to sue out his writ of *warrantia chartæ*, before he was evicted, the tenant was wholly without remedy upon his warranty.⁸³ Prof. Maitland informs us that the clause of warranty is regularly found in charters of feoffment about the year 1200.⁸⁴ The ancient deeds show various forms of this clause. The hybrid Latin "*warrantizo*" so venerated by Coke,⁸⁵ does not always appear. Sometimes the verb "I will defend" (*defendo*) is alone used,⁸⁶ and the clause is often supported by the solemn oath of the warrantor.⁸⁷ It is thus at least interesting to observe that the modern and familiar expression in the covenant of warranty, namely, "I will warrant and forever defend," is supported by the ancient forms.⁸⁸ The modern covenant of warranty, like other covenants, requires, however, no particular technical words in order to create it. The intention of the parties is the test.⁸⁹ Covenants of warranty are either general or special. In a general warranty, the warrantor agrees that he will warrant and defend against the lawful claims of all persons

⁸¹ That is, "a warranty deed."

⁸² 3 Blk. Comm. 300.

⁸³ Bacon, Abr. tit. Warranty, M. Stout v. Jackson, 2 Rand. (Va.) 132, 142.

⁸⁴ P. & M. II, 311, note 1. And see Holds. Hist. Eng. Law, III, 93.

⁸⁵ Thus it is said by Coke, and repeated by Blackstone, that express technical "*warranty*" at common law can be created only by the word "*warrantizo*," or "*warrant*" in English; that if any other word save "*shall*" or "*will*" be substituted or added to it, the ancient real covenant is not created, but only a personal covenant. See Co. Litt. 382b; 2 Blk. Comm. 301; Noke's Case, 4 Coke, 80b; Tabb's Adm'r v. Binford, 4 Leigh (Va.) 132, 26 Am. Dec. 317.

⁸⁶ Madox, Form No. 285.

⁸⁷ Madox, Form No. 293.

⁸⁸ Littleton (1422-1481) also tells us that the words "*warrant and forever defend*" were those generally inserted in a warranty, although he says that the word "*defend*" added no additional meaning. Litt. § 733. That the word "*defend*" makes the technical difference between a covenant of warranty and common-law warranty, the use of the word "*defend*" making a personal covenant, as said in some cases (see Williamson v. Codrington, 1 Ves. 511, 27 Eng. Reprint, 1174; Stout v. Jackson, 2 Rand. [Va.] 132), does not seem, therefore, to be justified by the ancient forms.

⁸⁹ Wheeler v. Wayne County, 132 Ill. 599, 24 N. E. 625; Kerngood v. Davis, 21 S. C. 183; Little v. Allen, 56 Tex. 133.

whomsoever.⁴⁰ In a special warranty, the protection is promised only against certain persons or claims.⁴¹ The modern covenant gives the grantee only a right of action to recover damages for the breach of the covenant.⁴² The covenant of warranty runs with the land.⁴³ It estops the warrantor, and those claiming under him, from setting up a subsequently acquired title against the grantee.⁴⁴ And some cases hold that if the grantor, after his conveyance, acquires a title paramount to the one which he has transferred, it immediately inures to the benefit of the grantee.⁴⁵ Statutory provisions to this effect exist in some states.⁴⁶ The covenant of warranty prevents the heirs of the warrantor from setting up a paramount title to the lands conveyed, if they have received assets from their ancestor, thus avoiding circuitry of action; because, if the heirs were permitted to recover from the grantee by virtue of a paramount title, the grantee could in turn sue them on the covenant of warranty, and enforce the damages out of the assets which they had received from the warrantor.⁴⁷

How Broken

The covenant of general warranty is broken by an eviction, actual or constructive, under lawful paramount title, from part or all of the premises.⁴⁸ A disturbance of the grantee by trespassers will

⁴⁰ *West Coast Mfg. & Inv. Co. v. Improvement Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763. See, also, *Caldwell v. Kirkpatrick*, 6 Ala. 60, 41 Am. Dec. 36.

⁴¹ See *infra*.

⁴² *Paxson v. Lefferts*, 3 Rawle (Pa.) 67, note; *Jones v. Franklin*, 30 Ark. 631.

⁴³ *Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Fisher v. Parry*, 68 Ind. 465; *Baker v. Bradt*, 168 Mass. 58, 46 N. E. 409; *Ely v. Hergesell*, 46 Mich. 325, 9 N. W. 435; *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Clarke v. Priest*, 21 App. Div. 174, 47 N. Y. Supp. 489; *Whitehill v. Gotvalt*, 3 Pen. & W. (Pa.) 313; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91.

⁴⁴ *Bates v. Norcross*, 17 Pick. (Mass.) 14, 28 Am. Dec. 271; *White v. Patten*, 24 Pick. (Mass.) 324; *Jackson ex dem. Stevens v. Stevens*, 13 Johns. (N. Y.) 316; *King v. Gilson's Adm'x*, 32 Ill. 353, 83 Am. Dec. 269; *Terrett v. Taylor*, 9 Cranch (U. S.) 43, 53, 3 L. Ed. 650.

⁴⁵ *Rawle, Cov. Tit.* 404, note 2; *Knowles v. Kennedy*, 82 Pa. 445; *Crocker v. Pierce*, 31 Me. 177.

⁴⁶ 1 Stim. Am. St. Law, § 1454 B.

⁴⁷ *Bates v. Norcross*, 17 Pick. (Mass.) 14, 28 Am. Dec. 271; *Cole v. Raymond*, 9 Gray (Mass.) 217. But see *Jones v. Franklin*, 30 Ark. 631. When those who would be the grantor's heirs take by purchase, they are not bound. *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295.

⁴⁸ *Norton v. Jackson*, 5 Cal. 262; *Comstock v. Son*, 154 Mass. 389, 28 N. E. 296; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Jones v. Warner*, 81 Ill. 343; *Mead v. Stackpole*, 40 Hun (N. Y.) 473; *Stewart v. Drake*, 9 N. J.

not constitute a breach of the covenant, for the disturbance, to be a breach, must be lawful.⁴⁹ The grantee, however, need not wait for an actual ouster under a judgment recovered against him, but may yield the possession to one having a paramount title without incurring the cost of a suit,⁵⁰ and he may even accept a title from such person without losing his right to rely on the covenant of warranty,⁵¹ although, when he brings action on the covenant, he must show that the title to which he yielded was a paramount one.⁵² A mortgage enforced against the premises conveyed,⁵³ or eviction by means of other incumbrances,⁵⁴ is a breach of the covenant of warranty, as is also the removal of fixtures by one having the right to do so.⁵⁵ The existence of a valid easement over the land conveyed is likewise a breach of the covenant.⁵⁶ A taking of the land, however, under the right of eminent domain, does not constitute a breach.⁵⁷

Special Warranty

As previously stated, the covenant of warranty may be limited in its operation to particular claims or to particular persons. Thus,

Law, 139; McGrew v. Harmon, 164 Pa. 115, 3 Atl. 265, 268; Montgomery v. Railroad Co., 67 Fed. 445.

⁴⁹ Barry v. Guild, 28 Ill. App. 39; Andrus v. Refining Co., 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054; Gleason v. Smith, 41 Vt. 293.

⁵⁰ Lambert v. Estes, 99 Mo. 604, 13 S. W. 284; Fowler v. Polling, 6 Barb. (N. Y.) 165; Knepper v. Kurtz, 58 Pa. 480; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Claycomb v. Munger, 51 Ill. 376; Funk v. Creswell, 5 Iowa, 62.

⁵¹ Eversole v. Early, 80 Iowa, 601, 44 N. W. 897; Hall v. Bray, 51 Mo. 288; Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710; Dillahunt v. Railway Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657. But see Huff v. Land Co. (Ky.) 30 S. W. 660.

⁵² Sheetz v. Longlois, 69 Ind. 491; Walker v. Kirshner, 2 Kan. App. 371, 42 Pac. 596; Somers v. Schmidt, 24 Wis. 417, 1 Am. Rep. 191; Merritt v. Morse, 108 Mass. 276; Cheney v. Straube, 43 Neb. 879, 62 N. W. 234.

⁵³ Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669; Ingram v. Ingram, 71 Ill. App. 497; Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89; Harlow v. Thomas, 15 Pick. (Mass.) 66; Tufts v. Adams, 8 Pick. (Mass.) 547; White v. Whitney, 3 Metc. (Mass.) 81; Cowdrey v. Coit, 44 N. Y. 382, 4 Am. Rep. 690.

⁵⁴ Clark v. Winchell, 53 Vt. 408; Jackson v. Hanna, 53 N. C. 188; Van Wagner v. Van Nostrand, 19 Iowa, 422; Bruington v. Barber, 63 Kan. 28, 64 Pac. 963.

⁵⁵ Van Wagner v. Van Nostrand, 19 Iowa, 422; Stewart v. West, 14 Pa. 336; West v. Stewart, 7 Pa. 122.

⁵⁶ Sherwood v. Johnson, 28 Ind. App. 277, 62 N. E. 645; Rea v. Minkler, 5 Lans. (N. Y.) 196; Alling v. Burlock, 46 Conn. 504; Harlow v. Thomas, 15 Pick. (Mass.) 66; Russ v. Steele, 40 Vt. 310. But see Hymes v. Esty, 36 Hun (N. Y.) 147; Brown v. Young, 69 Iowa, 625, 29 N. W. 941.

⁵⁷ Stevenson v. Loehr, 57 Ill. 509, 11 Am. Rep. 36; Folts v. Huntley, 7 Wend. (N. Y.) 210; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Peck v. Jones, 70 Pa. 83; Brimmer v. City of Boston, 102 Mass. 19.

a covenant of special warranty is often inserted in deeds, by which the grantor warrants the title against all persons claiming through him.⁵⁸ Such a covenant of special warranty does not prevent the grantor from setting up a subsequently acquired title against the covenantee,⁵⁹ and, since such a special covenant cannot be extended into a general covenant against all persons, the covenantee has no remedy for failure of his title arising from a paramount title held by others than those claiming through his grantor.⁶⁰

Action for Breach

Where an assignee, however remote from the covenantee, acquires his title before the breach of a covenant running with the land, he may have his action against the original covenantor or against any succeeding covenantor in his line of title.⁶¹ After the breach of such a covenant, there can be, however, at common law no assignment of it;⁶² and this is still the rule in this country by weight of opinion,⁶³ except in states where choses in action are assignable.⁶⁴ A covenant of warranty may be apportioned, and when the land to which it is annexed is divided and held by a number of owners, the covenant attaches to each part, and each grantee may sue, on the covenant, either the original covenantor or his personal representative.⁶⁵ When the grantor is sued on covenants of warranty, if the land has been warranted to him, he may vouch in his warrantor by giving him notice of the suit,⁶⁶ and by so doing he relieves himself of the necessity of proving, in a subsequent suit against

⁵⁸ *Sanders v. Betts*, 7 Wend. (N. Y.) 287; *Western Min. & Mfg. Co. v. Coal Co.*, 8 W. Va. 406; *Buckner v. Street*, 15 Fed. 365, 5 McCrary, 59.

⁵⁹ *Doane v. Willcutt*, 5 Gray (Mass.) 328, 66 Am. Dec. 369; *Davenport v. Lamb*, 13 Wall. (U. S.) 418, 20 L. Ed. 655; *Jackson ex dem. Glover v. Winslow*, 9 Cow (N. Y.) 13; *Trull v. Eastman*, 3 Metc. (Mass.) 124, 37 Am. Dec. 126; *Western Min. & Mfg. Co. v. Coal Co.*, 8 W. Va. 406; *Buckner v. Street*, 15 Fed. 365.

⁶⁰ *Buckner v. Street*, 15 Fed. 365

⁶¹ *Redwine v. Brown*, 10 Ga. 311; *Norman v. Wells*, 17 Wend. (N. Y.) 136.

⁶² *Lewes v. Ridge*, Cro. Eliz. 863.

⁶³ *Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; *Provident Life & Trust Co. v. Fiss*, 147 Pa. 232, 23 Atl. 560.

⁶⁴ *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Slater v. Rawson*, 1 Metc. (Mass.) 450; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142.

⁶⁵ *Blake v. Everett*, 1 Allen (Mass.) 248; *Fields v. Squires*, Fed. Cas. No. 4,776, *Deady*, 366; *Dickinson v. Hoomes' Adm'r*, 8 Grat. (Va.) 353. And see *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Lane v. Woodruff*, 1 Kan. App. 241, 40 Pac. 1079.

⁶⁶ *Grant v. Hill* (Tex. Civ. App.) 30 S. W. 952. The warrantor may be required to defend, though the claim set up is invalid. *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767, 58 Am. St. Rep. 391. An intermediate covenantee

such warrantor, that the action in which he was defeated was well founded.⁶⁷

Measure of Damages

As stated in connection with the covenant for quiet enjoyment,⁶⁸ the general measure of damages is the same, upon breach, for the covenant of warranty and the covenant for quiet enjoyment. The general rule applicable in both cases is that the covenantee may recover his actual loss.⁶⁹ In case of a total breach, the purchase money, with interest, is the general rule;⁷⁰ some cases holding, however, that the value of the land at the time of the eviction may be recovered.⁷¹ Where the loss is partial—that is, where the title fails only as to a part of the land—the amount recoverable is such a proportionate part of the purchase price as the tract of land affected bears to the whole tract,⁷² although, as before, other cases hold that the value of the tract affected may be recovered.⁷³ In case a covenantee has suffered no loss from a defective title, he will be entitled to nominal damages only.⁷⁴ If the covenantee has purchased valid outstanding titles, or has paid incumbrances covered by the covenant, he may recover the actual amount thus paid out, together

who has not been damnified cannot recover from prior covenantors. *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233.

⁶⁷ *Chamberlain v. Preble*, 11 Allen (Mass.) 370; *Morris v. Rowan*, 17 N. J. Law, 304; *Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275; *Merritt v. Morse*, 108 Mass. 276; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191; *Paul v. Witman*, 3 Watts & S. (Pa.) 409; *McConnell v. Downs*, 48 Ill. 271. The warrantee cannot recover from the warrantor when the former instigated a third person to claim title to the land. *Hester v. Hunnicutt*, 104 Ala. 282, 16 South. 162.

⁶⁸ *Supra*.

⁶⁹ *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Knowles v. Kennedy*, 82 Pa. 445; *Clark v. Zeigler*, 79 Ala. 346; *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. 105; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553.

⁷⁰ *Weber v. Anderson*, 73 Ill. 439; *Rhea v. Swain*, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; *Harris v. Newell*, 8 Mass. 262; *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292; *Kelly v. Church*, 2 Hill (N. Y.) 105; *McClure's Ex'rs v. Gamble*, 27 Pa. 288; *Northern Pac. R. Co. v. Montgomery*, 86 Fed. 251, 30 C. C. A. 17.

⁷¹ *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328; *Williamson v. Williamson*, 71 Me. 442; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749. *Contra*, *Thomas v. Hamilton*, 71 Ind. 277; *Boyer v. Amet*, 41 La. Ann. 721, 6 South. 734.

⁷² *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Weber v. Anderson*, 73 Ill. 439; *Wright v. Nipple*, 92 Ind. 310; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Appeal of Hood* (Pa. 1886) 7 Atl. 137.

⁷³ *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310; *Grant v. Hill* (Tex. Civ. App. 1894) 30 S. W. 952; *Ferris v. Mosher*, 27 Vt. 218, 65 Am. Dec. 192.

⁷⁴ *Sayre v. Coal Co.*, 106 Ala. 440, 18 South. 101; *Brady v. Spurck*, 27 Ill. 478; *Sebrell v. Hughes*, 72 Ind. 186; *O'Meara v. McDaniel*, 49 Kan. 685, 31 Pac. 303.

with interest, and the reasonable expenses incidental to the transaction, providing, however, that the maximum recovery does not exceed the purchase price, with interest.⁷⁵ By general rule, improvements made upon the land by the covenantee are not considered in the estimate of damages,⁷⁶ and where the covenantee has recovered for such improvements from the holders of the paramount title, it has been held that the covenantor is entitled to credit for that amount.⁷⁷

Covenant for Further Assurance

This covenant, while in common use in England, is not generally employed in this country. It may, however, be of considerable importance, and, in effect, it is an agreement on the part of the vendor to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require.⁷⁸ The covenant applies not only to the doing of further acts which may be necessary to protect the grantee's title, but also applies to the execution of additional instruments to give the grantee a perfect title of record, or to remove any clouds upon such title.⁷⁹ Thus a release of a mortgage may be an act of further assurance,⁸⁰ or the removal of a judgment lien or other incumbrance.⁸¹ A covenant in a deed that, if the grantor obtains title from the United States, he will thereupon execute a warranty deed to the grantee, is also an illustration of a covenant for further assurance.⁸² No particular words are required to create this covenant,⁸³ although the usual form is that "the said [vendor] shall at all times hereafter at the request and expense of the said [purchaser], his heirs and assigns, make and execute such other assurances for the more effectual conveyance of the said premises as shall be by him reasonably required."⁸⁴ While

⁷⁵ *Weber v. Anderson*, 73 Ill. 439; *Mooney v. Burchard*, 84 Ind. 285; *Leffingwell v. Elliott*, 10 Pick. (Mass.) 204; *Cox's Adm'rs v. Henry*, 32 Pa. 18; *Barlow v. Delaney*, 40 Fed. 97.

⁷⁶ *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Weiting v. Nissley*, 13 Pa. 650; *Conrad v. Trustees, etc.*, 64 Wis. 258, 25 N. W. 24.

⁷⁷ *Booker's Adm'r v. Bell's Ex'rs*, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; *Ingram v. Walker*, 7 Tex. Civ. App. 74, 26 S. W. 477.

⁷⁸ *Black*, Law Dict.; *Davis v. Tarwater*, 15 Ark. 286.

⁷⁹ *Lamb v. Burbank*, 1 Sawy. 227, Fed. Cas. No. 8,012; *Gwynn v. Thomas*, 2 Gill & J. (Md.) 420; *Warn v. Bickford*, 7 Price, 550.

⁸⁰ *Colby v. Osgood*, 29 Barb. (N. Y.) 339.

⁸¹ *Sugden, Vend.* (8th Am. Ed.) 613; *Rawle, Cov.* §§ 104, 105; *Colby v. Osgood*, 29 Barb. (N. Y.) 339; *Davis v. Tollemache*, 2 Jur. N. S. 1181.

⁸² *Davis v. Tarwater*, 15 Ark. 286. See, also, *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 112. See *Lamb v. Burbank*, 14 Fed. Cas. No. 8,012, 1 Sawy. 227.

⁸³ *Id.*

⁸⁴ *Rawle, Cov. Tit.* (4th Ed.) 28.

the remedy in case of most covenants is merely an action at law for the breach, yet equity will enforce a covenant for further assurance by requiring specific performance of any instrument covered by the agreement.⁸⁶ The covenant for further assurance is one which runs with the land,⁸⁶ and is technically broken by the failure of the covenantor to do the various acts necessary for perfecting the grantee's title when requested.⁸⁷ Only, however, where the covenantee suffers an actual or constructive breach by reason of the failure of the covenantor to comply, does a substantial breach arise.⁸⁸ In case of an action at law based upon the breach of this covenant, the covenantee may, if injured, recover his actual loss.⁸⁹ However, a mere refusal to execute a desired instrument, followed by no actual injury to the plaintiff, will result only in nominal damages.⁹⁰ In a proper case the covenantee may resort to equity, of course, for specific performance, as above suggested.

⁸⁶ Rawle, *Cov. Tit.* 195, 656.

⁸⁶ *GEISZLER v. DE GRAAF*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659, *Burdick Cas. Real Property*; *Colby v. Osgood*, 29 Barb. (N. Y.) 339; *Midlemore v. Goodale*, Cro. Car. 503.

⁸⁷ *Vance v. Pena*, 41 Cal. 686; *Miller v. Parsons*, 9 Johns. (N. Y.) 336; *Fields v. Squires*, Fed. Cas. No. 4,776, *Deady*, 366; *King v. Jones*, 5 Taunt. 418. Cf. *Kingdon v. Nottle*, 1 Maule & S. 355.

⁸⁸ *Zabriskie v. Baudendistel* (N. J. Ch. 1890) 20 Atl. 163.

⁸⁹ *King v. Jones*, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219.

⁹⁰ *Zabriskie v. Baudendistel* (N. J. Ch. 1890) 20 Atl. 163; *Burr v. Todd*, 41 Pa. 206.

CHAPTER XXIX

ABSTRACTS OF TITLE

304. Definition and Nature.

305. Duty of Attorney in Examining Abstracts.

DEFINITION AND NATURE

304. An abstract of title is an abstract or summary of the transfers, incumbrances, liens, and liabilities, appearing on public records, which affect the title to real property.

Definition

In addition to the definition of an abstract of title as given above,¹ an abstract may be defined as a short, methodical summary of the documents and facts which affect the title to a piece of land,² or as a synopsis of what appears on the public records affecting the title to any tract of realty.³

Object and Purpose

The purpose of an abstract of title is to enable one interested in the title to land to determine its sufficiency without reference to the original sources for information.⁴ In other words, its object is to enable the purchaser, or his legal adviser, to pass upon the validity of the title.⁵

"During the earlier years of the United States, but little attention was paid to title in purchases of real property. Ordinarily the buyer was fully satisfied with the vendor's warranty deed."⁶ Due, however, to the great increase in the value of land, and to the further fact that, in modern times, lands are frequently alienated or incumbered, and in various ways subjected to a complexity of interests, the prospective purchaser or mortgagee of land, to-day, usu-

¹ Martindale, Abstracts, 3.

² See Warvelle, Abstracts, § 2; Roberts v. Vornholt, 126 Ind. 511, 26 N. E. 207; Hoover v. Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905.

³ Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Loring v. Oxford, 18 Tex. Civ. App. 415, 45 S. W. 395.

⁴ Ballard, Real Prop. VI, § 1; Warvelle, Abstracts, 10; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

⁵ Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Kane v. Rippey, 22 Or. 296, 23 Pac. 180; Burnaby v. Equitable Reversionary Interest Soc., 54 L. J. Ch. 466, 52 L. T. Rep. N. S. 350.

⁶ Warvelle, Abstracts, § 3, quoted in Devlin, Decds (3d Ed.) § 1531.

ally desires a legal opinion concerning the validity of the title. Formerly, it was the custom of the practicing lawyer, or conveyancer, to examine the public records relating to the title of land, and to report to his client the result of his search. At the present time, however, the actual examination of the records is usually made by persons known as abstracters, who make a specialty of this class of work. In many cities, firms or corporations, known as abstract companies, are engaged exclusively in this line of business.⁷

The result of the abstracter's search is embodied in a report, known as an abstract of title. This is a short, concise statement, in chronological order, of the various transactions which have affected the title to the land. It shows the "chain of title" by setting forth all the links that go to make up the chain.

What the Abstract should Contain

An abstract of title, to be of value, must contain a note or memorandum of all conveyances, transfers, or other facts relied on as evidence of the claimant's title, together with all such facts appearing of record as may impair it.⁸ It should contain the most important facts of all deeds and other instruments connected with the title, and it should also contain "a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised."⁹ An abstract of title may be very short and simple, or it may be very long and complicated, depending upon the facts of any particular case. For example, it may consist of but a single memorandum of a single conveyance, as would be the case where a patentee of public lands furnished an abstract of his title.¹⁰ On the other hand, it may consist of many memoranda of many con-

⁷ At common law, no person has a right to examine or copy public records, either personally or by agent, unless he has a legal interest in such records. *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405; *Boylan v. Warren*, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551; *Burton v. Tuite*, 80 Mich. 218, 45 N. W. 88, 7 L. R. A. 824; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927, 2 Ann. Cas. 74. This rule applies also to abstracters of title (*Land Title Warranty & Safe Deposit Co. v. Tanner*, 99 Ga. 470, 27 S. E. 727), including persons or corporations engaged in insuring titles (*Barber v. Guaranty Co.*, 53 N. J. Eq. 158, 32 Atl. 222). Where, however, one has an interest in the public records, he has a right to inspect and copy the same, and this right may be exercised for him by an agent, as, for example, one engaged in the business of making abstracts. *Barber v. Guaranty Co.*, *supra*; *Boylan v. Warren*, *supra*; *Bell v. Insurance Co.*, 189 U. S. 131, 23 Sup. Ct. 569, 47 L. Ed. 741. See Cyc. vol. 34, p. 592, Access To Records.

⁸ *Heinsen v. Lamb*, 117 Ill. 549, 7 N. E. 75.

⁹ *Burrill, L. Dict.*, quoted in *Banker v. Caldwell*, 3 Minn. 94 (Gil. 46).

¹⁰ *Heinsen v. Lamb*, 117 Ill. 549, 7 N. E. 75.

veyances, mortgages, releases of mortgages, foreclosure suits, tax sales, mechanics' liens, judgment liens in both state and federal courts, unpaid tax liens, assessment liens, and other charges and liabilities. The rights of parties in the land may also depend upon the construction of wills, upon the result of partition suits and other judicial proceedings, upon contracts of purchase, and upon many and various conditions and covenants in the deeds of conveyance. Any and all of these matters, and other matters, which appear upon public record, and which in any way affect the title, should be sufficiently shown in the abstract.¹¹ In other words, not only should the descent and line of the title be clearly traced out, and all incumbrances, all chances of eviction or adverse claims, be shown, but material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title, and also liens and incumbrances of every nature, should be set forth.¹²

Particularity of Description

Just how much particularity of detail with reference to the various instruments on record should be set out in the abstract depends upon the nature of the instrument and its contents. Every important fact that affects the title should, of course, be shown. Counsel who examines an abstract, and who is employed to give his opinion thereon, has to depend upon the evidence of the facts as given in the abstract. If there is any omission of any essential fact, it must necessarily affect the opinion of the legal adviser. The abstract, therefore, must be correct and complete, in order to form the basis of a correct opinion. On the other hand, when the essential facts are stated in the abstract, just how full or minute they should be is a matter for the abstracter himself to decide.¹³ Providing all the material facts are set forth, the briefer the abstract is, as to immaterial details, the better. A purchaser, however, is entitled to consider that no part of the documents which is not set out has any bearing upon the title.¹⁴ An abstract need not express any opinion as to the legal effect of any instrument recited therein,¹⁵ since that is the province of the examiner of the abstract.

An abstract may be a complete summary of the transmutation of title from the beginning, which, in this country, usually means either from the earliest colonial grant, or from the patent issued by

¹¹ Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

¹² Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

¹³ Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

¹⁴ Burnaby v. Equitable, etc., Society, 54 L. J. Ch. 466.

¹⁵ Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

the government; or it may be a memorandum of the title for a certain period,¹⁶ or as gathered from certain records.¹⁷ An abstract should, however, show just what period it does cover, also the particular piece of property it is intended to trace, and should show, by the abstracter's certificate, the day and hour to which the title is extended.

Duties of Abstracters

One who engages in the business of examining the public records for the purpose of preparing abstracts for compensation is presumed, by implication of law, to have skill in such work, and to have contracted that he will exercise due care.¹⁸ For injury directly resulting from defects in his abstract he is liable for breach of contract.¹⁹ In some states, the statutes provide that all abstracters must be bonded for the purpose of securing persons who may employ their services.²⁰ As a rule, only those persons who order and pay for an abstract have a right of action against an abstracter for his neglect or fraud.²¹ In some states, however, either by reason of statute or of local judicial decisions, persons who are employed for the purpose of preparing abstracts are liable for all loss or damage which may happen by reason of their fraud or negligence, not only to their employers, but also to any person claiming title through, from, or under such persons.²²

With reference to his skill, an abstracter, it is said, is bound to have a sufficient knowledge of the law to know what is and what is not a lien upon real estate.²³ It has also been said in this connection: "That the making of a perfect abstract of title to a piece of land, with all the incumbrances that affect it, involves a great exercise of legal learning and careful research, I presume no lawyer will dispute. The person preparing such an abstract must under-

¹⁶ Wakefield v. Chowen, 26 Minn. 379, 4 N. W. 618.

¹⁷ Thomas v. Carson, 46 Neb. 765, 65 N. W. 899.

¹⁸ Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Chase v. Heaney, 70 Ill. 268; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Dodd v. Williams, 3 Mo. App. 278; WALKER v. BOWMAN, 27 Okl. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839, Burdick Cas. Real Property.

¹⁹ Roberts v. Sterling, 4 Mo. App. 593; Russell & Co. v. Abstract Co., 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 381.

²⁰ See Thomas v. Carson, 46 Neb. 765, 65 N. W. 899; WALKER v. BOWMAN, 27 Okl. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839, Burdick Cas. Real Property.

²¹ Mechanics' Bldg. Ass'n v. Whitacre, 92 Ind. 547; Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Zweigardt v. Birdseye, 57 Mo. App. 462. But see Gate City Abstract Co. v. Post, 55 Neb. 742, 76 N. W. 471.

²² National Sav. Bank v. Ward, 100 U. S. 195, 206, 25 L. Ed. 621.

²³ Dodd v. Williams, 3 Mo. App. 278.

stand fully all the laws on the subject of conveyances, descents and inheritances, uses and trusts, devises, and in fact every branch of the law that can affect real estate in its various mutations from owner to owner, sometimes by operation of law and again by act of the parties.”²⁴ It may, however, be questioned whether the standard thus set up is not too high. Thousands of perfect abstracts have been prepared by careful and intelligent abstracters, but to “understand fully all the laws on the subject of conveyances, descents and inheritances, uses and trusts, and in fact every branch of the law that can affect [the title to] real estate,” is to attain to a height that few men, even the lawyers and judges, ever reach. No professional opinion is required of an abstracter,²⁵ and the mere fact of furnishing an abstract does not in itself involve a guaranty of the title. Many abstract companies, however, in connection with the preparation of abstracts, make a business of furnishing legal opinions regarding the title, and will also contract for the insurance of the same.²⁶

DUTY OF ATTORNEY IN EXAMINING ABSTRACTS

305. An attorney employed to investigate the title to real property impliedly contracts to exercise reasonable care and skill in the performance of the service, and for his negligence or failure to exercise such reasonable care and skill he is responsible to his employer for any loss resulting from such neglect or want of skill.

As stated above, when, for the purpose of investigating the title to real property, attorneys are employed by prospective purchasers, or by persons desirous of ascertaining whether such property is a safe or sufficient security for a loan, such attorneys impliedly contract to exercise reasonable care and skill in the performance of the undertaking. For negligence, or for failure to exercise due care, they may be held responsible in damages.²⁷ Proof of employment and the want of reasonable care and skill must be shown, however, in order to maintain an action. An attorney is not liable for every mistake that may occur, or for every error of judgment, and if, as a matter of fact, he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held

²⁴ Flandrau, J., in *Banker v. Caldwell*, 3 Minn. 94 (Gil. 46).

²⁵ *Dickle v. Abstract Co.*, 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616.

²⁶ *Wacek v. Frink*, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502; *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576.

²⁷ *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Addison, Contr.* (8th Ed.) 593; *Rankin v. Schaeffer*, 4 Mo. App. 108.

responsible.²⁸ "Attorneys do not profess to know all the law, or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard."²⁹ An examiner of titles who gives an opinion as to the title does not thereby warrant the title. The contract made by him is merely that he will faithfully and skillfully do his work.³⁰

In case an attorney does become liable for negligence in the examination of an abstract, he is liable to the person who employed him, and not, as a rule, to a third person with whom there is no privity of contract.³¹ Where, however, an attorney is acting for a borrower and is to receive all his compensation from him, he may be the attorney also of the lender, so as to be liable to him for negligence in failing to discover liens on the property on which security was to be given, where the lender told him to search the records therefor, and he promised to do so. Such an undertaking, even without reward, will render an attorney liable for negligence.³²

In examining an abstract, it is the duty of the examiner to note carefully all descriptions of land. For example, it is actionable negligence for an examiner not to observe, where land had been sold under a mortgage foreclosure, that a release of part of the mortgaged premises described in fact the part of the land retained, and not the portion released.³³

With reference to the validity of judgments and decrees, in so far as they affect the title, particularly in regard to the jurisdiction of the court and the necessary parties, the examiner must exercise reasonable care. When, for example, the title, in whole or in part, depends upon a judgment or decree in a partition or other suit, it is an examiner's plain duty to investigate the judgment record itself, if necessary, where the abstract is not complete, in order to determine the validity, character, and extent of the judgment.³⁴

²⁸ *National Sav. Bank v. Ward*, 100 U. S. 195, 198; *Bowman v. Tallman*, 27 How. Prac. (N. Y.) 212, 274.

²⁹ *Mr. Justice Clifford in National Sav. Bank v. Ward*, *supra*. And see *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213; *Pitt v. Yalden*, 4 Burr. 2060; *Montriau v. Jefferys*, 2 Car. & P. 113.

³⁰ *Rankin v. Schaeffer*, 4 Mo. App. 108; *Dundee Mortg. & T. I. Co. v. Hughes*, 20 Fed. 39. Compare *Page v. Trutch*, Fed. Cas. No. 995.

³¹ *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Dundee Mortg. & T. I. Co. v. Hughes*, 20 Fed. 39; *Currey v. Butcher*, 37 Or. 380, 61 Pac. 631.

³² *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662. And see *Donaldson v. Holdone*, 7 C. & F. 762.

³³ *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479.

³⁴ *Moot v. Investment Ass'n*, 157 N. Y. 201, 209, 52 N. E. 1, 45 L. R. A. 666.

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